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FLRA Report of Case Decisions and FSIP Releases,

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FLRA Report of Case Decision No. 19-21

FLRA Report of Case Decision No. 20

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Federal Labor Relations Authority

1900 E Street, NW.
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Number 19 REPORT OF CASE DECISIONS January 11, 1980

UNFAIR LABOR PRACTICE CASES

2 FLRA No. 2 (October 19, 1979)

Department of the Air Force, Malmstrom Air Force Base, Montana, Assistant Secretary Case No. 61-4022(CA). The ALJ, upon a complaint filed by the union (AFGE Local 2609) under E.O. 11491, found that the activity violated section 19(a)(1) and (6) of the Order when it changed policies pertaining to the processing of traffic and parking violations without first affording the union an opportunity to negotiate concerning both the decision to make the change and the impact of its implementation. The Authority adopted the ALJ's recommended decision insofar as he found that the activity's failure to notify the union and afford it an opportunity to bargain over the impact and implementation of the new system on bargaining unit employees was violative of the Order. However, the Authority also concluded, contrary to the ALJ, that the decision to make the change fell within the ambit of section 12(b)(5) of the Order and, therefore, the activity was under no obligation to negotiate with the union concerning that decision. (Decision and Order attached.)

2 FLRA No. 6 (November 2, 1979)

Bureau of Government Financial Operations, Assistant Secretary Case No. 22-09144(CA). The ALJ, upon a complaint filed by the union (NTEU) under E.O. 11491, found that the activity's refusal to provide the union with the "unsanitized" results of a survey of employee attitudes and opinions concerning management, which results would have identified supervisors and managers below a particular level, was not violative of section 19(a)(1) and (6) of the Order. The Authority adopted the findings, conclusions and recommendations of the ALJ, and dismissed the union's complaint. (Decision and order attached.)

NEGOTIABILITY CASES

2 FLRA No. 1 (October 5, 1979)

American Federation of Government Employees, AFL-CIO, Local 2823 and Veterans Administration Regional Office, Cleveland, Ohio, Case No. O-NG-8. The dispute involved the negotiability of a union proposal that the union president or his designee be granted time each day, not charged to leave, for the preparation of financial and other reports required under section 7120(c) of the Statute. The Authority held that the proposal did not violate section 7131 of the Statute and, therefore, set aside the agency's allegation to the contrary. (Decision attached.)

2 FLRA No. 3 (November 2, 1979)

National Federation of Federal Employees, Anadarko and Muskogee Area Council and Department of the Interior, Bureau of Indian Affairs, Muskogee Area Office, Oklahoma, Case No. O-NG-152. The Authority dismissed the union's appeal for failure to comply with applicable procedural requirements within the time limit provided by the Authority to effect such compliance. (Decision letter attached.)

Appeals withdrawn:

Case No.	Date
O-NG-169	October 9, 1979
O-NG-170	October 9, 1979

ARBITRATION CASES

Case No. O-AR-23 (October 18, 1979)

Marine Corps Logistics Support Base, Pacific, Barstow, California and American Federation of Government Employees, AFL-CIO, Local 1482 (Adler, Arbitrator), Case No. O-AR-23. The arbitrator found that the activity's assignment of a supervisory employee to perform journeyman duties was not a grievable issue, as the union alleged, because it encompassed a management right under section 7106(a)(2)(B) of the Statute. The union filed a petition for review of the arbitrator's award with the Authority. The Authority, pursuant to the applicable rules of procedure, accepted the union's petition for review on the issue of whether the award violates section 7106 of the Statute.

2 FLRA No. 4 (November 2, 1979)

Federal Aviation Administration, Oakland ARTCC and Professional Air Traffic Controllers Organization (Meiners, Arbitrator), FLRC No. 78A-50. The arbitrator determined that the activity violated the parties' agreement by the manner in which it selected controllers for reassignment to newly created areas of specialization after a realignment of those areas. As a remedy, the arbitrator directed, in pertinent part, that the activity follow the procedures of the relevant provision in the agreement rather than the method that had been employed. The agency filed a petition for review of the arbitrator's award with the Federal the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated section 12(b)(2) of the Order. The Council also granted the agency's request for a stay (FLRC Report No. 153). The Authority found that the arbitrator's award did not violate section 12(b)(2) of the Order and, therefore, sustained the award and vacated the stay that previously had been granted. (Decision attached.)

2 FLRA No. 5 (November 2, 1979)

Social Security Administration, Headquarters, Bureaus and Offices in Baltimore and SSA Local 1923, American Federation of Government Employees, AFL-CIO (Ables, Arbitrator), Case No. 0-AR-48. Ms. Georgia E. Rayman filed exceptions to the arbitrator's award with the Authority. The arbitrator's opinion and award clearly indicate that two parties (the union and the agency) participated in the arbitration proceeding. Thus, Ms. Rayman, while one of the grievants, did not participate as a "party" in the proceeding and, consequently, was not entitled to file exceptions under section 2425.1(a) of the Authority's rules. Accordingly, and apart from other considerations, the Authority dismissed her exceptions. (Decision letter attached.)

Attachments (6)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Department of the Air Force
Malmstrom Air Force Base
Malmstrom Air Force Base, Montana

Respondent

and

Assistant Secretary
Case No. 61-4022(CA)

American Federation of Government
Employees, Local 2609, AFL-CIO

Complainant

DECISION AND ORDER

On March 13, 1979, Administrative Law Judge Alfred Lindeman issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order and the Complainant filed a brief in reply thereto.

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of

the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the exceptions filed by the Respondent and the Complainant's brief in reply thereto, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendations as modified herein.

The Administrative Law Judge concluded that the Respondent violated section 19(a)(1) and (6) of the Order when it changed policies governing traffic and parking violations at the Activity without first affording the Complainant with an opportunity to negotiate concerning the decision to change such policies or the impact of its implementation. More specifically, the change involved was the decision of the Base Commander to institute a "Magistrate System" as the method for handling Base traffic and parking violations. In reaching this conclusion, the Administrative Law Judge found, among other things, that the decision to implement the new system was a change in a matter affecting working conditions within the meaning of section 11(a) of the Order and, consequently, the Respondent was obligated to negotiate over both the change and the impact of its implementation.

The Administrative Law Judge's recommendation is adopted insofar as it would find a violation of section 19(a)(1) and (6) in the Respondent's failure to notify the Complainant and afford it an opportunity to bargain over the impact and implementation of the "Magistrate System" on bargaining unit employees involved herein. 1/ However, contrary to the Administrative Law Judge, it is concluded that the Respondent was under no obligation to meet and confer with the Complainant over its decision to make the change. Section 12(b)(5) of the Executive Order reserves to agency management the right "to determine the methods, means, and personnel by which. . . operations are to be conducted." In the Authority's view, the Respondent's decision to transfer processing of traffic offenses to a United States Magistrate clearly falls within the ambit of that section of the Order. As subjects encompassed within section 12(b) of the Order are non-negotiable, it follows that the Respondent had no bargaining obligation in this regard. 2/

Consistent with this decision, the Authority hereby issues the following order: 3/

1/ Federal Railroad Administration, 4 A/SLMR 497, 500-501, A/SLMR No. 418 (1974).

2/ Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431, FLRC No. 71A-56 (1973); Overseas Education Association, Inc. and Department of Defense, Office of Dependent Schools, FLRC No. 76A-142, Report No. 143 (February 28, 1978); and American Federation of Government Employees, AFL-CIO, Council 127 and State of Ohio, Air National Guard, FLRC No. 77A-114, Report No. 156 (November 9, 1978).

3/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or the application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of the Air Force, Malmstrom Air Force Base, Malmstrom Air Force Base, Montana, shall:

1. Cease and desist from:

(a) Instituting a "Magistrate System" as the method of handling traffic offenses at Malmstrom Air Force Base without first affording the American Federation of Government Employees, Local 2609, AFL-CIO, the exployees' exclusive bargaining representative, a reasonable opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be observed in implementing such system and the impact of the system on adversely affected employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action:

(a) Upon request by the American Federation of Government Employees, Local 2609, AFL-CIO, meet and confer, to the extent consonant with law and regulations, concerning the procedures to be observed in instituting a "Magistrate System" as the method of handling traffic offenses, and on the impact such system will have on adversely affected employees.

(b) Post at its facility at Malmstrom Air Force Base copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Base Commander and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. The Base Commander shall take reasonable steps to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

T IS HEREBY FURTHER ORDERED that the remainder of the complaint in Assistant ecretary Case No. 61-4022(CA) be, and it hereby is, dismissed.

ssued, Washington, D.C., October 19, 1979

Ronald W. Haughton,
Ronald W. Haughton, Chairman

Henry B. Frazier III,
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY 4/

/ Member Leon B. Applewhaite did not participate in the present case, which ad been processed prior to his confirmation by the United Senate as a member of ne Authority.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute a "Magistrate System" as the method of handling traffic offenses at Malmstrom Air Force Base without first affording the American Federation of Government Employees, Local 2609, AFL-CIO, the employees' exclusive bargaining representative, a reasonable opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be observed in implementing such system and the impact of the system on adversely affected employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, meet and confer with the American Federation of Government Employees, Local 2609, AFL-CIO, to the extent consonant with law and regulations, concerning the procedures to be observed in instituting a "Magistrate System" as the method of handling traffic offenses, and on the impact of such system on adversely affected employees.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, whose address is: City Center Square, 1100 Main Street, Suite 680, Kansas City, Missouri 64105, and whose telephone number is: (816) 374-2199.

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
SUITE 700 - 1111 20th Street, N. W.
WASHINGTON, D. C. 20036

In the Matter of DEPARTMENT OF THE AIR FORCE, MALMSTROM AIR FORCE BASE, MALMSTROM AIR FORCE BASE, MONTANA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2609 Complainant	CASE NO. 61-4022(CA)

Major William Cregar
United States Air Force
Central Labor Law Office
Randolph Air Force Base, Texas 78148
For the Respondent

Wayne A. Crabtree
National Representative
American Federation of Government
Employees
Star Route 1, Box 72
East Emerald Lake Drive
Grapeview, Washington 98546
For the Complainant

Before: ALFRED LINDEMAN
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under Executive Order 11491, as amended (hereinafter the "Executive Order"), pursuant to a complaint dated July 21, 1978, and an amended complaint dated August 1, 1978, wherein Complainant, Local 2609 of the American Federation of Government Employees, AFL-CIO, charges the Respondent, Department of the Air Force, Malmstrom Air Force Base, Malmstrom Air Force Base, Montana, with violating sections 19(a)(1) and (6) of the Executive Order in connection with the decision by the

base commander in May and June of 1978 to institute a "Magistrate System" for dealing with traffic and parking violations on Malmstrom Air Force Base. The Respondent filed an answer and statement of facts dated August 15, 1978, denying the allegations of the complaint. Subsequently, on October 18, 1978, the Acting Regional Administrator of the Labor-Management Services Administration issued a Notice of Hearing on Complaint Alleging Violations of Section 19 of Executive Order 11491, As Amended. This decision, pursuant to transition rules and regulations, Federal Register, Vol. 44, No. 1, January 2, 1979, pages 7-8, is issued in the name of the Federal Labor Relations Authority and, in accordance with § 2400.2 (5 C.F.R. § 2400.2) of the transition rules and regulations, shall be processed by the Authority in accordance with the rules and regulations of the Assistant Secretary for Labor-Management Relations, Title 29, Code of Federal Regulations, Part 201, et seq., except that the word "Authority" shall be substituted wherever the words "Assistant Secretary" appear in the rules and regulations of the Office of the Assistant Secretary.

A hearing was held in Great Falls, Montana, on January 18, 1979, at which both parties were afforded full opportunity to be heard, to adduce evidence, and to call, examine and cross-examine witnesses. Post-hearing briefing, as requested by the parties, has been fully considered. Upon the entire record in this case, I make the following findings of fact, conclusions and order.

Findings of Fact

1. The Complainant union has at all times relevant to this proceeding had exclusive recognition as representative of the bargaining unit of which eligible employees are members. Approximately 500 employees are currently members of said unit.

2. Sometime in May 1978, the base commander of Malmstrom Air Force Base, Colonel Edgar A. Gill, decided to institute a system known as the Magistrate System on the base. Under the Magistrate System all civilians cited with traffic and parking violations by the base police are referred to the U.S. Magistrate in Great Falls, either to plead their innocence or to pay the amount specified for the charged category of offense. Under Air Force Regulation 110-15, dated May 4, 1972, all base commanders have had discretion whether or not to institute this system (Respondent's Exhibit 1).

3. Although the Magistrate System was alleged to have been utilized at Malmstrom Air Force Base at some

unspecified time in the distant past, during the years immediately preceding May 1978 a "point system" had been employed under which civilians who were charged with moving violations were assessed a certain number of points, with the maximum number of points (12) resulting in revocation of driving privileges on the base. Other remedial measures imposed included counseling, driving training, and referral to alcohol/drug treatment rehabilitation. No monetary penalties were imposed (Respondent's Exhibit 2).

4. Based upon legal advice received from his chief legal officer, Colonel Gill took the position that the decision to institute and implement the Magistrate System was not subject to the negotiation requirements of Executive Order 11491. Colonel Gill therefore instructed his representatives to contact the union to give them necessary information regarding the Magistrate System. Pursuant to that direction two representatives of the Respondent attended a union meeting on May 24, 1978. After said representatives advised the union that the Magistrate System was to apply to union members, the union's president took the position that the decision to institute the system was a "negotiable item" and Respondent's representatives were asked to leave the meeting. At a subsequent meeting requested by the union in Colonel Gill's office on May 30, 1978, Colonel Gill adhered to the position that the decision to institute the Magistrate System was not negotiable. Actual implementation of the system officially commenced that day, and the first ticket under it was issued to a civilian employee on June 7, 1978 (Tr. 81).

5. On June 7, 1978, the union president filed a formal written request for negotiation (Complainant's Exhibit 1) and after a written denial from Colonel Gill dated June 13, 1978 (Complainant's Exhibit 2), the union's national representative filed a formal charge dated June 30, 1978, under the Executive Order (Complainant's Exhibit 3). On July 13, 1978, Colonel Gill responded stating: "Neither the decision to institute the magistrate court system at Malmstrom Air Force Base nor the implementation of that decision is negotiable." (Complainant's Exhibit 4). Although Respondent has argued that its representatives were not allowed to continue describing the Magistrate System to union members at their May 24, 1978 meeting, and that the union never presented any written issues for negotiation, it is clear from the testimony that the union was at all times being presented with an accomplished fact (i.e., "the activities that were taking place") (Tr. p. 72); it was not being afforded the opportunity to discuss the adverse impact of the system on its members. Indeed, it is clear from the record that throughout his

dealings with the union on this matter the base commander was uniformly consistent in taking the position that no aspect of the Magistrate System was open to negotiations (Tr. 91, 93-4).

6. The evidence is uncontroverted that parking tickets, traffic violations and citations for expired license plates received since the institution of the Magistrate System involve the payment of specified monetary penalties and/or appearance before the U.S. Magistrate, whereas previously such infractions were handled within the "point system" without imposition of monetary penalties. 1/

7. There has been no proof presented to support Respondent's assertion that the system of referring civilian traffic and parking violators to the U.S. Magistrate had a real relationship to the maintenance of the base's internal security. Rather, the record indicates the decision to institute the new system was made to produce a uniformity of treatment for infractions incurred by all civilians on the base whether they are employees, dependents or visitors (Tr. 55-6, 92-3).

Conclusions

The threshold issue thus presented is whether the decision to implement the Magistrate System was a matter affecting working conditions within the meaning of section 11(a) of the Executive Order, thereby requiring the Respondent to provide the union with an opportunity to meet and confer concerning said decision. The Respondent has variously claimed as the basis for its position refusing negotiation: (1) that the decision was "made in the [Commander's] capacity of manager rather than employer,"

1/ Further, until just prior to the day of the hearing in this matter the "point system" had not been applied to any infractions since the institution of the Magistrate System; however, once this fact was discovered the base commander was advised that it was erroneous to discontinue application of the point system, and he instructed the base police to apply the point system retroactively to those infractions that had occurred since institution of the Magistrate System (in addition to whatever penalties or other disposition had occurred through the Magistrate System).

(2) that "the [magistrate] system is applied to all civilians on base . . . and does not affect the terms and conditions of employment," and (3) that "the implementation of the magistrate system falls within this agency's internal security practices, and, consequently, is exempt from any requirement to meet and confer, as per the exemptions listed in section 11(b), Executive Order 11491" (Complainant's Exhibit 2). The Respondent has offered two cases as legal support for its position, Department of the Navy, Norfolk Naval Shipyard, A/SLMR No. 805 (March 1, 1977), the particular case relied upon by the legal officer in advising Colonel Gill, and Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, Case No. 40-7581(CA), Request for Review No. 909, Decision of the Assistant Secretary, dated July 7, 1977. I conclude Respondent's reliance on said cases is misplaced.

In the Norfolk Naval Shipyard case, the Navy published a notice informing all motor vehicle operators within the shipyard that, effective immediately, radar would be used to enforce posted speed limits. The Assistant Secretary found that no provision of the previously existing regulations "relating to speed limits or the penalties for violation thereof was changed" and therefore he concluded that under these circumstances the Respondent was not required to meet and confer with the Complainant concerning the new method of enforcing the existing policy (A/SLMR No. 805 at p. 2).

The Robins Air Force Base matter involved a request for review from a regional administrator's determination that a base commander's announced policy of suspending base driving privileges of persons responsible for traffic accidents only incidentally affected union employees and was thus not a valid basis for obligating that respondent to consult and negotiate with the union. The Assistant Secretary upheld the dismissal of the complaint and the Federal Labor Relations Council denied the petition for review because "the evidence fails to establish that the subject policy complained of effected any real change in employee terms and conditions of employment" (underlining added) (FLRC No. 77A-83), December 20, 1977, Report number 139, December 22, 1977. Significantly, prior to the institution of the policy which automatically imposed suspension of base driving privileges for accidents, there existed a point system under which suspension would result after an accumulation of 12 points (it appears that said point system is the same point system alluded to in the instant matter; see Respondent's Exhibit 2).

In contrast, the Magistrate System instituted at Malmstrom Air Force Base did introduce real changes in employee working conditions which I find clearly distinguishable from the changes involved in Norfolk and Robins. Specifically, the Magistrate System did not merely introduce the use of new equipment (radar) to enforce existing regulations and it did not maintain the same sanctions for motor vehicle infractions. Rather, it created new penalties for infractions incurred while operating either government or private vehicles, and thus it did materially change the result employees were accustomed to when cited for traffic violations on the base. For example, previously failure to have a current license plate registration only accrued points, whereas under the Magistrate System such an infraction is subject to a $20.00 penalty (Tr. pp. 41-2). Prior to instituting the current system there were no penalties for parking violations, but under the new system there is a $10.00 fine (Tr. 26). Driving under the influence of alcohol previously only subjected the driver to the point system; under the Magistrate System monetary penalties and a possible effect on his driver's license and insurance are involved (Tr. pp. 47-8). Accordingly, I must conclude the Respondent's decision to implement this system was a matter affecting working conditions within the meaning of section 11(a) of the Executive Order. See Department of Transportation, Federal Aviation Administration, Metropolitan Washington Airport Service, et al., A/SLMR No. 1062 (June 13, 1978) (change in employee parking permit fees held a matter affecting working conditions); Federal Aviation Administration, FAA Aeronautical Center, Oklahoma, A/SLMR No. 1047 (May 17, 1978) (change in agency policies concerning penalties for parking and traffic violations); General Services Administration, Region III, Public Building Service, Central Support Field Office, A/SLMR No. 582, 5 A/SLMR 706 (1975) (change in policy concerning parking privileges affected working conditions); U.S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 658, 6 A/SLMR 228 (May 25, 1976) (policy concerning motor vehicle registration affected working conditions); Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 828, 7 A/SLMR No. 337 (April 19, 1977) (new procedure for issuing parking passes was a matter affecting working conditions); cf., Department of HEW, Social Security Administration, Bureau of Retirement and Survivors Insurance, Northeastern Program Service Center, A/SLMR No. 1170 (December 28, 1978) (parking privileges are working conditions).

Respondent attempts to distinguish the foregoing cases on the ground they involved changes of rules concerned solely with the particular parking or motor vehicle regulation in question, whereas the Magistrate System was not negotiable

because it was to apply to other minor criminal offenses as well as being "incidentally" related to union members' working conditions. I do not agree that application of the Magistrate System was so remotely related to working conditions that the union, in behalf of its members, could not properly perceive a real basis for seeking negotiations. For example, all of the union members who testified indicated that the Magistrate System was to be effective when they were operating government-owned vehicles on official business. In fact, one member had incurred individual financial liability when, as an equipment operator in the course of his official duties, he damaged another vehicle in the parking lot (Tr. 45).

Furthermore, since I do not believe the effect on union members was de minimus or insignificant, I cannot agree with the Respondent's legal arguments that the decision to institute the Magistrate System was not negotiable either because it involved the Malmstrom Air Force Base "community as a whole" or because the system was intended to enforce "the entire corpus of Federal and Montana law." The principle relied upon by Respondent--that a change of a policy that affects both union members and others or that encompasses both rules that affect union members' working conditions and rules that do not is not subject to the negotiation requirements of the Executive Order--is not applicable where the effect on union members' working conditions is more than "incidental." Thus, I must conclude that the "parking fee and motor vehicle regulation" cases cited above remain controlling upon the change of policy in question in this case.

In view of the determination that a change in working conditions was involved, it is not relevant that the base commander claimed to be exercising his "sovereign" discretion under Air Force Regulations in the interest of applying a uniform system for safeguarding the safety and welfare of people and property on the base. Similarly irrelevant is Respondent's contention that Air Force Regulation 110-15 requires that all civilian offenders be referred "for indiscriminate and impartial judicial disposition" under the Magistrate System (Respondent's Exhibit 1, p. 7). It is precisely because the commander had discretion over a matter affecting working conditions that the union should not have been precluded from attempting to persuade him to exercise that discretion by not instituting the new system at all, or at least not applying it to all categories of parking, driving and motor vehicle infractions (e.g., those incurred while operating government vehicles

in the course of official duties). 2/ Moreover, even assuming arguendo that the commander had been derelict in not exercising his discretion before May of 1978, he would have been obligated to meet and consult regarding the new decision. See Department of the Army, Dugway Proving Ground, Dugway, Utah, A/SLMR No. 745, 6 A/SLMR 618 (November 9, 1976).

Finally, although in its brief Respondent has withdrawn its "internal security" defense, I note the absence of evidence demonstrating any real nexus between the decision to institute the Magistrate System and the internal security of the base. Hence, Respondent was not exempt from the obligation to meet and confer under the "internal security practices" provision of section 11(b) of the Executive Order.

Having found that the base commander's decision to exercise his discretion under Air Force Regulation 110-15 to institute the Magistrate System at Malmstrom Air Force Base was a matter affecting working conditions under section 11(a) of the Executive Order, and that said decision was made without affording the union the opportunity to confer and/or negotiate on either the decision itself or the impact of its implementation on the members of the union, I conclude such activity constituted a refusal to negotiate, which is an unfair labor practice within the meaning of section 19(a)(6) of the Executive Order. Derivatively, Respondent's actions must be construed to have interfered with and restrained the union's member-employees in the exercise of their rights assured by the Order; thus, an unfair labor practice under section 19(a)(1) of the Executive Order.

2/ For example, see paragraphs 1 and 1(b) of AF Regulation 110-15 as it incorporates the "pen and ink changes" indicated in Respondent's Ex. 1:

> 1. . . . Petty infractions, such as minor traffic violations committed on-base, may be disposed of under the disciplinary and administrative authority of the commander.
>
> * * *
>
> b. An installation commander may determine whether charges will be preferred against civilians for trial before United States Magistrates . . . . the commander may make a blanket determination

In view of the foregoing violations of the Executive Order, it is appropriate that the decision to institute and implement the Magistrate System be rescinded in order that such a change in policy governing motor vehicle violations may be effected only after proper notice and an opportunity to negotiate is provided to the union. Also, the customary "posting" requirements are called for in this case. However, there is no basis or authority for causing "all fines levied against bargaining unit members" to be refunded, as requested by the union for the first time in its brief; the U. S. Magistrate to whom said fines presumably were paid is not a party to this proceeding, and there has been no showing that any of said fines are within the possession or control of the Respondent.

ORDER

Pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.26(b) of the Regulations, the Federal Labor Relations Authority hereby orders that the Department of the Air Force, Malmstrom Air Force Base, Malmstrom Air Force Base, Montana, shall:

1. Cease and desist from:

(a) Changing policies governing motor vehicle violations at Malmstrom Air Force Base without first affording the American Federation of Government Employees, AFL-CIO, Local Union 2609, notice and an opportunity to meet and confer concerning a proposed change in such policies.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

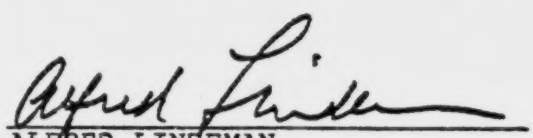
2/ (cont.)
that administrative disposition of certain offenses committed by civilians on-base is inadequate and inappropriate and that all such offenses will be referred to trial by a United States Magistrate . . . . Once a category of offenses has been identified as appropriate for reference to a Magistrate, all civilian offenders in that class should be so referred . . . . (underlining added)

(a) Rescind the decision made in May 1978 to implement the Magistrate System concerning motor vehicle violations at the Base.

(b) Upon request, meet and confer with the American Federation of Government Employees, AFL-CIO, Local Union 2609, concerning any proposed change in policy regarding motor vehicle violations at Malmstrom Air Force Base.

(c) Post at the Malstrom Air Force Base, Montana, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Base Commander, Malmstrom Air Force Base, Montana, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Base Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 203.27 of the Regulations, notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.



ALFRED LINDEMAN
Administrative Law Judge

Dated: March 14, 1979
San Francisco, California

Attachment

AL:vag

APPENDIX

N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT change policies governing traffic and parking violations at the Malmstrom Air Force Base without first affording the American Federation of Government Employees, AFL-CIO, Local Union 2609, notice and an opportunity to meet and confer concerning a proposed change in such policies.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind the decision made in May 1978 to implement the Magistrate System concerning traffic and parking violations at Malmstrom Air Force Base.

WE WILL, upon request, meet and confer with the American Federation of Government Employees, AFL-CIO, Local Union 2609 concerning any proposed change in policy regarding traffic and parking violations at the Base.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority whose address is: Room 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Bureau of Government Financial Operations

Respondent

and

Assistant Secretary
Case No. 22-09144(CA)

National Treasury Employees Union

Complainant

DECISION AND ORDER

On April 23, 1979, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order. 1/

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the exceptions filed by the Respondent, the

1/ The Complainant filed untimely exceptions which were not considered.

Authority hereby adopts the Administrative Law Judge's findings, 2/ conclusions and recommendations under the circumstances herein, noting particularly that there is no evidence that at the time it requested the unsanitized survey results, the Complainant asserted any valid reason as to why such information was necessary and relevant to its duties as a bargaining agent. 3/

ORDER 4/

IT IS HEREBY ORDERED that the complaint in Assistant Secretary Case No. 22-09144(CA) be, and it hereby is, dismissed.

Issued, Washington, D.C., November 2, 1979

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY 5/

2/ Contrary to the findings of the Administrative Law Judge at footnote 2 of his Recommended Decision and Order, the record reveals that the Complainant asked for the names of managers or supervisors below the Assistant Commissioners' level. This inadvertent error, however, has had no effect upon the outcome in this case.

3/ In view of the disposition of this case, the Authority finds it unnecessary to pass upon the conclusions of the Administrative Law Judge with respect to the Respondent's concern for the privacy of its supervisors and the bad faith allegedly displayed by the Complainant during the bargaining sessions involved herein.

4/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or the application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

5/ Member Leon B. Applewhaite did not participate in the present case, which had been processed prior to his confirmation by the United States Senate as a member of the Authority.

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
BUREAU OF GOVERNMENT FINANCIAL OPERATIONS Respondent	
and	Case No. 22-09144(CA)
NATIONAL TREASURY EMPLOYEES UNION Complainant	

Joseph S. Smolen
Harold H. Howard
Labor Management Relations Specialists
Bureau of Government Financial Operations
Treasury Annex
Madison & Pennsylvania Avenues
Washington, D.C. 20226
For the Respondent

James R. Lawrence, Esquire
National Treasury Employees Union
1730 K Street, N.W., Suite 1101
Washington, D.C. 20006
For the Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on December 1, 1978 by the Regional Administrator for Labor-Management Services Administration, U.S. Department of Labor, Philadelphia Region, a hearing was held before the undersigned on February 1 and 2, 1979 at Washington, D.C.

This proceeding was initiated under Executive Order 11491, as amended (herein called the Order), based on a complaint filed on August 1, 1978 by National Treasury Employees Union (herein called Complainant) against the Bureau of Government Financial Operations (herein called Respondent). It was alleged in the complaint that Respondent violated Sections 19(a)(1) and (6) of the Order by refusing and denying a request, made by Complainant on April 13, 1978, for access to the result of a survey conducted by Respondent of employee attitudes. Respondent filed a response to the Complaint on August 29, 1978 in which it denied the commissions of any unfair labor practices. 1/

Both parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence and to examine as well as cross-examine witnesses. Thereafter, both parties filed briefs which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein Complainant has been, and still is, the collective bargaining representative of Respondent's non-professional and wage grade Employees.

2. By letter dated November 22, 1977 Respondent informed Complainant that it would begin conducting a management survey (herein called MAS) on December 12, 1977. The union was apprised in the letter that employees would be requested to answer various questions in the survey and a copy of the questionnaire was enclosed therewith. Moreover, the stated purposes of the survey were to: (a) provide statistical feedback to the manager re their employees' attitudes about management in each component supervised by a manager; (b) provide comparative data re attitudes of employees in a given component contrasted with employees' attitudes in other components; (c) provide comparative data re attitudes of Respondent's employees contrasted with the attitudes of employees in other Bureaus of the Treasury Department.

1/ Certain procedural defenses, which were raised by Respondent as its response, were reviewed before the undersigned and will be treated herein.

3. Subsequent to November 22, 1977 the parties herein discussed the prospective survey. Although they did not register objection to the survey and did assent thereto, Complainant's representatives, Susan McCluskey and Frank Ferris, insisted that the union should have a copy of the results. The union repeated its request in December. Despite the fact that management was willing to give the MAS results to Complainant, it was not certain to what extent the data should be divulged.

4. In January, 1978, the union published its newsletter. "Snoopy", in which it urged all Employees who are asked to complete the questionnaire, to send management a message as to how poor conditions were at the activity.

5. Thereafter the parties again discussed the proposed MAS. Respondent was reluctant to disclose any data which would reveal the identity of the supervisors or managers below the level of Assistant Commissioner. Ferris, who insisted upon such data, remarked the Union would sabatage the results and publish the names of supervisors who fared badly in the survey. 2/

6. As a result of the discussions between them, and in order to further a cooperative undertaking, both parties signed a joint statement on February 2, 1978 directed to all headquarters employees. The memo announced that, starting February 6, 1978, a management survey would begin seeking to identify attitudes and problems of employees; that both the union and the Employees agreed the survey would be a helpful and beneficial tool to assess the work environment; and that the undertaking was designed to identify employee opinions re their working conditions. It was also stated that all employees should complete the survey accurately.

7. The MAS was developed by the Institute for Behavioral Research in Creativity. It was conducted in Respondent's operation in 1975, at which time all level results were furnished the union. MAS was designed to aid manager and supervisors make better use of their human resources. The survey involved a 100 item questionnaire related to 19 different aspects of organizational climate or management areas. Answers to these questions provide an analysis of

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2/ While I find that Complainant did not ask for the names of the managers or supervisors below the Assistant Commissioner's level, the record reflects that if the results for each unit or level were furnished, the union could ascertain the identity of all unit supervisors.

the work environment as seen through the eyes of the employees. The 19 factors, to which the questions are keyed, consist of the following:

1. Fairness of Management
2. Delegation of Authority
3. Supervisory Effectiveness
4. Planning & Administrative Efficiency
5. Climate for Innovation
6. Work Satisfaction
7. Training Effectiveness
8. Performance Feedback
9. Equal Employment Opportunity for Women
10. Equal Employment Opportunity for Minorities
11. Opportunity for Promotion
12. Downward Communication
13. Upward Communication
14. Satisfaction With Pay
15. Morale
16. Physical Working Conditions & Equipment
17. Co-Worker Cooperation
18. Operational Efficiency
19. Workload Balance

After the questions have been answered the scores are tabulated by two methods: (a) the percent of favorable responses based on a percentage of employees who chose the most favorable answers 3/ to questions in a certain area; (b) the percentile rank system which describes the score of a work group and compares it to a norm group. Thus, under the percent scoring system, if a resultant figure is 53 for the #1 factor, Fairness of Management, this indicates that 53% of the Employees felt management to be fair.

8. Upon the final tabulations of MAS scores each supervisor, who supervises a unit of five or more employees, receives his own feedback report-an analysis of his work environment. He is expected to communicate to his employees any existing problems and thereby attempt, by reason of sharing the information, to solve difficulties within his unit. However, management allows each supervisor to decide

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3/ The questions in MAS, which relates to the 19 factors, provide several answers characterizing each particular work environment, and the employee must select that response which he deems applicable thereto.

whether he desires to discuss the feedback with his employees. 4/ Each supervisor also receives a copy of the MAS Handbook to guide him in understanding the survey, their relationships to other scores and to help improve performance within his unit. As indicated in the Handbook, the information is included only as a guide to future management actions and not to be used as disciplinary or other adverse personal action.

9. Negotiations for a collective bargaining agreement between the parties herein commenced on February 14, 1978. On that date union representative Ferris told management that the MAS was one of its biggest clubs; that if the Respondent did not respond properly, the union could air the MAS data outside the bargaining room, publish the bad supervisor of the month in its newsletter, and would get Respondent "where it hurts." Ferris also stated that the employer could "buy it (MAS) back" during negotiations, suggesting that the union would not publish the data if contract negotiations were to its advantage. The union representative also remarked that if management did not respond favorably during negotiations, the MAS results could be used to embarrass managers.

10. By letter dated April 13, 1978 Complainant requested, pursuant to the Order and the Freedom of Information Act, that Respondent furnish it with all statistical and analytical data concerning the MAS survey. 5/ This written request encompassed the resultant scores at the lowest organizational level.

11. On May 4, 1978 Respondent advised Complainant that it would receive the data requested in sanitized form on or before June 15. In a letter to Complainant dated the following day Respondent stated its desire to protect the privacy of the supervisors and managers in respect to the MAS survey. The Employer stated that the information furnished 6/ the

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4/ Only two supervisors did in fact hold conferences with their employees. The record reflects that others were reluctant to conduct meetings with their Employees in view of the threats made by Complainant.

5/ He also requested data re an EEO survey which was later supplied to the union.

6/ Some data concerning the previous survey was transmitted therewith to the union.

union, and to be furnished, represented an honest effort to provide the maximum information provided under the Freedom of Information Act. Subsequently, on May 11, 1978, Respondent hand delivered to Complainant a letter reiterating its intention to deliver all MAS data by June 15, and stating that the data re work level below Assistant Commissioner would be sanitized to protect the privacy of the supervisors. Moreover, Respondent averred it did not believe the identification of managers or supervisors was relevant or necessary for the purpose of intelligent bargaining.

12. On June 15, 1978 all MAS survey results were furnished Complainant. However, the scores sheets were sanitized, and pages involving levels below the Assistant Commissioner were scrambled to protect the identity of the supervisors 7/ of those lower levels or units. A collective bargaining agreement was reached by the parties thereafter which became effective on October 19, 1978 for a term of two years.

Conclusions

Apart from its substantive defenses, Respondent raises several "procedural" grounds for dismissal. 8/ It contends that: (1) under 5 USC 7114(b)(4)(c), which is the new Title VII, Federal Service Labor-Management Relations Act, the obligation to bargain does not require an agency to furnish data which constitutes guidance, advice, counsel or training for management supervisors, and therefore Respondent may not be charged with a violation of the Order since the material sought herein was guidance and counsel for its supervisors; (2) this proceeding is barred by Section 19(d) of the Order since Complainant proceeded under the Freedom of Information Act, having an appeals mechanism, to obtain the same information sought under the Order.

Upon consideration of the aforesaid contentions, I am persuaded that neither has merit. Section 7114(b)(4)(c) of the new Act has no applicability to this matter since the statute became effective after the incidents herein and subsequent to the filing of this complaint. No retroactive

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7/ Without this sanitization, Complainant would have been able to obtain the identity of about 135-140 supervisors at the lower level.

8/ At the hearing Respondent's motion to dismiss based on these grounds was denied by the undersigned with leave to renew it thereafter. Respondent has renewed the same motion in its post-hearing brief.

effect may be given to this legislative. Further, while 19(d) of the Order precludes raising issues under Section 19 which may be properly raised under an appeals procedure, the issue as to whether Respondent's failure to furnish the data sought herein is an unfair labor practice could not be raised under the FDIA appeals procedure. In Department of Health, Education and Welfare, Region VIII, A/SLMR No. 1109, Judge Halpern reasoned that the FDIA procedure, under which a union appealed a denial of certain information, did not preclude the union asserting a violation of 19(a)(6) of the Order. I subscribe to his reasoning and agree that the issue to be litigated herein could not have been raised on an appeal under FDIA procedures. Accordingly, I deny the instance to dismiss based on the aforementioned grounds.

In resisting its alleged obligation to furnish the codes for the levels below the position of Assistant Commissioner, Respondent raises several issues worthy of serious consideration.

(1) The employer maintains that if it reveals the work levels and thus identifies the units with their attendant scores, the Complainant will be able to ascertain who are the supervisors of such units. Moreover, the employer adverts to the fact that the union has, during its negotiations as well as at other times, uttered threats which were directed toward the supervisors or managers. Thus, if a particular unit's score does disclose a "morale" problem or a low opinion of "supervisory effectiveness", the union would publish there results and designate these supervisors as "bad" ones. In addition, Complainant conceded it would use the scores as a club to obtain concessions from managment; that it would "sabotage" the results; and that Complainant would get the employer "where it hurts". Such utterances, argues Respondent, disclosed bad faith intentions on the part of the union. Accordingly, it is urged that the bargaining agent shows a lack of good faith in its request for the data which should militate against the employer's obligation to supply the lower level identities. In addition, Respondent insists that furnishing such data would invade the supervisor's right of privacy, as enunciated by the Supreme Court of the United States in Detroit Edison Co. v. NLRB, U.S. Supreme Court, No. 77-968 (March 5, 1979). In view of the union's threats and intentions to use the MAS results to embarrass managers, it is claimed that the lower level identities should be kept confidential so as to protect the supervisors who might be subject to harassment.

Although Respondent lays stress upon the Detroit Edison case, supra, I do not consider it apposite or controlling of the case at bar. Protection was afforded therein to employees who took aptitude tests for the position of Instrument Man. Unless a particular applicant consented, the employer was not obliged to turnover to the union the test scores for such individual. The Court concluded that the preservation of employee confidence was well founded. The right of privacy was paramount, in that instance, to the possible impairment of the union's function in processing a grievance stemming from a denial of the position to an applicant.

The situation prevailing in the instant case is, in my opinion, quite distinguishable. Complainant herein is not seeking, and did not request, the names of the supervisors in each unit. The fact that it might be able to ascertain the identity of such managers does not call for the application of the rationale expressed in the cited case. The Supreme Court lent protection to individuals who undertook examinations concerning their aptitudes. Such employees could well be disturbed if the results, and information set forth in such tests, were disclosed to others. To that extent, such disclosure was an invasion of privacy. Not so here. The supervisors disclosed no information which should be insulated against disclosure. They revealed no confidential details in respect to their performance or background which must be shielded from the union. Moreover, even though Respondent furnishes the identification of the lower level results, there is no assurance - despite the utterances of the union - that the bargaining agent will seek out the names of the respective supervisors and take steps to embarrass them.

Respondent argues, however, that the union manifested its intent to make things difficult for these managers whose unit score results reflect problems with their employees. Such manifestation, it is averred, show a lack of good faith and justify refusal to supply the data which would enable Complainant to undertake such action upon ascertaining the identities. In support of this argument the employer relies upon Shell Oil Co., 457 F.2d 615(1972) where the refusal to furnish names and addresses of unit employees was justified in view of possible harassment against them. Note is taken that in the cited case a strike had ensued and violence was inflicted upon employees. It was apparent to the court that a clear and present danger existed which warranted a refusal to turnover the information requested. I am not convinced that such a danger prevailed in the instant case. Apart from the fact that I do not conclude the physical safety of supervisors was in jeopardy, statements by Fernis and remarks

in "Snoopy" seem more akin to tactics employed by a union during its organizational campaign, or when it becomes involved in labor dispute with management. Even if Complainant threatened to publish the "bad supervisor of the month", the union was always at liberty to do so independently of whether the information sought herein was in fact supplied. On balance, I deem the statements by the union to resemble bargaining tactics which, in themselves, often are inflammatory in nature. In this posture, I reject Respondent's contentions that it is entitled to refuse the information on the grounds of privacy or likely harm to its supervisors.

(2) A primary issue for determination herein is whether the Complainant is entitled to the MAS survey, as requested, in order to fullfill its duty as the collective bargaining representative. Although Respondent furnished the data to the Assistant Commissioner's level, it resists supplying the code or identity for the lower levels on the further ground that such information is not needed by Complainant in its role as bargaining agent.

It is now well established, in both the private and public sectors, that an employer must furnish information to the union representing its employees which is relevant and necessary to proper representation. NLRB v Whitin Machine Workers, 217 F.2d 593(C.A. 4), cert. denied 349 U.S. 905; Department of Health, Education and Welfare, Social Security Administration, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance, A/SLMR No. 411. The right to such information exists not only for negotiating an agreement with the employer, but for the purpose of administering such collective bargaining agreement. In either instance the employer is obliged to supply the material requested to further intelligent representation. Moreover, in the private sector, at least, it is sufficient if the information is of probable or potential relevance to give rise to an obligation by the employer to provide it.

Complainant herein urges that an identification of the unit levels is necessary and relevant to intelligent bargaining. It asserts that once it becomes known where the weaknesses exist, in respect to the relationships between supervisors and employees, the union would be able to alter its bargaining demands, e.g. require more stewards in troublesome areas. Further, the union deems itself as a disadvantage vis a vis management in bargaining sessions since it does not know whether the data applies to unit or non-unit employees, professional or non-professional, permanent or seasonal,

long-time or short-time employees. Thus, Complainant insists the sanitized results furnished it do not suffice for strategy meetings, negotiations and other representational duties.

While not free from doubt, I reject the union's argument in this respect. The MAS survey was essentially a questionnaire designed to gather information relating to subjective opinions of employees. It is true the data would hopefully enable supervisors to utilize their human resources in better fashion, but the survey itself did no more than yield attitudes of individuals towards management, the working environment and attendant conditions of employment. I construe this type data to be different in nature from factual information governed by an employer re wages or existing conditions. Statistical reports re work performance could, in my opinion, certainly be relevant and necessary in administering a contract, filing grievances, or bargaining with an employer. However, I view the data acquired by the survey herein to be distinguishable from such statistics. It does not reflect performance of employees, qualitatively or quantitatively, nor does it deal with facts re such items as security, promotions, upgrades, vacations, or other such conditions of employment. MAS was intended for the guidance 9/ of unit supervisors, and to be used at their discretion, in improving relationships with employees. As a managerial tool the survey yielded no statistical data which could inure to the single advantage of management in its bargaining with Complainant.

In Internal Revenue Service, Chicago District Office, A/SLMR No. 1004 the union sought a statistical analysis of supervisory evaluations prepared in respect to promotions. The information was requested in connection with a grievance filed on behalf of an employee not selected for promotion. The statistical analysis did not deal with the ranking panel's interpretation thereof and the panel did not rely on the analysis in making its selections. Accordingly, the Assistant Secretary held the information contained therein was not necessary to process the grievance. Although I

9/ Respondent argues that under 7114(b)(4)(c) of the new statute the duty to bargain excludes furnishing data which constitute guidance, advice, counsel or training for management officials or supervisors. Respondent may well be relieved of turning over the survey results of MAS under the new Act. However, its obligation to furnish the information in June, 1978 must be governed under the Order and the appropriate case law existent prior to the effective date of the said statute.

recognize such factual situation is dissimilar to the case at bar, in each instance the statistics were predicated on evaluations which were not essential to intelligent bargaining. In truth, the MAS survey was an evaluation by employees of their working conditions, morale, and interchange with the supervisors. I do not agree that such evaluations were relevant or necessary to enable Complainant to fulfill its duties as bargaining agent. Opinions of employees - which could well have been ascertained directly by the union in any event - are scarcely similar to performance data which Complainant requires to bargain with management re conditions of employment. A statistical analysis founded on such a conceptual survey might be interesting, but I conclude it is not necessary for proper representation. Therefore, I find that Respondent's failure to supply the unsanitized results of the lower levels was not a refusal to bargain and did not violate Section 19(a)(1) and (6) of the Order. 10/

Accordingly, and in view of the foregoing, the complaint is hereby dismissed.

William Naimark

WILLIAM NAIMARK
Administrative Law Judge

Dated: 23 APR 1979
Washington, D.C.

10/ This decision does not address the question as to whether Respondent could unilaterally conduct such survey. Notification to, and consent by, the union took place and, in any event, no such allegation was made in the complaint.

UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

American Federation of
Government Employees, AFL-CIO,
Local 2823

(Union)

and

Case No. O-NG-8

Veterans Administration
Regional Office, Cleveland,
Ohio

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Union Proposal

Based on the record in the case, the underlined portion of the statement which follows reflects the mutual understanding of the parties with respect to the matter in dispute: The Union President or her/his designee will be granted two hours each day, not charged to leave for preparation of financial and other reports as required under section 7120(c) of the Statute and to carry out the provisions of this agreement.

Question Here Before the Authority

The question is whether the union's proposal providing for official time to prepare the reports required under section 7120 of the Federal Service Labor-Management Relations Statute (the Statute)[1/] violates section 7131 of the Statute, as alleged by the agency.[2/]

1/ The Federal Service Labor-Management Relations Statute, § 7120 (92 Stat. 1210) provides, in relevant part, as follows:

§ 7120. Standards of conduct for labor organizations

. . . . . .

(c) A labor organization which has or seeks recognition as a representative of employees under this chapter shall file financial and other reports with the Assistant Secretary of Labor for Labor Management Relations, provide for bonding of officials and employees of the organization, and comply with trusteeship and election standards.

2/ Section 7131 of the Statute provides, in part, as follows:

(Continued)

Opinion

Conclusion: The subject proposal does not violate section 7131 of the Statute. Accordingly, pursuant to section 2424.8 of the Authority's Rules and Regulations (44 Fed. Reg. 44740 et seq. (1979)), the agency's allegation that the disputed proposal is not within the duty to bargain is set aside.3/

Reasons: Section 7131(b) of the Statute requires that activities relating to the internal business of a labor organization be performed by an employee while that employee is in a non-duty status, i.e., not on duty time. Therefore, the union's proposal, which provides that the union president or her/his designee be granted time each day not charged to leave, i.e., duty time, for preparation of the financial and other reports required under section 7120(c) of the Statute, raises the issue as to whether the preparation of such reports constitutes an activity relating to the internal business of a labor organization, within the meaning of section 7131(b), which must be performed during the time the employee involved is in a non-duty status.

The Statute does not expressly define the phrase "internal business of a labor organization." Section 7131(b) merely lists examples of some activities which are related to the "internal business of a labor organization," i.e., solicitation of membership, election of labor organization officials, and collection of dues. None of these specific examples have any relationship to the preparation of the statutorily prescribed reports which are the subject of the disputed proposal.

The provision regarding official time in the version of the bill reported out of the Senate-House Conference Committee, which was enacted and signed into law (§ 7131), was identical to that in the bill (H.R. 11280) reported out of the

(Continued)

§ 7131. Official time

. . . . . .

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

. . . . . .

(d) Except as provided in the preceding subsections of this section--
(1) any employee representing an exclusive representative, or
(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative, shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

3/ In so deciding that the subject proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

House Committee (§ 7132)[4] and in the final version of the bill passed by the House (the "Udall substitute").[5] The Report which accompanied the House Committee bill indicated that subsection (b) of the provision on official time was intended to require that matters solely relating to the internal business of a labor organization be performed when an employee is in a non-duty status.[6]

Proponents of the final version of the House bill, in statements on the House floor, indicated that subsection (b) was intended to be strictly construed to apply only to those activities regarding the "structure and institution" of the labor organization.[7] The Senate-House Conference Report did not address the

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4/ H.R. 11280, 95th Cong., 2d Sess. § 7132 (1978). See H.R. REP. No. 95-1403, 95th Cong., 2d Sess. 288-289 (1978).

5/ See 124 CONG. REC. H 9631 (daily ed. Sept. 13, 1978).

6/ The Committee Report stated, in relevant part, as follows:

> Section 7132 provides standards for determining when an individual may or may not be authorized official time (paid time) to engage in activities concerning labor-management relations.
>
> . . . . . .
>
> Section 7132(b) provides that matters solely relating to the internal business of a labor organization must be performed when the subject employee is in a nonduty status.
>
> . . . . . .
>
> Section 7132(d) makes all other matters concerning official time for unit employees engaged in labor-management relations activity subject to negotiation between the agency and the exclusively recognized labor organization involved. [Emphasis supplied.]

H.R. REP. No. 95-1403, 95th Cong., 2d Sess. 58-59 (1978).

7/ The following statements concerning the official time provision in the final version of the House bill were made during the floor debate on Title VII of that bill:

> Mr. CLAY.
>
> . . . . . .
>
> Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal business of a labor organization. The section also lists three such activities reflecting our intention that "internal business" be strictly construed to apply only to those activities

(Continued)

matter of official time or, specifically, the intended application of section 7131(b). 8/

(Continued)

> regarding the structure and institution of the labor organization. Activities that involve labor-management contacts are not included in this section. Nor is preparation for such activities, such as grievances, bargaining, unfair labor practice proceedings, included within this section. Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representional activities just as management uses official time to carry out its responsibilities.

124 CONG. REC. H 9638 (daily ed. Sept. 13, 1978).

> Mr. FORD of Michigan.
>
> . . . . . .
>
> Section 7132(b) of the compromise precludes the use of official time by employees for conducting the internal business of a labor organization. This subsection specifically provides that employees shall not solicit membership, engage in electioneering, or collect dues on official time. The inclusion of these three categories reflects the general intention that "the internal business of a labor organization" encompasses those activities directed to the institutional structure of such organizations. This section does not, therefore, apply to activities of labor organizations that involve an "interface" with agency management, such as negotiations, grievances, negotiability disputes, and unfair labor practices. Nor does this section apply to preparation for such "interface" activities. Management, of course, engages in all these activities, including preparation, on official time, and subsection 7132(d)(2) makes the use of official time by employees for these activities a subject of negotiated agreement between the agency and the exclusive representative.

124 CONG. REC. H 9650 (daily ed. Sept. 13, 1978). See also Statement of Congressman Ford of Michigan subsequent to enactment of Civil Service Reform Act of 1978, 124 CONG. REC. H 13610 (daily ed. Oct. 14, 1978).

8/ Thus, in enacting the language of the bill as passed by the House (the "Udall substitute"), with its attendant legislative history, as quoted above, the Congress did not adopt the corresponding provision in the Senate bill, which the accompanying Senate Committee Report described, in part, as follows:

> The limitations contained in the first part of this provision concern the use of official time for internal labor organization business and are directed toward restricting to non-duty hours activities which are of primary concern and benefit only to the labor organization.

[Emphasis not in original.]

S. REP. No. 95-969, 95th Cong., 2d Sess. 112-113 (1978).

The issue before the Authority in this case, therefore, more precisely stated, is whether the preparation of the financial and other reports required under section 7120(c) of the Statute is an activity related to the internal business of a labor organization because it is solely related to the structure and institution of such labor organization. That is, in accordance with the meaning of section 7131(b) of the Statute as reflected in the legislative history of that provision, if the filing of financial and other reports under section 7120(c) is not solely related to the institutional structure of the labor organization, it must be found, likewise, not to be a matter related to internal union business. In this regard, Congress intended to proscribe the use of duty time for only those activities relating to the union as an organization and pertaining to the operation of that organization, such as union business meetings, communication with members, contracting for goods and services, payment of bills, and other similar and associated activities. Thus, it is clear that the activities cited in the Statute, i.e., solicitation of membership, collection of dues, and election of union officials, were included as examples because the only function of such activities is the maintenance of the union as an organization, i.e., they are related solely to the institutional structure of the union.

In contrast, the reports which are the subject of the disputed proposal do not solely relate to the structure and institution of the labor organization. Rather, the preparation of these reports is a requirement imposed upon labor organizations by the Statute and thereby makes available to the public information regarding the conduct of union affairs.9/ In this regard, section 7120(c) of the Statute and Part 204 of the regulations of the Assistant

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9/ Section 7120(a)-(d) of the Statute was adopted from the Senate bill (§ 7217). The Senate Committee Report which accompanied the bill indicated that these provisions were the same as those contained in Executive Order 11491, as amended. S. REP. No. 95-969, 95th Cong., 2nd Sess. 107-108 (1978). The Presidential Study Committee Report and Recommendations accompanying Executive Order 11491 stated with respect to these provisions, in part, as follows:

> The 1961 task force . . . suggested the extension to public employee organizations of standards of conduct established for trade unions in the private sector, such as reporting and disclosure of financial transactions and administrative practices. Accordingly, the standards of conduct for employee organizations were developed and issued in 1963.
>
> . . . . . .
>
> To bring uniformity of treatment to all labor organizations representing Federal employees, we recommend that the Assistant Secretary of Labor for Labor-Management Relations add to the present standards of conduct by promulgating rules and regulations for reporting and disclosure of financial transactions and administrative practices, bonding requirements, and standards for trusteeships and elections for labor organizations having recognition under the new order.

"Study Committee Report and Recommendations, August 1969," Labor-Management Relations in The Federal Service (1975) 74.

Secretary of Labor[10] require that every labor organization to which those provisions apply must file with the Department of Labor certain information reports,[11] financial reports,[12] and trusteeship reports.[13] The initial information report (Form LM-1) requires, among other things, a list of the present officers of the labor organization, copies of the organization's constitution and by-laws, a statement regarding the dues and fees required of members, an estimate of expected annual receipts, and a statement of the labor organization's fiscal year. Any changes in the information contained in this initial report must be filed in annual supplementary reports (Form LM-1A). The annual financial report (Form LM-2 or Form LM-3) requires detailed information regarding the assets and liabilities of the labor organization, including statements as to amounts and sources of receipts and amounts and recipients of disbursements. The content of these reports will be made available to any person complying with the conditions established by Department of Labor regulations.[14]

As this brief description of the required reports, and of their intended purpose, makes clear, they function as an externally imposed disclosure mechanism opening to view facets of the operations of the labor organization, as a means of implementing the policy of the Statute. It must be concluded, therefore, that the preparation of the reports is not solely related to the institutional structure of a labor organization and, thus, is not an activity related to the internal business of a labor organization within the meaning of section 7131(b) of the Statute.[15]

10/ 29 C.F.R. Part 204 (1978). See, in particular, 29 C.F.R. § 204.3 which specifies the reporting provisions of the regulations of the Department of Labor implementing the Labor-Management Reporting and Disclosure Act (LMRDA) that apply to labor organizations in the Federal Government. As to the applicability to regulations issued under the Statute of the principles applied to labor organizations under the LMRDA, see section 7120(d) of the Statute. For proposed regulations of the Assistant Secretary of Labor for Labor-Management Relations governing standards of conduct for labor organizations in the Federal sector under the Statute, see 44 Fed. Reg. 50558 (Aug. 28, 1979).

11/ See 29 C.F.R. § 402 (1978). See also 29 U.S.C. § 431(a) (1978).

12/ See 29 C.F.R. § 403 (1978). See also 29 U.S.C. § 431(b) (1978).

13/ See 29 C.F.R. § 408 (1978). See also 29 U.S.C. § 461 (1978).

14/ 29 C.F.R. §§ 402.12, 403.10, 408.12. See 29 C.F.R. Part 70. See also 29 U.S.C. § 435 (1978).

15/ The agency contends that, since the Statute which requires the preparation of the reports in question also provides for the periodic election of labor organization officials, an activity which section 7131(b) includes among those to be performed when an employee is in a non-duty status, the preparation of

(Continued)

Accordingly, section 7131(b) would not bar negotiations on the proposal at issue and the agency allegation that the proposal is not within the duty to bargain must be set aside.

Issued, Washington, D.C., October 5, 1979

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY16/

(Continued)

the subject reports likewise must be performed when an employee is in a non-duty status. There are significant distinctions, however, between the election of union officials and the preparation of the particular reports. As indicated above, the only function of the election of union officials is organizational; its sole function is the maintenance of the institutional structure of the union. This cannot be said of the preparation of the required reports. They have no function related to the maintenance of the union as an organization. Rather, their purpose, as stated above, is to open up to public scrutiny the manner in which the business of the union has been transacted.

16/ Member Leon B. Applewhaite did not participate in the present case, which had been processed prior to his confirmation by the United States Senate as a member of the Authority.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

November 2, 1979

Mr. R. L. Corntassel
President, Anadarko and Muskogee
Area Council
National Federation of Federal Employees
Route 1, Box 45
Wyandotte, Oklahoma 74370

Re: National Federation of Federal Employees, Anadarko and Muskogee Area Council and Department of the Interior, Bureau of Indian Affairs, Muskogee Area Office, Oklahoma, Case No. 0-NG-152

Dear Mr. Corntassel:

By Authority letter of September 13, 1979, you were advised that preliminary examination of your petition for review in the above-entitled case disclosed a number of apparent deficiencies in meeting various requirements of the applicable rules of procedure (a copy of which was enclosed for your information). The pertinent sections of the rules included sections 2424.4(b) and 2429.25.

You were also advised in the Authority's letter:

> Further processing of your appeal is contingent upon your compliance with the above-designated provisions of the Authority's rules. Accordingly, you are hereby granted until the close of business on October 5, 1979, to take necessary action and file additional materials (in this case, an original and three copies of a statement of service of your petition on the agency's principal bargaining representative, along with the required number of additional copies of your petition and all enclosures thereto) in completion of your appeal. Such additional materials should be filed by certified mail or in person in accordance with section 2429.24(e) of the Authority's rules, and should be submitted to the Executive Director, Federal Labor Relations Authority, 1900 E Street, NW., Room 7469, Washington, D.C. 20424.
>
> Moreover, in conformance with sections 2424.4(b) and 2429.27(a) of the Authority's rules, you must serve the agency head and principal agency bargaining representative with a copy of any additional material which has not previously been served on those parties and which you submit to the Authority in completion of your appeal, and you must include a statement of such service with your additional submission to the Authority.

Failure to comply with the above requirements within the time limit prescribed may result in dismissal of your appeal.

You have made no submission in compliance with the above requirements, within the time limit provided. Accordingly, your appeal is hereby dismissed for failure to comply with the Authority's rules of procedure.

For the Authority.

Sincerely,

Harold D. Kessler

Harold D. Kessler
Executive Director

cc: Hon. C. D. Andrus
E. Farris
Interior

UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

Federal Aviation Administration,
Oakland ARTCC

and

FLRC No. 78A-50

Professional Air Traffic Controllers
Organization

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

The findings of the arbitrator and the record before the Authority indicate that this dispute arose when the Oakland Air Route Traffic Control Center (the activity) realigned radar sector areas of specialization for air traffic controllers. A grievance was filed and submitted to arbitration that disputed the manner in which the activity assigned controllers to the reconfigured areas of specialization. The issues to be resolved by the arbitrator were stipulated by the parties as follows:

> Was Article 24, Section 3[1/] violated when areas of specialization were realigned in the Spring of 1976?
>
> If so, what is the appropriate remedy? [Footnote added.]

The Arbitrator's Award

In his discussion of this matter, the arbitrator observed that there was no dispute that, after the realignment, the controllers were not assigned to the reconfigured areas solely on the basis of seniority. Instead, reassignments were based only in part on seniority. They were also based in part on each controller's prior area of specialization. Accordingly, the arbitrator concluded that in assigning controllers to the reconfigured areas of specialization, the activity violated Article 24, Section 3 of the agreement. As a remedy the arbitrator ordered "that the procedures of Article 24, Section 3 be followed and total CAA/FAA service be employed rather than the method utilized in this case." Consequently, the arbitrator also ordered that the grievant be allowed "to bid wherever his seniority takes him."

1/ Article 24, Realignment of Work Force, of the parties' negotiated agreement provides, in part:

> Section 3. In facilities when areas of specialization are realigned or established, or staffing imbalances at the full performance level need to be resolved, volunteers will be solicited and qualified employees selected on the basis of total CAA/FAA service before final assignments are made by the Employer.

Agency's Appeal

The agency filed a petition for review of the arbitrator's award with the Federal Labor Relations Council. Pursuant to section 2411.32 of the its rules of procedure, the Council accepted the petition for review which took exception to the award on the ground that it violates section 12(b)(2) of the Order.[2/] In its acceptance letter the Council also directed the parties to address relevant Council precedent relating to the interpretation and application of section 11(b) of the Order--particularly that precedent concerning job content--as it might relate to the circumstances of this case. Both parties filed post-acceptance briefs. The case was pending before the Council on December 31, 1978.

Opinion

In accordance with section 2400.5 of the transition rules and regulations of the Authority (44 Fed. Reg. 44741) and section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215), the Council's rules of procedure remain operative with respect to this case except that the word "Authority" is substituted, as appropriate, wherever the word "Council" appears in such rules.

Section 2411.37(a) of the rules as so amended provides:

> (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Federal Labor Relations Council accepted the agency's petition for review of the arbitrator's award which took exception to the award on the ground that the award violates section 12(b)(2) of the Order.[3/] Thus, the issue that was pending before the Council in this case and that is now to be decided by the Authority is whether the arbitrator's award violates section 12(b)(2) of the Order.

2/ The agency requested and the Council granted, pursuant to section 2411.47(f) of its rules of procedure, a stay of the arbitrator's award.

3/ Section 12(b)(2) of the Order provides, in part:

> Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--
>
> . . . . . .
>
> (b) management officials of the agency retain the right, in accordance with applicable laws and regulations --
>
> . . . . . .
>
> (2) to hire, promote, transfer, assign, and retain employees in positions within the agency . . . [.]

The dispute before the arbitrator in this case involved the activity's realignment of radar sector areas of specialization for controllers. The activity restricted its solicitation of controllers for assignment to each reconfigured area to those controllers whose prior area of specialization included all or any part of the reconfigured area. It was only among these controllers that seniority was considered in making final assignments. In challenging the award as violative of section 12(b)(2) of the Order, the agency principally argues that the arbitrator's award infringes on management's authority under section 12(b)(2) to assign controllers to positions within the agency. For the following reasons we find that the arbitrator's award in this case does not violate section 12(b)(2) of the Order.

In this case the arbitrator ordered in his award that the activity abide by Article 24, Section 3 of its negotiated agreement[4/] which prescribes the manner in which controllers will be solicited for assignment to areas of specialization after a realignment. He interpreted that negotiated provision as obligating the agency to make assignments to the realigned areas on the basis of seniority among all controllers concerned rather than the activity's method of limiting seniority consideration to only those controllers whose prior area of specialization included all or part of the particular reconfigured area. The agency has not demonstrated that such an award violates section 12(b)(2) of the Order. That is, the agency has not shown that the assignment in this case of controllers from the prior areas of specialization to the realigned areas of specialization involved an assignment from one position within the agency to another position within the agency, and that the arbitrator's award thus infringes upon the activity's 12(b)(2) right to assign employees to positions within the agency. The agency does not demonstrate that in this case the controllers were assigned from one separate and distinct position within the agency to another position within the agency. The agency submitted no evidence to indicate the creation of new controller positions in conjunction with the realignment. The agency did not show that the existing position description to which the employees were assigned were changed, or that new position descriptions were prepared.

Instead, it would appear that the arbitrator's award in this case directs the agency to abide by the provisions of its collective bargaining agreement following a change in the duties of a single, distinct position within the agency. It is well established under the Order that matters concerning the duties of a given position, that is, the job content of that position, are not within the ambit of section 12(b) of the Order. Rather, such matters are within the meaning of the phrases agency "organization" and "numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty" in section 11(b).[5/] In such circumstances it is well established under the Order that while an agency is under no obligation to negotiate about a matter within the ambit of section 11(b), once included in a negotiated agreement, and not otherwise inconsistent with law, regulation, or

4/ Article 24, Section 3 of the parties' agreement is set forth in note 1, supra.

5/ Department of the Army, U.S. Army, Aberdeen Proving Ground, Maryland and International Association of Machinists and Aerospace Workers, AFL-CIO, Lodge 2424 (Gottlieb, Arbitrator), 5 FLRC 852, 857 & n.10 [FLRC No. 77A-27 (Aug. 31, 1977), Report No. 137].

the Order, a negotiated provision concerning job content of a particular position may be enforced through arbitration.6/ Accordingly, the arbitrator's award in this case does not violate section 12(b)(2) of the Order.

The agency's assertions concerning the arbitrator's failure to address the term "qualified employees" in Article 24, Section 3, which the activity had construed as limiting the assignment of controllers only to reconfigured areas including all or part of their former areas of specialization, do not compel a different conclusion. The agency argues that if controllers were reassigned to areas with which they were unfamiliar and as to which they were uncertified in specialized procedures, seniority would be prevailing over qualifications, and consequently air safety would be compromised and disrupted. However, nothing in the arbitrator's award directs the activity to take any action that would compromise or disrupt air safety. For instance, nothing in the award precludes a period for familiarization and certification of controllers in conjunction with its implementation, and nothing in the award precludes the activity from delaying its implementation with respect to any controller until that controller has been certified as to a particular realigned area of specialization.

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the amended rules, the arbitrator's award is sustained and the stay of the award is vacated.7/

Issued, Washington, D.C., November 2, 1979

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY8/

6/ International Brotherhood of Electrical Workers, AFL-CIO, Local 640 and Parker-Davis Project Office, Bureau of Reclamation, United States Department of the Interior (Irwin, Arbitrator), 5 FLRC 562 [FLRC No. 76A-44 (July 12, 1977), Report No. 130].

7/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the instant case was decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision does not prejudge in any manner either the meaning or application of related provisions of the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Order.

8/ Member Leon B. Applewhaite did not participate in the present case, which had been processed prior to his confirmation by the United States Senate as a member of the Authority.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

November 2, 1979

Ms. Georgia E. Rayman
707 North Calvert Street
Baltimore, Maryland 21202

Re: Social Security Administration, Headquarters Bureaus and Offices in Baltimore and SSA Local 1923, American Federation of Government Employees, AFL-CIO (Ables, Arbitrator), Case No. 0-AR-48

Dear Ms. Rayman:

This refers to your exceptions to the arbitrator's award in the above-entitled case, filed with the Authority on October 5, 1979.

Section 2425.1(a) of the Authority's rules of procedure (44 F.R. 44740 et seq., copy enclosed) provides, "Either party to arbitration under the provisions of chapter 71 of title 5 of the United States Code may file an exception to an arbitrator's award rendered pursuant to the arbitration."

In this case, the arbitrator's opinion and award clearly indicate that two parties (the union and the agency) participated in the arbitration proceeding. Thus, it does not appear from the arbitrator's opinion and award that you, one of the grievants, participated as a "party" in the proceeding before the arbitrator. Consequently, you are not entitled to file an exception under section 2425.1(a) of the Authority's rules.

Accordingly, and apart from other considerations,*/ your exceptions to the arbitrator's award in the above-entitled case are hereby dismissed.

For the Authority.

Sincerely,

Harold D. Kessler

Harold D. Kessler
Executive Director

cc: (w/c of exceptions)

R. A. Matthews
SSA

*/ In this regard, section 2425.1(b) of the Authority's rules of procedure specify that the time limit for filing an exception to an arbitrator's award is 30 days beginning on the date of the award. The subject award is dated June 26, 1979; any exceptions to that award were due in the office of the Authority no later than the close of business on July 26, 1979; and, as indicated above, your exceptions were not filed with the Authority until October 5, 1979. Thus, those exceptions appear to have been untimely filed.

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 20 REPORT OF CASE DECISIONS January 14, 1980

UNFAIR LABOR PRACTICE CASE

2 FLRA No. 7 (November 2, 1979)

Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, Assistant Secretary Case Nos. 71-4280(CA) and 71-4333(CA). The ALJ, upon complaints filed by the union (Bremerton Metal Trades Council, AFL-CIO) under E.O. 11491, found, among other things, that the activity violated section 19(a)(1) of the Order by its action in suspending an employee/union steward because of his remarks to a foreman while representing another employee. While agreeing with the ALJ that the activity had violated the Order in so disciplining the union steward, the Authority reached its conclusion for different reasons, namely, that although flagrant misconduct by an employee, even though occuring during the course of protected activity may justify disciplinary action, the conduct of the steward in this case was not sufficiently flagrant to remove it from the ambit of protected activity. Having so found, the Authority issued an appropriate order. (Decision and Order attached.)

NEGOTIABILITY CASES

2 FLRA No. 8 (November 15, 1979)

National Treasury Employees Union and U.S. Customs Service, Region IX, FLRC No. 78A-29. The dispute involved the negotiability of a provision in the local parties' agreement related to the consideration of covered employees for reestablished positions. The Authority held that the provision did not contravene either applicable civil service directives or section 12(b)(2) of the Order and, therefore, set aside the agency's allegation to the contrary. (Decision attached.)

Appeals withdrawn:

Case No.	Date
O-NG-176	November 13, 1979
O-NG-121	November 14, 1979

ARBITRATION CASE

2 FLRA No. 9 (November 15, 1979)

Veterans Administration Hospital, Dallas, Texas and American Federation of Government Employees, Local 2437 (Schedler, Arbitrator), FLRC No. 78A-120. The arbitrator determined that the activity violated the parties' agreement by not announcing a particular vacancy and, in a three-part award, directed the activity to, among other things, vacate the position and to rerun the personnel action in a particular manner. The agency filed a petition for review of the arbitrator's award with the Federal Labor Relations Council under E.O. 11491. The Authority, pursuant to the applicable rules of procedure, accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated appropriate regulations, specifically the Federal Personnel Manual. The Authority also granted the agency's request for a stay. Thereafter, based on an interpretation of the FPM by the Office of Personnel Management, the Authority found that the portion of the arbitrator's award which directed the activity to vacate the position involved violated the FPM and, therefore, set aside that portion of the award (FLRA Report No. 2). In addition, the Authority modified part 3 of the award by adding a sentence: "Nothing in this award shall limit the Hospital's right to use alternate staffing methods in making selections." As so modified, the Authority sustained the award and vacated the stay which it previously had granted. (Decision letter attached.)

Attachments (3)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Department of the Navy,
Puget Sound Naval Shipyard,
Bremerton, Washington

Respondent

and

Assistant Secretary
Case Nos. 71-4280(CA)
71-4333(CA)

Bremerton Metal Trades Council,
AFL-CIO

Complainant

DECISION AND ORDER

On March 7, 1979, Administrative Law Judge Thomas Schneider issued his Recommended Decision and Order in the above-entitled proceeding, finding that Respondent had engaged in some of the unfair labor practices alleged in the complaint and recommending that certain other alleged unfair practices be dismissed. Thereafter, the Respondent filed timely exceptions only to that portion of the Administrative Law Judge's Recommended Decision and Order pertaining to his finding that the Respondent violated section 19(a)(1) by its action in suspending employee John Cleary.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions and supporting brief, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation as modified below.

The Administrative Law Judge (ALJ) found as violative of section 19(a)(1) of the Order the two day suspension of a union steward who had been disciplined because of his remarks to the General Foreman while representing another employee. The ALJ concluded that the union steward's impulsive language arose from his frustration at trying to interview an employee regarding a grievance, and, thus, came within the definition of "robust debate," which the ALJ considered to be protected

activity under the Order. While the Authority agrees with the ALJ that the Respondent violated the Order in disciplining the union steward for his impulsive language, it reaches this conclusion for different reasons.

In the Authority's view flagrant misconduct by an employee, even though occurring during the course of protected activity, may justify disciplinary action by the employer. On the other hand, not every impropriety committed during such activity is beyond the ambit of protected activity. The employee's right to engage in protected activity permits leeway for impulsive behavior, which is balanced against the employer's right to maintain order and respect of its supervisory staff on the job site. The Authority neither defends nor endorses the use of intemperate language in the conduct of labor management relations in the Federal sector. However, under the circumstances of this case, the Authority finds that the nature of the steward's conduct and language was not sufficiently flagrant to justify removing it from the ambit of protected activity. In this regard, the Authority notes the uncontested findings and conclusions of the ALJ to the effect that for a period of approximately one month immediately preceeding the incident the Respondent, and most particularly the General Foreman, had engaged in a pervasive course of conduct constituting, among other things, interference with, restraint and coercion of employees and union stewards in the exercise of their protected right to utilize the contractually established grievance procedure. In these circumstances, the Authority concludes that the steward's conduct was not sufficiently flagrant to remove it from the ambit of protected activity, and, in agreement with the ALJ, finds that the Respondent violated section 19(a)(1) of the Executive Order 11491, as amended, by suspending him for such conduct. 1/

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their rights to utilize the contractually established grievance procedure.

(b) Discouraging employee Hestand, or any other employee, from membership in a labor organization by excessive assignment to onerous or undesirable work duties.

(c) Sponsoring, controlling, or otherwise assisting a labor organization, except as permitted by the Executive Order.

(d) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Executive Order.

1/ In view of this finding, the Authority finds it unnecessary to consider or pass upon the ALJ's finding that the discipline imposed on the steward was excessive.

2. Take the following affirmative actions to effectuate the purposes of Executive Order 11491, as amended:

(a) Make whole, consistent with applicable laws and regulations, any loss of income employee John Cleary may have suffered by reason of his two day suspension, on or about January 12, 1977, for alleged insubordination.

(b) Remove or expunge all references to the two day suspension suffered by employee John Cleary from his personnel file and from any other documents in the possession or control of the Activity in which such reference may appear.

(c) Post in its facility at Bremerton, Washington, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Commander of the Puget Sound Naval Shipyard and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that all other allegations in the complaints in Case Nos. 71-4280(CA) and 71-4333(CA) be, and they hereby are, dismissed. 2/

Issued, Washington, D.C., November 2, 1979

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY 3/

2/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

3/ Member Leon B. Applewhaite did not participate in the present case, which had been processed prior to his confirmation by the United States Senate as a member of the Authority.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We Hereby Notify Our Employees That:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their rights to utilize the contractually established grievance procedure.

WE WILL NOT discourage employee Hestand, or any other employee, from membership in a labor organization by excessive assignment to onerous or undesirable work duties.

WE WILL NOT sponsor, control or otherwise assist a labor organization except as permitted by the Executive Order.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Executive Order.

WE WILL make whole, consistent with applicable laws and regulations, any loss of income employee John Cleary may have suffered by reason of his two day suspension, on or about January 12, 1977, for alleged insubordination.

WE WILL remove or expunge all references to the two day suspension suffered by employee John Cleary from his personnel file and from any other documents in our personnel file and from any other documents in our possession or control in which such reference may appear.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, whose address is: 450 Golden Gate Avenue, Room 11408, P.O. Box 36016, San Francisco, California 94102, and whose telephone number is: (415) 556-8105.

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
SUITE 700 - 1111 20th Street, N. W.
WASHINGTON, D. C. 20036

In the Matter of DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, BREMERTON, WASHINGTON, Respondent and BREMERTON METAL TRADES COUNCIL, AFL-CIO, Complainant	CASE NOS. 71-4280(CA) & 71-4333(CA)

W. Don Wilson
Labor Relations Advisor
Office of Civilian Personnel
Western Field Division
Department of the Navy
525 Market Street, Suite 3522
San Francisco, California 94105
For the Respondent

Jon Howard Rosen
Attorney at Law
27th Floor, Smith Tower Building
506 Second Avenue
Seattle, Washington 98104
For the Complainant

Before: THOMAS SCHNEIDER
Administrative Law Judge

This proceeding was initiated under Executive Order 11491, as amended; the Notice of Hearing was issued by a Regional Administrator of the Labor-Management Services Administration, United States Department of Labor; and the proceeding was conducted before the Assistant Secretary for Labor-Management Relations. This decision, pursuant to transition rules and regulations, Federal Register, Vol. 44, No. 1, January 2, 1979, pages 7-8, is issued in the name of the Authority and, in accordance with § 2400.2 (5 C.F.R.

§ 2400.2) of the transition rules and regulations, shall be processed by the Authority in accordance with the Rules and Regulations of the Assistant Secretary for Labor-Management Relations, Title 29, Code of Federal Regulations, Part 201, et seq., except that the word "Authority" shall be substituted wherever the words "Assistant Secretary" appear in the rules and regulations of the Office of the Assistant Secretary.

DECISION AND ORDER

The Bremerton Metal Trades Council ("union" or "council") filed two complaints against the Puget Sound Naval Shipyard ("activity"). The complaint in case number 71-4280(CA) was filed June 6, 1977 and the complaint in case number 71-4333(CA) was filed August 10, 1977. The latter complaint alleged that the activity violated subsections (1), (2) and (4) of section 19(a) of Executive Order 11491, as amended ("the Order"), by suspending John E. Cleary and by terminating the employment of Joseph E. Pittson. The complaint in case 71-4280(CA) alleged that the activity violated subsections (1), (2), (4), (5) and (6) of section 19(a) of the Order, in a series of incidents between October 1, 1976 and February 4, 1977, as well as by the actions taken against Cleary and Pittson.

On February 24, 1978, the Regional Administrator, Labor-Management Services, after investigating, dismissed the complaint in case 71-4333(CA) in its entirety and dismissed a large portion of the complaint in case 71-4280(CA).

Upon review on June 19, 1978, the Assistant Secretary of Labor agreed with the Regional Administrator respecting the discharge of Joseph Pittson, and held that such discharge could not be held violative of the Order since that issue could properly be raised under an appeals procedure. § 19(d). 1/ However, the Assistant Secretary held that all other allegations of both complaints should be resolved on the basis of evidence adduced at a hearing.

Such a hearing was held before me in Bremerton, Washington, on September 11, 12, 13, 21 and 22, 1978. The last briefs were filed on December 11, 1978.

1/ Section references are to the Order.

Findings of Fact and Conclusions

Background

The activity has accorded the union exclusive recognition, and has entered into a negotiated agreement with it, which was in effect at all material times.

For several months prior to August 1976, several persons in the welding shop (shop 26 or 926) at the activity believed they were doing work at a higher level than they were being paid for. A person at a lower classification can get promoted to a higher classification. But even without being promoted, if a person performs the higher classification work for more than two weeks he is entitled to a temporary promotion--i.e., higher pay during the time he performs the work at the higher level. (Art. Eighteen, R-A.) 2/

In order to investigate such complaints and to assist with any grievances such complaints might lead to, the president of the council appointed Joseph E. Pittson to the post of shop steward, and informed the activity of his appointment on September 24, 1976 (C-1).

The Issues

In a letter accompanying the notice of hearing, dated August 11, 1978, the Regional Administrator focused on 26 issues concerning which he thought evidence should be introduced. That letter was introduced as ALJ Exhibit #1, and the issues numbered consecutively in the margin. I found this system of identifying the issues useful at trial and will use it in the following discussion. For convenience, I will restate the Regional Administrator's statement at the beginning of the discussion of each issue.

> (1) Were sections 19(a)(1) and (2) of the Order violated when Foreman Welder Null prepared an alleged 'poor' Work Performance Appraisal on a Merit Promotion Application filed by former Shop Steward Pittson?

2/ R-A is Respondent's Exhibit A, the negotiated agreement. References to Respondent's Exhibits are prefixed by R; references to Complainant's Exhibits are prefixed by C. The Transcript is referred to by Tr. followed by a page reference.

One of the workers desiring a promotion was the same Joseph E. Pittson, who was appointed shop steward as mentioned above. He was a welder-limited (WG-8) and filed for journeyman (WG-10) in April 1976. On August 30 he was found eligible for WG-10, but the register was closed. In September 1976, Pittson filed a new application. Shortly thereafter, on October 1, 1976, he was evaluated as "just barely an average worker." The activity contends that this is not a "poor" appraisal, but that in any event, it is accurate.

The union points out that it followed shortly after Pittson was appointed steward to deal with welder complaints, and that Pittson had previously been found eligible for WG-10. The papers concerning that eligibility were destroyed. The testimony of Mr. Blakey, head of the activity's personnel operations division (Tr. 843-851), made it clear that this destruction was not routine. Nevertheless it is not clear that union animus was the motive behind the rating. The obvious reason for a new evaluation shortly after being noted "eligible" was that Pittson had again applied for a promotion (Tr. 190).

There is no necessary inconsistency between the "eligible" rating in August 1976 (C-10) and the "barely average" appraisal (R-C) Pittson got in October. Crediting Mr. McFall's statement (R-C) that Pittson was ranked 15th and 16th out of 16 in the list of eligibles in May and July 1976, I conclude that the "barely average" appraisal was, if not accurate, at least consistent with the previous appraisals. Therefore I find no violation of the Order in this regard.

(2) Were sections 19(a)(1) and (2) of the Order violated on or about October 4, 1976, when Pittson was issued a Letter of Caution and Requirement regarding the abuse of sick leave?

On October 4, 1976, Pittson received a letter of caution and requirement telling him that he would need a doctor's note for any days that he took sick leave.

Pittson himself testified that he took a lot of sick leave prior to November 1976, because of a shoulder problem (Tr. 255). The union contends that he should have been advised verbally prior to being issued a letter of caution and requirement (R-A, Art. Twelve, section 5). The evidence shows he was advised, although several months previously (Tr. 430). Whether such warning complies with the negotiated agreement is a question of "arguable interpretation," and

therefore not appropriate for resolution by me. See, Department of the Army, Watervliet Arsenal and American Federation of Government Employees, AFL-CIO, Local Union 2352, A/SLMR No. 624 (1976); Department of Health, Education and Welfare and American Federation of Government Employees, Local 1802, AFL-CIO, A/SLMR No. 1168 (1978). But even if it were, I would find no violation of the Order. The requirement stated in the letter was not particularly burdensome--merely to substantiate sick leave with a doctor's note. Such a requirement seems reasonable in light of the fact that Pittson took approximately 15 days of sick leave in the first nine months of 1976 on days immediately preceding or following a Saturday or Sunday or other sick leave day (R-D).

> (3) Was section 19(a)(1) of the Order violated on October 13, 1976, when Pittson was denied the right to see then Chief Steward John Cleary regarding the cancellation of his annual leave?

John Cleary was chief shop steward of the machinists local, and secretary of the council, and was the person who suggested that Pittson be made a steward. Later, in December, Cleary was elected president of the council.

Pittson had applied for leave from Saturday, October 16 through Sunday, October 24, to go hunting. This had apparently been granted. On Wednesday, October 13, said leave was cancelled. After some discussion between Pittson, Cleary, General Foreman Mee, and Pittson's foreman, Henshaw, the leave was restored.

The evidence thus shows that Pittson in fact saw Cleary about this incident (Tr. 203, 691). Therefore there is no violation of the Order.

> (4) Were sections 19(a)(1), (2) and (3) of the Order violated on or about November 5, 1976, by the threatening actions of General Foreman Runte and, in a separate incident, the actions of Welder Foreman Ingraham and Shop Superintendents Gurley, Towers, and Kidrick while Pittson was representing employee Hestand? Were the above sections violated by the alleged threatening actions of Supervisors Rowland, Hughes, Cooper and Henshaw later on that same day as Pittson was about to leave work?

In the morning on Friday, November 5, 1976, at 0740 hours Pittson obtained a slip from Henshaw, his acting foreman, authorizing Pittson to go to a meeting at the union

office at 1220 hours. At that meeting Pittson obtained a list of people to see in connection with his investigation. He returned at 1330 hours to arrange to see the people involved. Acting foreman Henshaw was not there, but Superintendent Hughes was. Hughes wanted the names of the individuals to be seen and decided it would be easier for Pittson to interview the ones who were working on the carrier Kitty Hawk all together and denied permission for Pittson to see them singly at that time. Pittson wanted to see at least two other individuals: Potter, who was about to go on leave, and Hestand, who was not aboard the Kitty Hawk. There was some conflict in the testimony as to whether Hughes gave Pittson permission to visit the Sacramento where Hestand was, or only to call. In any event, Pittson went to the Kitty Hawk to see Potter and then to the Sacramento 3/ to see Hestand.

While Pittson was aboard the Sacramento, Ingraham, Hestand's foreman, called Hughes and asked him whether he had given permission to Pittson to be aboard the Sacramento, located a considerable distance from his worksite. Hughes said, "No." Ingraham reported to his general foreman I, Runte. Runte called Henshaw, Pittson's acting foreman, to verify that Pittson had no permission to be aboard the Sacramento. Thereupon Runte and Ingraham approached Pittson and Hestand.

The ostensible reason for Foreman I, Runte to be concerned that Pittson was on board the Sacramento was that it was out of his territory. The Sacramento was more than half a mile from Pittson's worksite. The prevailing practice was to have those stewards handle grievances who were located nearby. However, from all the evidence it appears to me that Mr. Runte was more upset about Pittson's presence than a technical violation of rules would warrant. Both Hestand and Pittson testified that when Runte approached them Runte was excited and shaking his finger or fist at Pittson before the latter had said anything.

Runte asked Pittson what he was doing aboard the ship, to which Pittson replied that he was on union business. Runte ordered Pittson to leave the ship. Pittson said, "You are not my foreman." Runte repeated his order, shaking his finger at Pittson. Pittson repeated that he was on union business. It was close to quitting time.

3/ There is some evidence that this was the Camden, but the name of the ship is irrelevant for present purposes.

Runte was angry. He and Ingraham left. Pittson was angry too, and shaken.

I conclude that it was not Pittson's disobedience of a direct order that first infuriated Runte, although it undoubtedly made the situation worse, but Pittson's very presence. Furthermore, I credit Pittson's testimony that Runte said, "You can stick the union," (Tr. 226) when Pittson sought to take cover under the terms of the union contract. I conclude that Mr. Runte's conduct had the effect of intimidating both Mr. Hestand and Pittson. In fact, Hestand testified that if filing a complaint resulted in such a hassle "it wasn't even really worth it" (Tr. 73). Therefore sections 19(a)(1) and (2) were violated.

There was some evidence concerning "the actions of Welder foreman Ingraham, and shop superintendents Gurley, Towers, and Kidrick," described in the Regional Administrator's letter, but those actions were overshadowed by Runte's conduct and I find no separate violation of the Order.

After the heated exchange between Runte and Pittson, Pittson went to the Kitty Hawk to muster out. There he was met by Rowland who was General Foreman II, and thus Runte's and Hughes' supervisor, by Hughes, who was on that day acting general foreman, and thus Henshaw's supervisor, and by Henshaw, who was acting foreman and Pittson's supervisor. There were other people there too, but they played no part in the confrontation that followed. Hughes told Pittson he had been off the job and might be subject to discipline (Tr. 699). Henshaw asked for Pittson's pass and asked how come it wasn't signed. Pittson said he didn't have much time to talk, and he didn't need this job. Then he said, "I'll take care of this [or you] outside." He then left on vacation. Considering that Pittson had just refused to obey the direct order of a general foreman, and that Hughes and Henshaw had been alerted of this by Runte, the supervisors' conduct at the mustering-out point is understandable, and proper. I am foreclosed from deciding whether Pittson's statement or threat warranted his dismissal as discussed below in issue No. 24.

(5) Were sections 19(a)(1) and (5) of the Order violated on or about November 8, 1976, by the actions of Supervisors Ingraham and Runte in refusing to allow Cleary the right to see Hestand regarding a grievance?

Hestand, who was interviewed for a while by Pittson on board the Sacramento on November 5, as described above, had a complaint for which he was trying to file a grievance. He was a welder-helper-general (WG-5) who felt he was doing WG-8, or better, work. On November 8, he met with Cleary in an office to complete his grievance. Before filing a grievance, the agreement between the activity and the union requires that the matter be discussed with the grievant's immediate supervisor (R-A, Art. Thirty, section 5(a)). In Hestand's case that was his foreman, Ingraham. Ingraham entered the office and Cleary asked him to meet respecting Hestand's grievance. Ingraham did not know what to do, and therefore went to the phone and called his general foreman I, Runte, who came in shortly thereafter. Immediately after Ingraham used the phone Cleary called the union's president, Holt. Then Cleary and Ingraham talked. According to Cleary he showed Ingraham the union-activity contract, and Ingraham threw it across the room, saying the union would shut down the shipyard. According to Ingraham, he said he was powerless to promote Hestand. I believe both witnesses. Soon thereafter, Holt came in, in response to Cleary's call. At that point Runte went out.

The activity urges that this aspect of the complaint be dismissed because it involves interpretation of the negotiated agreement which could be, and, the activity claims was, resolved by other procedures. It does not seem that the incidents on November 8 involved an interpretation of the contract. But it also appears that Cleary and Hestand met, and were not interfered with. Cleary and Hestand sought to get Ingraham to join them in an informal meeting, to accomplish the first step of processing Hestand's grievance concerning temporary promotion. This meeting was not successful, in that Ingraham could not grant the promotion. But I find no violation of the Order.

> (6) Were sections 19(a)(1), (5) and (6) violated by the Shipyard's alleged adherence to different procedures in Shops 931 and 926 for arranging appointments between shop stewards and unit employees throughout the period covered by the complaint?

Shop 931 is the Machine Shop in which Cleary works. Shop 926 is the welding shop. The welding shop has its personnel widely dispersed over the shipyard. The machine shop is in one discrete location. The procedure for a steward arranging to see a worker in shop 926 at the time involved here was that the steward would contact his supervisor, who would arrange for a meeting by contacting the

worker's supervisor. In shop 931 the supervisors were not involved in making appointments. Stewards made their own appointments.

The activity explained this disparity by the different geographical distributions of the shops. In pertinent part, the negotiated agreement provides (Art. Seven, section 2):

> When any Council official or steward is required to leave his worksite on appropriate matters related to his representational duties, he will request permission, advise where he is going, and state the general nature of his business. Permission shall also be obtained from the cognizant immediate supervisor of any employee being cont[]acted. The supervisor's permission in these instances will normally be granted.

To the extent that the different procedures are different interpretations of the agreement, particularly in the interpretation of "permission" in the agreement, I am precluded from considering them here by A/SLMR Report No. 49, and Department of the Army, supra, p. 5, A/SLMR No. 624, and Department of Health, Education and Welfare, supra, p. 5, A/SLMR No. 1168. Insofar as Mr. Cleary or Mr. Pittson in particular was restrained in his function, I shall deal with such restraint specifically in the appropriate issues.

> (7) Was section 19(a)(3) of the Order violated on or about November 8, 1976, when Supervisor Wixson called Stewards Owens and Sprenger into his office allegedly to complain about machinists representing welders?

On November 8, 1976, the Monday after the incidents on the Sacramento and the Kitty Hawk, Mahlon Wixson, Superintendent of Welding, Shop 26, had what he described as a "routine" (Tr. 437) meeting of chief stewards. There was some evidence that there were no "regular" meetings (C-8). In any event, present were: Levi Owens, Chief shop steward of the boilermakers, and Ed Sprenger, Chief shop steward of the operating engineers. John Cleary, Chief shop steward of the machinists was not there. (Incidentally, I find on the basis of my observation of all three witnesses, that Cleary was far younger, more aggressive and more articulate than either Sprenger or Owens.) Wixson told them that Pittson, a machinist, was operating outside of his geographical area among the welders. Thereupon Sprenger went to the union office, angry that Pittson was on his "turf."

The activity contends that since the complaint did not allege a violation of section 19(a)(3) of the Order, this issue is not before me. I conclude that since both sides introduced evidence and arguments concerning this incident, it is before me. I find that one purpose Mr. Wixson had in calling this meeting was to inform Sprenger and Owens that Pittson was a new steward for the welders. Sprenger's reaction was to immediately talk to Cleary about this. Cleary responded that president Holt had appointed Pittson. Thereupon Sprenger "asked Mr. Holt what he was trying to do because I told him I thought we were trying to keep . . . the stewards for the welders between the boilermakers and Local 48 [operating engineers]." (Tr. 130-131.) I have no doubt that Wixson knew enough about union affairs and about Ed Sprenger to have forseen this reaction. Since Pittson had the right, under section 1 of the Order to assist a labor organization, and since Wixson's action was an attempt to interfere with that right, a violation of section 19(a)(1) is established.

(8) Was section 19(a)(1) of the Order violated on or about November 8, 1976, when Supervisor Runte purportedly refused to allow Cleary to meet Hestand?

The evidence shows this incident occurred on November 9.

Hestand had discussed his grievance concerning his temporary promotion with Pittson on the Sacramento on November 5, but the paperwork had not been completed. Cleary was attempting to follow through, since Pittson was on vacation. A logical opportunity to do so arose on November 9, 1976, when Hestand and Cleary both were in Ingraham's office for a scheduled meeting with Runte. When Runte came in he was informed that the meeting was cancelled. After checking with his superior, Rowland, Runte announced that the meeting was off, and told Cleary and Hestand to go back to work. Cleary requested permission to talk to Hestand right then. Runte refused, saying that the proper way to do it was for Cleary to set up an appointment through Hestand's foreman. Since it was obvious that Hestand's foreman already knew that Hestand was at a meeting, and presumably had accommodated his work schedule accordingly, the only possible effect of Runte's decision was to interfere with Hestand's right to pursue his grievance. This is a patent violation of section 19(a)(1) of the Order.

The activity contends that this issue is rendered moot by the negotiation and execution in April 1977 of

a document entitled "Intent of Specific Articles and Sections." That document added interpretations to several sections of the negotiated agreement. The contention is that arguable interpretations of negotiated agreements are not to be resolved in unfair labor practice proceedings. In the abstract that is a sound proposition. But this conduct by Runte was not a bona fide disagreement concerning the interpretation of the negotiated agreement. Even if the agreement required an appointment made by a supervisor, in this instance the appointment had been made. It is unreasonable to construe the agreement to require making a second appointment.

> (9) Were sections 19(a)(1) and (2) of the Order violated on or about November 11, 1976, when Supervisor Hughes prepared an allegedly 'poor' Work Performance Appraisal on Pittson?

This appraisal (R-C) was slightly better ("average" rather than "barely average") than foreman Null's appraisal a month earlier, which is discussed above, in issue No. 1. A fortiori, I find no violation of the Order.

> (10) Was section 19(a)(1) of the Order violated on or about November 12, 1976, when Cleary, allegedly because he was denied official time to meet with Hestand, had to arrive early to work to have Hestand sign a grievance form?

Since the activity violated the Order by refusing to let Cleary and Hestand meet on November 9, 1976, as discussed in issue No. 8, and since other attempts by Hestand to speak to stewards had been surrounded by unpleasant incidents, i.e., the confrontation between Runte and Pittson on the Sacramento (issue No. 4) and Ingraham's tossing the contract across the room on November 8 (issue No. 5), it was reasonable for Hestand and Cleary to meet on off duty hours. Therefore it was the foreseeable result of the violation discussed in issue No. 8, and is part of the same violation.

> (11) Were sections 19(a)(2) and (4) of the Order violated on or about November 15, 1976, when Supervisor Hughes informed Pittson that Pittson would be charged LWOP for two hours for November 5, 1976?

There was no evidence to show that Pittson had filed a complaint or given testimony under the Order, so that no violation of section 19(a)(4) is established. The reason Pittson was going to be charged leave without pay for two

hours for November 5, 1976, was that Hughes denied giving Pittson permission to talk to Hestand aboard the Sacramento. Since I credit Hughes in this regard, charging the time to LWOP seems appropriate. Since charging the time is appropriate, it was also appropriate to inform Pittson accordingly.

(12) Were sections 19(a)(1), (2) and (4) of the Order violated on or about November 16, 1976, when Pittson was told by Hughes that Pittson would be investigated for his actions of November 5, 1976?

Since the incidents on November 5, 1976, were significant and upsetting for all parties, they required investigation. The negotiated agreement permitted such investigation (R-A, Art. Twenty-one, section 4) and common courtesy as well as due process required that Pittson be informed of such an investigation.

(13) Were sections 19(a)(1) and (2) of the Order violated on or about November 29, 1976, when Hestand was assigned to be "fire watch?"

Between December 1, 1976 and July 1977, when he quit, Hestand was assigned to "fire watch" approximately 50 percent of the time. Fire watch is an essential but tedious function, which consists of watching to insure that welding operations do not result in fires. Welders who want to advance and improve their skills do not like fire watch duty because it offers little opportunity to demonstrate improved welding skills.

A single or an occasional or a rotating assignment to "fire watch" would not be a violation of the Order. But to be assigned 50 percent of the time for a six-month period is unusual. Since Hestand had been one of the people trying to push his grievance with Pittson's and Cleary's help and in view of his above average performance appraisals (C-5 and 6) I infer that the excessive fire watch duty was in reprisal for his protected activities. It was directly intended to discourage his membership in the union and is a violation of sections 19(a)(1) and (2) of the Order.

(14) Was section 19(a)(3) of the Order violated on or about November 3, 1976, when Hestand was given a list of shop stewards and allegedly told that these were the only stewards from which he could choose for representation?

The list was introduced as C-7. It probably was given to Hestand toward the end of November, rather than on November 3, 1976 (Tr. 105). Hestand testified that his foreman, Ingraham, gave him the list even though he wanted Cleary, and limited him to the names on it. Ingraham, on the other hand, denied giving Hestand C-7 (Tr. 688). The union does not address this issue in its brief. Resolving the conflicts in the evidence in favor of the activity as being more plausible on this point I find no violation of the Order.

> (15) Were sections 19(a)(1), (2), (3) and (4) of the Order violated on or about November 24, 1976, when Pittson was ordered by Hughes to see Superintendent Wixson; Pittson's request to have Cleary represent him was not honored; Wixson appointed a representative for Pittson; and Pittson was handed a memorandum dated November 23, 1976, dealing with disciplinary action?

On November 24, Pittson was told by his supervisor, Hughes, to report to Superintendent Wixson's office. Pittson told Hughes that he wanted Cleary to be there to represent him. Hughes said he'd see what he could do. In fact, Hughes did nothing. When Pittson arrived, he was met by several people, including Superintendent Wixson, other supervisors, and Henry Clancy, a shop steward in the operating engineers local. Clancy had been called by Mr. Mee (welder general foreman) to represent Pittson. Pittson refused to have Clancy as a representative and thus the meeting lasted only long enough for Wixson to hand Pittson a letter (C-14) advising him that a determination is being made as to whether disciplinary action is warranted, presumably as a result of the November 5 incidents. Eventually, on December 17 and December 21, Pittson was to get letters of proposed removal, and on February 4, 1977, he was finally terminated.

The activity contends that the meeting on November 24, 1976, was not a formal meeting within the meaning of section 10(e) of the Order since it dealt solely with the individual conduct of Mr. Pittson. Even if it be assumed that the possibility of disciplinary action arose exclusively because of Pittson's conduct as an individual and not as a union steward on union business, Article Twenty-one of the Negotiated Agreement (R-A) provides that an employee may have council representation. Apparently Mr. Wixson thought so too, which is why he arranged, through Mee, to have a steward there. If representation is to be meaningful it must be by someone in whom the employee has confidence. Management,

especially Mr. Hughes, knew that Pittson wanted Cleary. Yet Hughes never communicated this desire to anyone. Thus, Pittson was denied real representation. I find that, but for Pittson's activity in pushing the welders' grievances, he would have been accorded the representative of his choice. Thus, Mr. Mee testified that it is normal practice to give an employee the steward of his choice, if requested (Tr. 725). In all the circumstances this amounted to a violation of section 19(a)(1) and (3) of the Order. There is no violation of section 19(a)(4), because there is no evidence that Pittson had filed a complaint or given testimony under the Order.

> (16) Were sections 19(a)(1), (2), (3) and (5) of the Order violated on or about November 29, 1976, when Cleary was denied permission to see Pittson even though Cleary allegedly had obtained permission to see him?

On November 29, Cleary wanted to have a meeting with Hughes and Pittson. In trying to locate Hughes and to get permission to see Pittson, Cleary entered the welders' supervisors' office. He there engaged in a discussion during which he was getting increasingly frustrated by the difficulty he was having in arranging the meeting. At this point welder general foreman I, Lyle Runte, entered the office, and Cleary made the statements that are discussed below in issue No. 25. Obviously Cleary was upset. Because of this upset, I believe the testimony that Cleary "stormed out of the office" (Tr. 739) rather than trying to find Hughes to get permission to talk to Pittson. I find that he was not denied the opportunity to meet with Pittson on this occasion.

> (17) Were sections 19(a)(1) and (5) of the Order violated during the period between November 23, 1976, and December 1, 1976, by the actions of Supervisors Drouin and Mayton in refusing to allow Pittson to see Cleary to discuss Pittson's grievance?

I can find no evidence in the record concerning these specific incidents, and therefore I make no ruling on them.

> (18) Were sections 19(a)(1), (2), (3) and (4) of the Order violated at the end of November 1976 by the actions of Supervisors Ungren and Hughes when they attempted to determine if Pittson had prompted the filing of grievances by other employees against Shop 926 regarding temporary promotions?

The evidence is uncontradicted that Supervisors Ungren and Hughes approached two workers named Champ and Douglas to ask them whether they had grievances. Mr. Ungren declined to characterize this inquiry as an attempt to see whether Pittson was soliciting grievances. But both Douglas and Champ testified that the question asked was whether Pittson solicited. I believe that, in fact, this is the information the supervisors were after. Pittson's activities were creating problems (witness the incident of November 5, 1976--see issue No. 4, above) and it seems likely that management sought to find out if Pittson was behaving illegally.

The effect of this inquiry was to discourage Champ and Douglas from pursuing their grievances actively thereafter, especially after they learned that Pittson was being fired. This is a violation of section 19(a)(1), but not of any other section.

The union also contends that Champ was offered a promotion if he would drop his grievance. The activity's witnesses denied that such an offer was made. Champ himself just testified that "some sort of arrangement" was mentioned (Tr. 177) and apparently nothing further was said about it. I find this evidence insufficient to support a violation of the Order in this respect.

> (19) Were sections 19(a)(1), (3) and (5) of the Order violated from November 17, 1976, by Wixson's refusal to accept grievances filed by Pittson on behalf of unit employees?

Wixson testified that he received a total of six grievances which he returned because they lacked specificity (Tr. 444-446; C-4). He testified that this was not a rejection of the grievances, but merely a request for further information.

Article Thirty, section 5(b)(1) of the negotiated agreement provides in part:

> . . . the grievance shall be reduced to writing on the appropriate form and shall specify, as a minimum, the following details: the nature, time, and date of the action or incident giving rise to the grievance, the Agreement provision alleged violated, the date of the informal discussion and the corrective action desired. The form must be submitted to the head of the shop or branch within five (5) working days of the immediate supervisor's informal decision.

> Grievances deficient in required details will be returned to the employee for inclusion of additional necessary information. The shop or branch head shall schedule a meeting with the employee and his steward within five (5) work-days of receipt of the grievance to attempt resolution.

The emphasis of this outlined procedure is speed and oral communication, with writing primarily as a means of keeping a record. C-4 shows that the grievance contained the minimum details specified: nature, time and date of the incident giving rise to the grievance, the agreement provision alleged violated, the date of the informal discussion and the corrective action desired. Mr. Wixson testified that the statement of the nature of the grievance lacked specificity. In this regard the grievance states: "they have assigned me duties above the level of my position for more than one pay period without temporarily promoting me to the higher position." Although this does not give a description of precisely what work is claimed to be "above the level of my position," it is enough to put the activity on notice of the general nature of the grievance. If the thrust of the grievance procedure was written communication, a more specific writing would be desirable. But the thrust is oral, not written communications. A meeting involving the branch head, employee and steward is required to be held within five days. It is evident that the activity did not schedule such a meeting with any of the grievants. At a meeting the details could easily have been supplied. In this light, the return of the grievances seems more like a tactic of delay than a bona fide request for details. I conclude that this was a violation of section 19(a)(1) of the Order, but not of 19(a)(3) or (5).

> (20) Was section 19(a)(1) of the Order violated on or about December 1, 1976, when Supervisor Hughes allegedly questioned the need for his presence at a grievance meeting?

The questioning referred to was based on Hughes' inexperience with grievance procedure and rectified when he met with Cleary and Pittson. There was no violation of the Order in this respect.

> (21) Were sections 19(a)(1) and (4) of the Order violated when Hestand was issued a memorandum regarding the need for disciplinary action because of stolen tools?

In part this issue is argued by the parties on the point whether a proposed notice of discipline should have preceded the memorandum. The contract is not clear on this point (R-A, Article Twenty-one, sections 1, 2 and 5). The activity's Director of Labor Relations testified it was not customary to issue proposed letters of reprimand. I find insufficient evidence upon which to premise a violation of the Order in this respect. Furthermore, on this aspect of the issue, I am precluded from considering it by the rule in Department of the Army, supra, p. 5, A/SLMR No. 624, and Department of HEW, supra, p. 5, A/SLMR No. 1168.

On the more basic issue, whether a reprimand was justified, or was an instance of reprisal, as was the fire watch duty imposed on Hestand, I also find no violation of the Order. It appears that valuable tools were missing while in Hestand's custody. Although Hestand suggested that the tools were taken as a reprisal (Tr. 117-118), there is nothing to corroborate this speculation.

> (22) Were sections 19(a)(1) and (5) of the Order violated when A. L. McFall, on or about December 22, 1976, issued a letter to the BMTC indicating that a grievance regarding sick leave filed against Supervisor Wixson should be returned to the BMTC?

Complainant does not argue this issue. Only Mr. McFall testified on it. I find insufficient evidence on which to premise a violation of the Order.

> (23) Were sections 19(a)(1), (2), (3) and (4) of the Order violated on or about December 22, 1976, when a letter proposing a two day suspension of J. Cleary was forwarded to the BMTC despite Cleary's specific instruction that the document remain private?

As the result of Cleary's disrespect to Runte on November 29 (see issue No. 25, below), Cleary's superintendent issued a letter of proposed adverse action to Cleary, dated December 20, 1976. On December 21, Cleary requested in writing that the union not be given a copy of the letter. On December 22, the union in fact received a copy of the letter. Based on testimony, which I believe, that the shipyard personnel office had Xerox copiers only, and the copy that the union received was a copy made by another process, I find that the activity did not furnish the union a copy of the letter of proposed adverse action.

(24) Were sections 19(a)(1) and (4) of the Order violated on December 20, 1976, when Pittson received an official letter proposing to terminate his employment with the Shipyard?

Obviously it does not violate the Order to issue a proposed letter of adverse action if the adverse action itself is justified. The basic question is whether Pittson's termination was in reprisal for his union activity or was a bona fide response to his actions. I am foreclosed from considering this question by the Assistant Secretary of Labor's decision in his letter of June 19, 1978 (Asst. Secy. Exhibit 1(e)) and by section 19(d) of the Order.

(25) Were sections 19(a)(1), (2) and (4) of the Order violated on December 20, 1976, when Cleary received an official letter proposing to suspend him for two days, and on December 21, 1976, when Pittson was given a slightly revised copy of the December 20, 1976, letter proposing to remove him?

Respecting Pittson, this issue is disposed of by the discussion of issue No. 24, above. Respecting Cleary, the basic issue is whether the two-day suspension was in reprisal for his union activities or was justified by his actions. His actions were that on November 29, 1976, Cleary, a chief steward, wanted to meet with one of his stewards, Pittson. In order to see him he had to get permission of Pittson's foreman, Hughes. Cleary looked for Hughes in the welders' supervisors' office. Hughes was not there but foreman Main was. Main's conversation with Cleary made Cleary more and more frustrated with what he perceived as obstacles put in his way. Cleary, was, of course, aware of the run-in Pittson had earlier that month with general foreman Runte (see issue No. 4); and with Runte's refusal to let him meet with Hestand on November 9 (see issue No. 8). At that point Runte entered the office and Cleary said, "What is he doing here?" and then he shook his fist in his face and he said, "I am going to get your ass. I filed an Unfair Labor Practice and if the Council doesn't get your job, then something is wrong." (Tr. 746; see also pp. 755-756.) Shortly thereafter Cleary "stormed out of the office." (Tr. 739.) This was the exclusive basis for Cleary's two-day suspension. Cleary had had no disciplinary actions against him previously. Mr. McFall, testified: "We have no problem with Mr. Cleary in his discussions with general foremen and supervisors, now. There were some things said, at that time, which were not typical of even himself." (Tr. 405-406.) In short, Cleary's statement was an isolated incident. He was clearly on union business. There had

been a recent history of incidents which violated the Order. In these circumstances almost any discipline was improper, and a two-day suspension certainly so.

Cleary's language comes within the definition of "robust debate" which the Supreme Court has declared protected, both under the NLRA and the Order, in Old Dominion Br. No. 496, Nat. Assn., Letter Car. v. Austin, 418 U.S. 264, 273 (1974). In U.S. Small Business Administration, Central Office and American Federation of Government Employees, Local 2532, AFL-CIO, A/SLMR No. 631, the Assistant Secretary adopted the following statement by Administrative Law Judge Giesey:

> The brief encounter between Mr. Foster and Mr. Grant did occur and somewhere between two and three 'damns,' one 'ass' and one 'hell' were spoken by Mr. Foster. As Mr. Foster testified, 'I was really angry.' I believe him, he appeared at the hearing to be somewhat mercurial in nature in contrast with Mr. Grant's imperious and glacial demeanor.

I adopt that language as applicable here, substituting Cleary for Foster and Runte for Grant. Flagrant conduct of an employee in the course of protected activity justifies disciplinary action by an employer, but there must be leeway for impulsive behavior. N.L.R.B. v. Thor Power Tool Co., 351 F.2d 584, 587 (7th Cir. 1965). This is an instance of such "impulsive behavior." The discipline imposed was excessive; it resulted from union animus. I find that section 19(a)(1) of the Order was violated.

> (26) Were sections 19(a)(1), (2) and (4) of the Order violated on or about January 12, 1977, when then Chief Steward Cleary was suspended for two days for alleged insubordination?

This issue has been disposed of in the discussion of issue No. 25.

Relief

For relief the union seeks the reinstatement of Pittson with back pay; reimbursement for Cleary's lost wages; purging of references to Cleary's alleged misconduct and the two-day suspension from all government records; attorney's fees and expenses of litigation; and posting of the usual notice.

Despite the union's contention, I believe I am foreclosed from ordering Pittson's reinstatement by the Assistant Secretary of Labor's decision in his letter of June 19, 1978 (Asst. Secy. Exhibit 1(e)). I do order the relief requested respecting Cleary. Precedent for such action is found in paragraphs 2(a) and (b) of the Order issued in Veteran's Administration, North Chicago Veterans Hospital and Local 2107, AFGE, A/SLMR No. 1024 (1978).

Despite my request for authorities from counsel (Tr. 10) he has furnished none, and I have found none, that would authorize the award of attorney's fees and costs. The Civil Service Reform Act of 1978, P.L. 95-454, 92 Stat. 1111, Section 702, amends 5 U.S.C. Section 5596(b) to provide for reasonable attorney fees to "an employee of an agency" in certain circumstances. In the instant case the employee involved, John Cleary, had no attorney's fees. The union's counsel represented the union, not Mr. Cleary as an individual. Therefore that provision does not apply. In the absence of authority authorizing award of such fees and costs I decline to order such relief.

ORDER

Pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.26(b) of the Regulations, and the transition Rules and Regulations published in 44 Fed. Reg. 7 (January 2, 1979) adding Part 2400 to 5 C.F.R., the Federal Labor Relations Authority hereby orders that the Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Executive Order.

(b) Discouraging membership in a labor organization by discrimination in regard to any conditions of employment.

(c) Sponsoring, controlling, or otherwise assisting a labor organization except as permitted by the Executive Order.

2. Take the following affirmative actions in order to effectuate the purposes of Executive Order 11491 as amended:

(a) Reimburse John Cleary the wages he was not paid as a result of the two-day suspension referred to in issue 26 above.

(b) Delete all references to the two day suspension given to John Cleary, referred to in issue 26 above, and delete all references to the conduct of John Cleary in the presence of Lyle Runte on November 29, 1976, from Cleary's personnel file and from any other documents in the activity's possession or control in which such reference may appear.

(c) Post in its facility at Bremerton, Washington copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Commander of the Puget Sound Naval Shipyard and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 203.27 of the Regulations, notify the Federal Labor Relations Authority in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

Thomas Schneider

THOMAS SCHNEIDER
Administrative Law Judge

Dated: March 7, 1979
San Francisco, California

TS:vag

APPENDIX

N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL NOT discourage membership in the Bremerton Metal Trades Council, or any labor organization, by discriminating in regard to any conditions of employment.

WE WILL NOT sponsor, control, or otherwise assist a labor organization except as permitted by the Executive Order.

WE WILL reimburse John Cleary the wages he was not paid as a result of the two-day suspension he received on or about January 12, 1977, for alleged insubordination.

WE WILL delete all references to the aforesaid two-day suspension and delete all references to the conduct of John Cleary in the presence of Lyle Runte on November 29, 1976, from Cleary's personnel file and from any other documents in our possession or control in which such references may appear.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, whose address is: Room 317, 211 Main Street, San Francisco, California 94105.

UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

National Treasury Employees Union

(Union)

and

FLRC No. 78A-29

U.S. Customs Service,
Region IX

(Activity)

DECISION ON NEGOTIABILITY ISSUES[1/]

Provision I

Article 16, Section 3:

Section 3

A. The employer agrees that when an employee has been reassigned due to the abolishment of his/her position, he/she will be considered first if that position is reestablished within one (1) year and he/she applies for the position within fifteen (15) days after written notification is given to the employee to (sic) its reestablishment.

B. If an abolished position is reestablished within one (1) year, it is in the interest of the U.S. Customs Service to reassign an employee who applies to his/her former position and he/she will be reimbursed for relocation expenses to the extent authorized under Federal Travel Regulations.

C. If there are two (2) or more displaced applicants for any reestablished position, the applicant with the greater amount of Customs service will be given first consideration.

1/ In accordance with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), this case is decided solely on the basis of E.O. 11491, as amended, and as if the Statute "had not been enacted." In this regard, the decision does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Order.

Agency Determination

The agency determined in connection with the section 15 review process[2/] that the provision violates section 12(b)(2) of the Order and conflicts with provisions of the Federal Personnel Manual and is therefore nonnegotiable.[3/]

Questions Here Before the Authority

The questions are whether Article 16, Section 3 conflicts with applicable civil service directives or violates section 12(b)(2) of the Order.[4/]

2/ Section 15 of E.O. 11491, as amended, provides:

> Sec. 15. Approval of agreement. An agreement with a labor organization as the exclusive representative of employees in a unit is subject to the approval of the head of the agency or an official designated by him. An agreement shall be approved within forty-five days from the date of its execution if it conforms to applicable laws, the Order, existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities. An agreement which has not been approved or disapproved within forty-five days from the date of its execution shall go into effect without the required approval of the agency head and shall be binding on the parties subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency. A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement, or, if none, under agency regulations.

3/ The agency determined that Article 16, Section 3 of the agreement was inconsistent with the Federal Personnel Manual Chapter 335 which was then in effect without reference to specific provisions of that directive.

4/ Section 12(b)(2) of the Order provides in part:

> Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--
>
> . . . . . .
>
> (b) management officials of the agency retain the right, in accordance with applicable laws and regulations--
>
> . . . . . .
>
> (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees . . . .

Opinion

Conclusion: Article 16, Section 3 does not contravene applicable civil service directives and does not violate section 12(b)(2) of the Order. Therefore, the agency's determination of nonnegotiability was improper and, pursuant to section 2424.8 of the Authority's Rules and Regulations (44 Fed. Reg. 44740 et seq. (1979)), is set aside.5/

Reasons: This case was pending before the Federal Labor Relations Council in June 1978 at which time the Civil Service Commission (CSC) had primary responsibility for the issuance and interpretation of the directives relied upon by the agency. The Council, in accordance with its established practice, requested the CSC to interpret its own directives as they pertained to the dispute in this case. On January 1, 1979, the Council's functions were transferred to the Federal Labor Relations Authority and the CSC's responsibility for the directives in question were transferred to the Office of Personnel Management (OPM). Subsequently, the OPM responded to the Authority, in pertinent part, as follows:

> This letter is in reply to your request for our opinion concerning the negotiability of a union proposal relating to the filling of reestablished positions.
>
> The union proposal would provide as follows:
>
> > Article 16, Section 3:
> >
> > A. The employer agrees that when an employee has been reassigned due to the abolishment of his/her position, he/she will be considered first if that position is reestablished within one (1) year and he/she applies for the position within fifteen (15) days after written notification is given to the employee of its reestablishment.
> >
> > B. If an abolished position is reestablished within one (1) year, it is in the interest of the U.S. Customs Service to reassign an employee who applies to his/her former position and he/she will be reimbursed for relocation expenses to the extent authorized under Federal Travel Regulations.
> >
> > C. If there are two (2) or more displaced applicants for any reestablished position, the applicant with the greater amount of Customs service will be given first consideration.
>
> A reassignment is defined in Attachment 1 to FPM Letter 335-12, Revised Merit Promotion Policy, dated December 28, 1978, "as the change of an employee from one position to another without promotion or demotion."*

* Our analysis of the negotiability of this union proposal is based on the assumption that the term "reassignment" in the proposal has the same meaning as that in FPM Letter 335-12.

5/ In so deciding that the subject provision was within the duty to bargain, the Authority makes no judgment as to the merits of the provision.

While such personnel actions need not be made under the competitive procedures of an agency merit promotion plan (provided that the new position has no higher promotion potential), they must be made with regard to applicable requirements of the merit system.

Civil service regulations and instructions require noncompetitive consideration for certain categories of employees prior to attempts to fill vacancies by any other means, including merit promotion. For instance, section 713.271 of title 5, CFR, requires that priority consideration granted as remedial action in a discrimination complaint takes "precedence over priorities under other regulations in this chapter."

A literal reading of part A of the union proposal would require that whenever an agency decides to fill a reestablished position that has been abolished within the past year, the agency must give first consideration to the employee who had occupied the position prior to its abolishment if that employee applies within 15 days after notification that the position has been reestablished. Because that part of the proposal would require consideration of such employees prior to other employees who have a statutory, regulatory, or FPM granted right to be placed in or considered for the position, it conflicts with mandatory civil service instructions.

However, there would be no bar to considering an employee whose position was abolished and later reestablished after all other candidates entitled to priority or special consideration by statute or civil service regulations or instructions had been considered.

Any consideration granted under the proposal could not extend to requiring selection of any candidate for promotion. While management is required by civil service regulations or instructions to give noncompetitive consideration to certain candidates, and could properly be required by part A of the union proposal to consider previous occupants of reestablished positions prior to use of competitive procedures, it could not be constrained to select any particular candidate or even to select from a group of priority or special consideration candidates.*

The meaning of part B of the union proposal is not clear. If it is intended that whenever an employee applies for a reestablished position that he or she formerly occupied, management will select that employee because it would be in management's best interest to do so, that part of the proposal would effectively negate management's ability to make a selection decision. In that regard, Rule 7.1 of the civil service rules

* In Kirk Army Hospital, FLRC No. 72A-18, the Council had occasion to cite FPM chapter 335, subchapter 4-3(c)(2), and commented that "With respect to the repromotion rights of such employees, the FPM plainly states that, even though they are entitled to 'special consideration', they are 'not guaranteed promotion.' In other words, a selection decision remains to be made by the selecting official." See also Commission opinions in Warren Air Force Base, FLRC No. 75A-127, and Tooele Army Depot, FLRC No. 75A-104.

requires management to fill positions in the competitive service solely on the basis of merit and fitness and grants management the right to make selections from any appropriate source.

However, if part B of the proposal is not interpreted as either limiting consideration to the former incumbents of reestablished positions or restricting management from exercising its right to select from any appropriate source, it would not conflict with civil service regulations and instructions. Since the General Services Administration has responsibility for the interpretation of the Federal Travel Regulations, GSA would be the appropriate agency to determine the consistency of that part of part B of the proposal concerning the payment of relocation expenses with its regulations.

Part C of the proposal would not conflict with civil service regulations or instructions as long as its coverage is limited to those individuals receiving consideration under part A (see our discussion above on that part of the proposal) and would not supersede or limit the consideration of others entitled to priority or special consideration by civil service law, regulations or instructions.

In summary, as long as parts A and C of the proposal provide for only consideration of covered employees after all other employees otherwise entitled to priority or special consideration, civil service laws and regulations would not bar negotiation of those portions of the proposal. However, if part B would limit the management discretion granted by Rule 7.1, that portion of the proposal would conflict with civil service rules and regulations.

Based on the foregoing interpretation by the OPM of its own directives, Article 16, Section 3 does not conflict with the directives of the OPM[6/] since the record in the case supports the conclusions that: first, Article 16, Section 3A. and C. does not supersede or limit the consideration of others entitled to priority or special consideration under civil service laws or regulations; but instead provides for the consideration of covered employees after all other employees otherwise entitled to priority or special consideration have received such consideration;[7/] and, second, Section 3B. of Article 16 neither limits

6/ We note that the parties in this case do not contend that Article 16, Section 3B. violates the Federal Travel Regulations, and research failed to reveal any such violation.

7/ See National Federation of Federal Employees, Local 122 and Veterans Administration, Atlanta Regional Office, Atlanta, Georgia, FLRC No. 77A-94 (Nov. 8, 1978), Report No. 159, at 9-11 of Council decision ruling the agency's contention, that an agreement provision was nonnegotiable because it did not specifically make the provision subject to legal time-in-grade requirements of the Federal Personnel Manual, failed to state a ground for finding the provision nonnegotiable. The Council noted that, under section 12(a) of the Order, the provisions of which must be included in every agreement, the administration of any agreement entered into by the parties would be subject to existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual. See also infra pp. 8-9 of this decision.

consideration to former incumbents of reestablished positions nor restricts management from exercising its right to select from any appropriate source (and the Authority so interprets Article 16, Section 3 for the purposes of this decision).

Accordingly, the agency determination that Article 16, Section 3 is nonnegotiable because it violates regulations of appropriate authority outside the agency was in error and is set aside.

The agency further contends that Article 16, Section 3A. and C., insofar as it provides that certain employees will be considered first for reestablished positions within the agency, constitutes an impermissible hiring preference, which interferes with management's right under section 12(b)(2) of the Order to select employees for positions in the agency, and is, therefore, nonnegotiable. The contention is without merit.

By its plain language, Article 16, Section 3A. and C. requires only that the agency will give consideration to certain employees for reestablished positions before the agency actually selects particular employees for those positions. Nothing in the language of the disputed provision requires agency management to select the employees who are to receive such consideration under the terms of the provision.

By providing for "consideration" rather than "selection," Article 16, Section 3 is clearly distinguishable from the proposals at issue in the Council's decision in National Maritime Union and NOAA.8/ In that case the Council found that the union proposals calling for the agency to accord hiring preference to certain individuals for positions in the agency constituted a positive requirement on the agency to hire certain individuals ahead of others, thereby interfering with management's right to hire employees under section 12(b)(2) of the Order. Unlike those proposals, however, in the present case Article 16, Section 3, as noted above, provides only that certain employees must be considered first when the agency is filling certain reestablished positions and

8/ National Maritime Union of America, AFL-CIO and National Oceanic and Atmospheric Administration, 5 FLRC 497 [FLRC No. 76A-79 (June 21, 1977), Report No. 128]. The union proposals at issue in that case provided:

Proposal No. 1:

> That hiring preference be given to applicants who have endorsements of U.S. Coast Guard for the positions they seek.

Proposal No. 2:

> Employees who have satisfactorily completed 90 days of employment and are thereafter laid off should be given rehire preference for positions in the same department over inexperienced seamen applicants when positions aboard NOAA agency vessels become available.

does not require the agency to select those individuals.9/ Consequently, Article 16, Section 3 does not deprive the selecting official of the reserved discretion inherent in deciding and acting in the selection of individuals for positions in the agency. Hence, it is distinguished in this material respect from the proposals held nonnegotiable in National Maritime Union and NOAA. Accordingly, the provision does not violate section 12(b)(2) of the Order and the agency's contrary determination is set aside.

Provision II

Article 17, Section 2:

Section 2

A. The Employer agrees that an employee who is detailed to a bargaining unit position of a higher grade for over thirty (30) consecutive calendar days and who meets the appropriate qualifications and time-in-grade requirements as set forth by statute or Civil Service regulations will be temporarily promoted and receive the rate of pay for that position. The Employer agrees to refrain from rotating details of employees solely to avoid compensation at the higher level.

B. Nothing in this Article shall be interpreted as authorizing a retroactive promotion.

Agency Determination

The agency determined that the provision violates section 12(b)(2) of the Order and the temporary promotion requirements of the Federal Personnel Manual.10/ Accordingly, the agency determined the provision is nonnegotiable.

9/ Cf. AFGE (National Border Patrol Council and National INS Council) and Immigration and Naturalization Service, U.S. Department of Justice, 5 FLRC 808 [FLRC No. 76A-68 (Aug. 31, 1977), Report No. 136] (union proposal that an applicant from outside the agency would not be considered for appointment or transfer unless certain conditions were met held violative of section 12(b)(2) of the Order since it would require management to select from among internal candidates ahead of all other applicants).

10/ The temporary promotion requirements then in effect relied upon by the agency are those which were contained in Federal Personnel Manual, Chapter 335, subchapter 4-3, which provided in part:

4-3. PROMOTIONS AS EXCEPTIONS TO COMPETITIVE PROCEDURES

. . . . . .

e. Promotion to a higher grade for 120 days or less. An agency may make a temporary promotion limited to 120 days or less as an exception to

(Continued)

Questions Here Before the Authority

The questions are whether Article 17, Section 2A. of the agreement violates section 12(b)(2) of the Order[11/] or conflicts with the temporary promotion requirements of the Federal Personnel Manual.

Opinion

Conclusion: Article 17, Section 2A. does not violate section 12(b)(2) of the Order and does not conflict with the temporary promotion requirements of the Federal Personnel Manual. Therefore, the agency's determination of nonnegotiability was improper and, pursuant to section 2424.8 of the Authority's Rules and Regulations (44 Fed. Reg. 44740 et seq. (1979)), is set aside.[12/]

Reasons: The agency argues that the temporary promotion provision of Article 17, Section 2A. interferes with management's right to promote employees and therefore violates section 12(b)(2) of the Order, and conflicts with the temporary promotion requirements of the Federal Personnel Manual by not specifically adverting to that directive's 120-day limitation for duration of temporary promotions.[13/] These contentions are without merit.

Article 17, Section 2A. of the agreement, providing for the temporary promotion of a bargaining unit employee detailed to a higher-grade position for over 30 days, bears no material difference from the agreement provision found negotiable by the Council in the National Federation of Federal Employees,

(Continued)

> competitive promotion procedures. This exception is not to be used to circumvent competitive promotion requirements by a series of temporary higher-level assignments. Therefore, competitive promotion procedures must be used if after completing the period of service under temporary promotion an employee will have spent more than 120 days (prior service under details and previous temporary promotions included) in high-grade positions during the preceding year.

These requirements are now contained in the revised Federal Personnel Manual, Chap. 335, subchap. 1-5(c)(4).

11/ See supra, n. 4.

12/ In so deciding that the subject provision was within the duty to bargain, the Authority makes no judgment as to the merits of the provision.

13/ See supra, n. 10.

Local 122 and Veterans Administration, Atlanta Regional Office, Atlanta, Georgia case.[14] In that case the agency took the position that the provision interfered with management's right to promote employees under section 12(b)(2) of the Order and, by not specifically adverting to applicable time-in-grade requirements for temporary promotions established by the Federal Personnel Manual, was in conflict with such requirements. As to the alleged conflict with section 12(b)(2) of the Order, the Council stated (at 10 of Council decision) as follows:

> The "temporary promotion" called for by the disputed provision is simply a ministerial act which implements the decision and action taken by the agency itself in selecting and assigning the particular employee to the higher-grade position. Nothing in the provision interferes in any manner with the right of the agency to make such decision or accomplish such action, and thus nothing in the provision impairs the agency's right to determine whether and whom temporarily to promote. Accordingly, we find that the disputed provision is not violative of section 12(b)(2) of the Order. [Footnote omitted.]

As to the alleged violation of the Federal Personnel Manual, the Council found that argument also without merit stating (at 10-11 of Council decision):

> Although the provision itself does not specifically advert to time-in-grade requirements, nothing in the provision, nor in the union's stated intent, precludes the agency from enforcing such requirements in the implementation of the provision. Further, as the Council has previously indicated, under section 12(a) of the Order, the provisions of which must be included in every agreement, the administration of any agreement entered into by the parties would be subject to existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual. Therefore, since the agreement provision does not conflict with the legal time-in-grade requirements, the agency's contention fails to state a ground for finding the provision nonnegotiable. [Footnotes omitted.]

It is clear that the Council's decision in Veterans Administration, Atlanta Regional Office is dispositive of the issue of negotiability with respect to the disputed provision in the present case, both as to the alleged contlict with section 12(b)(2) of the Order and with the temporary promotion requirements of the Federal Personnel Manual. Accordingly, for the reasons stated in that case, Article 17, Section 2A. does not conflict with either

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14/ National Federation of Federal Employees, Local 122 and Veterans Administration, Atlanta Regional Office, Atlanta, Georgia, FLRC No. 77A-94 (Nov. 8, 1978), Report No. 159, at 8-11 of Council decision. The agreement provision in dispute in that case, as here pertinent, required that an employee temporarily placed in a higher-grade position would be temporarily promoted, if the assignment exceeded 60 days.

section 12(b)(2) of the Order or with requirements of the Federal Personnel Manual and is, therefore, negotiable.15/

Provision III

Article 22, Section 10:

Section 10

All employees in identified career ladder positions working below the full (journeyman) level will be certified and promoted on the first day of the first pay period after a period of one (1) calendar year or whatever lesser period may be applicable provided that the employee has demonstrated the ability to perform at the next higher grade level and there is sufficient higher level work to be performed.

Agency Determination

The agency determined that the provision violates section 12(b)(2) of the Order and is therefore nonnegotiable.

Question Here Before the Authority

The question is whether the provision violates section 12(b)(2) of the Order.16/

Opinion

Conclusion: The provision does not violate section 12(b)(2) of the Order. Therefore, the agency's determination of nonnegotiability was improper and, pursuant to section 2424.8 of the Authority's Rules and Regulations (44 Fed. Reg. 44740 et seq. (1979)), is set aside.17/

15/ There is no dispute in this case with respect to the negotiability of the second sentence of Article 17, Section 2A., which provides that the agency will refrain from rotating details of employees solely to avoid compensation at the higher level, and this portion of the provision does not affect the Authority's determination that Article 17, Section 2A. does not violate section 12(b) of the Order. Cf. Philadelphia Metal Trades Council, AFL-CIO and Philadelphia Naval Shipyard, Philadelphia, Pennsylvania, 1 FLRC 456, 458-60 [FLRC No. 72A-40 (June 29, 1973), Report No. 41] (proposal that agency not make overtime assignments for the sole purpose of denying overtime work to unit employees held negotiable under section 11(a) of the Order).

16/ See supra n. 4.

17/ In so deciding that the subject provision was within the duty to bargain, the Authority makes no judgment as to the merits of the provision.

Reasons: The agency principally contends that Article 22, Section 10 interferes with management's right to promote or not promote employees under section 12(b)(2) of the Order. On the other hand, the union essentially argues that, with respect to career-ladder promotions covered by Article 22, Section 10, the right reserved to management under section 12(b)(2) is to select or not select an employee for a career-ladder position. The union's position has merit.

The record does not indicate that the terminology "career-ladder promotion" as used by the parties in the disputed provision is intended to be given a meaning other than its usual meaning when used in connection with Federal personnel matters. In this regard, the Federal Personnel Manual provides in relevant part as follows:[18/]

> A promotion without current competition when at an earlier stage an employee was selected from a civil service register or under competitive promotion procedures for an assignment intended to prepare the employee for the position being filled (the intent must be made a matter of record and career ladders must be documented in the promotion plan) . . . .

Thus, in essence, the Federal Personnel Manual defines a "career-ladder promotion" as the noncompetitive promotion of an employee who is part of a group selected competitively at an earlier stage for career ladder positions, with the recorded intention of preparing the employees for successive promotions. It is clear that agencies may promote individual members of the group who, as required by the proposal, have demonstrated ability to perform at the next higher level, provided that there is enough work at the full performance level for all the employees in the group. A career-ladder promotion, then, is the direct consequence of the agency's deciding to select the employee and placing the employee in a career-ladder position in the agency. It follows that the agency's selecting an employee for and placing that employee in a career-ladder position also constitutes the agency's decision to promote that employee noncompetitively at appropriate stages in the employee's career up to the full performance level of the position once the requisite conditions have been met. In this regard, the disputed Article 22, Section 10 merely calls for the agency to certify and promote unit employees who are in career-ladder positions within a specified time period after those employees meet certain conditions.

In view of the foregoing, it is clear that in the context of section 12(b)(2) of the Order, a career-ladder promotion as referenced in Article 22, Section 10 would be simply a ministerial act implementing the agency's earlier decision made pursuant to its reserved discretion under section 12(b)(2), to select and place the employee involved in a career-ladder position in the agency, with the intention of preparing the employee for successive noncompetitive promotions where any conditions prescribed by the FPM are otherwise met. As such, the disputed provision does not interfere in any way with the agency's right under

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18/ Federal Personnel Manual, Chap. 335, subchap. 1-5(C)(1)(a).

section 12(b)(2) to promote or to not promote employees.19/ Accordingly, consistent with Council precedent, Article 22, Section 10 of the parties' agreement does not violate section 12(b)(2) of the Order.

Provision IV

Article 35, Section 3:

Section 3

The Employer agrees that where, through administrative error or oversight, an employee receives a monetary payment above that to which he or she would otherwise be entitled, said overpayment shall be waived upon a showing that:

1. The amount involved is not more than five hundred dollars ($500.00) or the equivalent;

2. The employee was not responsible for the error; and

3. Collection action under the claim would be against equity and good conscience and not in the best interests of the U.S. Government, that is, notice of the mistaken overpayment was not brought to the employee's attention by the Employer within five (5) calendar days of the payment.

Agency Determination

The agency determined that the provision violates the regulations of the Comptroller General and is therefore nonnegotiable.

Question Here Before the Authority

The question is whether the provision conflicts with the requirements of the Comptroller General governing waivers of overpayments of $500 or less made to employees through administrative oversight.20/

19/ National Federation of Federal Employees, Local 122 and Veterans Administration, Atlanta Regional Office, Atlanta, Georgia, FLRC No. 77A-94 (Nov. 8, 1978), Report No. 159, at 10 of Council decision (agreement provision calling for temporary promotion of unit employees upon assignment for more than 60 days to a higher-grade position not violative of section 12(b)(2) of the Order since the temporary promotion is simply a ministerial act which implements the decision and action taken by the agency itself in selecting and assigning the particular employee to the higher-grade position).

20/ The Comptroller General's regulations governing overpayments are set forth in 4 C.F.R. § 91.1 et seq. and provide in pertinent part:

(Continued)

Opinion

Conclusion: The provision conflicts with the regulations of the Comptroller General governing waivers of overpayments of $500 or less made to employees through administrative oversight. Therefore, the agency's determination of nonnegotiability was proper and, pursuant to section 2424.8 of the Authority's Rules and Regulations (44 Fed. Reg. 44740 et seq. (1979)), is sustained.

(Continued)

SUBCHAPTER G- STANDARDS FOR WAIVER OF CLAIMS FOR ERRONEOUS PAYMENT OF PAY AND ALLOWANCES

PART 91 - STANDARDS FOR WAIVER

. . . . . .

§ 91.4 Waiver of claims for erroneous payment of pay and allowances.

. . . . . .

(b) The head of the agency or the Secretary concerned, as appropriate, may waive in whole or in part a claim of the United States in an amount aggregating not more than $500, without regard to any repayments, against any person arising out of an erroneous payment of pay or allowances to or on behalf of an employee or member when all of the conditions set out in § 91.5 are present . . . .

§ 91.5 Conditions for waiver of claims.

Claims of the United States arising out of an erroneous payment of pay or allowances may be waived in whole or in part in accordance with the provisions of § 91.4 whenever:

. . . . . .

(c) Collection action under the claim would be against equity and good conscience and not in the best interests of the United States. Generally these criteria will be met by a finding that the erroneous payment of pay or allowances occurred through administrative error and that there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee or member or any person having an interest in obtaining a waiver of the claim. Any significant unexplained increase in pay or allowances which would require a reasonable person to make inquiry concerning the correctness of his pay or allowances, ordinarily would preclude a waiver when the employee or member fails to bring the matter to the attention of appropriate officials. Waiver of overpayments of pay and allowances under this standard necessarily must depend upon the facts existing in the particular case . . . .

Reasons: Because the case concerns issues within the jurisdiction of the General Accounting Office, the Authority requested a decision from the Comptroller General as to whether the proposal violates applicable law and regulation.

The Comptroller General's decision in the matter, B-194626, August 9, 1979, is set forth, in pertinent part, below:

> This decision is in response to the request from the Federal Labor Relations Authority, FLRC No. 78A-29, concerning the legality of a provision in a locally negotiated collective bargaining agreement on waiver of erroneous payments of pay and allowances. The question presented for our decision is whether the provision in the negotiated agreement conflicts with the standards for waiver of claims issued by our Office and contained in 4 C.F.R. Part 91 et seq.
>
> The Federal Labor Relations Authority is considering the negotiability of several provisions of a collective bargaining agreement entered into by the U.S. Customs Service, Region IX, and the National Treasury Employees Union. The provision of the agreement which is the subject of our decision provides, in Article 35, Section 3, as follows:
>
> > "The Employer agrees that where, through administrative error or oversight, an employee receives a monetary payment above that to which he or she would otherwise be entitled, said overpayment shall be waived upon a showing that:
> >
> > "1. The amount involved is not more than five hundred dollars ($500.00) or the equivalent;
> >
> > "2. The employee was not responsible for the error; and
> >
> > "3. Collection action under the claim would be against equity and good conscience and not in the best interests of the U.S. Government, that is, notice of the mistaken overpayment was not brought to the employee's attention by the Employer within five (5) calendar days of the payment."
>
> The Customs Service argues that this provision is inconsistent with the standards for waiver issued by our Office, particularly 4 C.F.R. § 91.5(c), since the negotiated agreement would permit an employee who has not made reasonable inquiries as to the correctness of a payment to retain the overpayment. The union contends that the provision is consistent with the rules, regulations, and decisions of our Office with regard to the standards for waiver.
>
> Under the authority of 5 U.S.C. § 5584 (1976) a claim of the United States arising out of an erroneous payment of pay or allowances may be waived if collection would be against equity and good conscience and not in the best interests of the United States. Such waiver may be made by the head of the agency when the claim is in an amount aggregating not more than $500 and by the Comptroller General for claims exceeding $500 provided "the

waiver is made in accordance with standards which the Comptroller General shall prescribe." 5 U.S.C. §5584(a). The law provides further that this authority for waiver may not be exercised if there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim. 5 U.S.C. § 5584(b).

The standards for waiver, promulgated by this Office under 5 U.S.C. § 5584, are contained in 4 C.F.R. Part 91 et seq. These regulations provide, in section 91.5(c), that a claim may be waived whenever:

> "(c) Collection action under the claim would be against equity and good conscience and not in the best interests of the United States. Generally these criteria will be met by a finding that the erroneous payment of pay or allowances occurred through administrative error and that there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee or member or any other person having an interest in obtaining a waiver of the claim. Any significant unexplained increase in pay or allowances which would require a reasonable person to make inquiry concerning the correctness of his pay or allowances, ordinarily would preclude a waiver when the employee or member fails to bring the matter to the attention of appropriate officials. Waiver of overpayments of pay and allowances under this standard necessarily must depend upon the facts existing in the particular case * * *." (Emphasis added.)

Our decisions have held that whether an employee who receives an erroneous payment is free from fault in the matter, can only be determined by a careful analysis of all pertinent facts, not only those giving rise to the overpayment but those indicating whether the employee reasonably could have been expected to have been aware that an error had been made. If under the circumstances involved a reasonable man would have made inquiry as to the correctness of the payment and the employee involved did not do so, then, in our opinion, the employee could not be said to be free from fault and the claim against him should not be waived. B-177629, February 22, 1973; and B-165663, June 11, 1969. See also Gilbert G. Quintero, B-183558, April 23, 1975.

In the present case, the collective bargaining agreement provision does not provide for an inquiry into the facts surrounding the overpayment. Instead, the agreement imposes a burden upon the agency to notify the employee within 5 days of the mistaken payment or lose its right to collect the overpayment. Furthermore, as the U.S. Customs Service has pointed out, the collective bargaining agreement does not take into consideration the obligation of the employee to make inquiries as to the correctness of a significant unexplained increase in pay or allowances. See 4 C.F.R. § 91.5(c).

As an example of the duty to make reasonable inquiries, we have held that where an employee has records which, if reviewed, would indicate an overpayment, and the employee fails to review such documents for accuracy or otherwise fails to take corrective action, he is not without fault and waiver will be denied. See Roosevelt W. Royals, B-188822, June 1, 1977,

and decisions cited therein. An employee has the responsibility to verify the information provided on his payroll change slips or leave and earning statements, and where a reasonable man would have made inquiry but the employee did not, then he is not free from fault and the claim may not be waived. John J. Doyle, B-191295, July 7, 1978; and Simon B. Guedea, B-189385, August 10, 1977.

The provision of the collective bargaining agreement in question here makes no mention of the obligation of an employee to review records or documents in his possession for accuracy or to otherwise inquire as to the correctness of a significant unexplained increase in pay. The requirement that an overpayment be waived if the agency has not notified the employee of the error within 5 days does not take into consideration other facts which are relevant in determining if the employee is free from fault.

Accordingly, we conclude that the collective bargaining agreement provision is not consistent with the provisions of 5 U.S.C. § 5584 or the standards for waiver set forth in 4 C.F.R. Part 91, and such provision could not be legally implemented.

Based on the foregoing decision by the Comptroller General, Article 35, Section 3 conflicts with the regulations of the Comptroller General governing conditions for waiver of claims for overpayments to employees and is, therefore, nonnegotiable. Accordingly, the agency's determination of nonnegotiability is sustained.

Issued, Washington, D.C., November 15, 1979

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

Veterans Administration Hospital,
Dallas, Texas

and

FLRC No. 78A-120

American Federation of Government
Employees, Local 2437

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

According to the arbitrator, the dispute in this matter arose when the activity filled a vacancy for the position of painter, WG-9, from a Civil Service certificate of eligibles without posting the vacancy. The union contended that the grievant and other interested activity employees did not know of the vacancy and consequently could not bid on it and that the grievant was qualified as a painter and could have filled the position. A grievance was filed which was ultimately submitted to arbitration.

The Arbitrator's Award

According to the arbitrator, the issue before him was:

> Did the Hospital violate the agreement in filling a WG-9 painter vacancy without announcing the vacancy on the station? If the answer is "yes" what will be the remedy?

The arbitrator determined that the activity had violated Article XI, Section 7(a) and (c)(1) of the parties' collective bargaining agreement[1/] by not posting the vacancy since all interested employees had thus not been given "full and fair consideration" for advancement.

Accordingly, the arbitrator awarded as follows:

> The Hospital will immediately offer to:
>
> 1. Vacate the WG-9 position and order a new personnel action for WG-9 painter.

1/ According to the arbitrator, Article XI, Section 7(a) and (c)(1) provides, in relevant part:

(Continued)

2. Post the vacancy for 10 calendar days on 2 official bulletin boards on the station and accept applications for consideration from the employees that were on the station on February 26, 1978.

3. If there are not 3 or more highly qualified candidates on the promotion certificate, the Hospital may enlarge the area of consideration to include a Civil Service Certificate of eligibles and management may make a selection from the combined list of highly qualified candidates on the promotion certificate, if there are any, and the highly qualified candidates on the Civil Service Certificate of eligibles.

Agency's Appeal to the Authority

The agency filed a petition for review of the arbitrator's award with the Federal Labor Relations Council. This case was pending before the Council on December 31, 1978. In accordance with section 2400.5 of the transition rules of the Federal Labor Relations Authority (44 Fed. Reg. 44741) and section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215), the rules of procedure of the Council, 5 C.F.R. part 2411 (1978), remain operative with respect to the present case, except that the word "Authority" is substituted, as appropriate, wherever the word "Council" appears in such rules. Pursuant to section 2411.32 of the rules as so amended, the Authority accepted the agency's petition for review of the arbitrator's award insofar as it related to the agency's exception which alleged that the award violates the Federal Personnel Manual.2/ The union filed a brief on the merits.

Opinion

Section 2411.37(a) of the amended rules provides:

(a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable

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(Continued)

ARTICLE XI

7. Promotions:

a. Policy: The Union and the Hospital agree that the purposes and intent of the promotion policy are to ensure that employees of the VA are given full and fair consideration for advancement and to ensure selection from among the best qualified candidates.

. . . . . .

c. Promotion Announcements

(1) In order to assure all interested employees consideration for promotion, the Hospital shall post local vacancies on the two official bulletin boards for ten calendar days.

2/ The agency requested, and the Authority granted, pursuant to section 2411.47(f) of the rules of procedure, a stay of the award pending determination of the appeal.

> law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Authority accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violates the Federal Personnel Manual. Since the Civil Service Commission was responsible for prescribing regulations concerning the matters involved herein, and since under section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224) this appeal must be resolved as if the Civil Service Reform Act had not been enacted, the Authority requested from the Office of Personnel Management (the successor agency to the Civil Service Commission with respect to the matters involved herein) an interpretation of the relevant Civil Service Commission regulations as they relate to the arbitrator's award in this case. The Office of Personnel Management replied in relevant part as follows:

> This case involved a grievance over management's failure to post a vacancy announcement for a WG-9 Painter position, in accord with a contract provision. The arbitrator found that the Veterans Administration had violated the contract provision by not posting, and had filled the position by requesting a certificate of eligibles from the Civil Service Commission and selecting an individual from the certificate for the position. [Footnote omitted.]
>
> At issue herein is the three-part arbitration award requiring the Veterans Administration to: (1) vacate the position and order a new personnel action to fill the position; (2) post a vacancy announcement for the position so vacated in accordance with contractual provisions; and (3) "enlarge the area of consideration to include a Civil Service certificate of eligibles" only if posting the vacancy yields less than three highly qualified candidates, and then select or not select from the combined lists of highly qualified candidates.
>
> From the standpoint of Civil Service Commission rules and regulations in effect at the time, two issues arise in this case: (1) whether as part of an arbitration award in a challenged promotion action an employee may be removed from a position in advance of other corrective action to be taken; and (2) whether an arbitration award may limit the use of a Civil Service certificate of eligibles in filling vacancies. These issues relate to Part 1 and Part 3 of the arbitrator's award, respectively. The portions of Parts 1 and 2 of the arbitrator's award which order that the promotion action be rerun and that management fulfill its contractual posting obligation, do not conflict with Civil Service Commission rules or regulations in effect at the time of the filling of the position, or of the award.
>
> The first issue, regarding whether the arbitrator may order the position herein to be vacated, must be answered in the negative. FPM Chapter 335-6-4b states that an erroneously promoted employee "may be retained in the position only if reconstruction of the promotion action shows that he could have been selected had the proper procedure been followed at the time the action was taken." An employee, therefore, should not be removed from a position in advance of corrective action being taken unless it has been determined by an arbitrator or other competent authority that the

employee/incumbent could not properly have been selected for the position. Many cases decided by the Federal Labor Relations Council reflect and apply this well-established principle based on FPM regulations. (Defense Mapping Agency, Hydrographic Center, Department of Defense and AFGE Local 3407 FLRC 75A-33; Adjutant General, State of New Hampshire and Granite State Chapter, Association of Technicians, FLRC 76A-95; Community Services Administration and National Council of CSA Locals AFGE, FLRC 76A-154.) In the immediate case, there is no finding that the incumbent could not have been properly considered for the position. In fact, under the circumstances of this case, any such finding would have violated applicable regulation, specifically Civil Service Rule 7.1 which maintained agency discretion in the filling of vacancies and provided:

> In his discretion, an appointing officer may fill any position in the competitive service either by competitive appointment from a civil service register or by non-competitive selection of a present or former Federal employee, in accordance with Civil Service Regulations.

Thus, the part of the award ordering that the incumbent be removed violated applicable Civil Service Commission rules and regulations.

The second issue raised herein regarding whether the use of a certificate of eligibles may be limited, is more complex. It would appear that, as written, the arbitration award violates Civil Service rules and regulations, and the question posed in this issue therefore must also be answered in the negative.

The possible confusion which exists goes to the part of the arbitration award which states that "if there are not 3 or more highly qualified candidates on the promotion certificate, the Hospital may enlarge the area of consideration to include a Civil Service Certificate of eligibles . . ." (emphasis added). While it is not directly stated, the arbitrator appears to be equating the use of a certificate of eligibles with enlarging the area of consideration. If the arbitrator meant merely to limit the area of consideration (regarding which a certificate of eligibles has no relevance since it is an additional source of candidates, not part of an area of consideration, and neither impacts upon nor is impacted by the area of consideration), his award in Part 3 would not violate Commission rules and regulations. In other words, area of consideration is a term of art with respect to filling positions from within. The scope of the area of consideration may be limited or expanded by contractual provision. Rule 7.1, cited above, however, will retain to management the right to turn to all alternate sources, in this case a certificate of eligibles,*/ to fill positions. If, however, through misunderstanding or intent, the arbitrator meant to limit management's right to use alternate staffing methods in making selections, Part 3 of the award clearly violates Civil Service rules and regulations.

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*/ In addition to Rule 7.1, FPM Chapter 330, Subchapter 1-1 stated, in part:

> An appointing officer may choose the method to be used for filling a competitive position except when that choice is limited by statute or the civil service regulations.

Conclusion

Based upon the foregoing interpretation of the Office of Personnel Management, we find that the portion of part 1 of the arbitrator's award which directs the activity to "[v]acate the WG-9 position" violates appropriate regulations and therefore must be set aside. Accordingly, pursuant to section 2411.37(b) of the rules of procedure, we modify part 1 of the arbitrator's award by striking the following words: "Vacate the WG-9 position and." As so modified, part 1 of the award is sustained.

In addition, based on the foregoing interpretation of the Office of Personnel Management and pursuant to section 2411.37(b) of the rules of procedure, we modify part 3 of the arbitrator's award by adding thereto the following sentence: "Nothing in this award shall limit the Hospital's right to use alternate staffing methods in making selection." As so modified, part 3 of the award is sustained.3/ The stay previously granted is vacated.

Issued, Washington, D.C., November 15, 1979

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the instant case was decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision does not prejudge in any manner either the meaning or application of related provisions of the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Order.

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 21 REPORT OF CASE DECISIONS January 18, 1980

UNFAIR LABOR PRACTICE CASES

2 FLRA No. 12 (November 29, 1979)

Department of Health, Education and Welfare, Social Security Administration, Great Lakes Program Service Center, Chicago, Illinois, Assistant Secretary Case No. 50-17077(CA). The ALJ, upon a complaint filed by the union (AFGE Local 1395) under E.O. 11491, found that the activity had not engaged in conduct prohibited by sections 19(a)(1) and (2) of the Order by terminating an employee during her probationary period for work-related causes. The Authority adopted the ALJ's findings, conclusions and recommendations and dismissed the complaint. (Decision and Order attached.)

2 FLRA No. 13 (November 29, 1979)

Department of the Air Force, Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma, Assistant Secretary Case No. 63-8033(CA). The ALJ, upon a complaint filed by the union (AFGE Local 916) under E.O. 11491, found that the activity had not violated section 19(a)(1) of the Order when it charged the union steward for being AWOL when he left his duty station during duty hours to engage in union activity without obtaining prior permission. The Authority adopted the ALJ's findings, conclusions and recommendations and dismissed the complaint. (Decision and Order attached.)

2 FLRA No. 14 (November 29, 1979)

4392 Aerospace Support Group, Vandenberg Air Force Base, California, Department of the Air Force, Assistant Secretary Case No. 72-7644(CA). The ALJ, upon a complaint filed by the union (NFFE Local 1001) under E.O. 11491, found that the activity's phasing out of a particular automated personnel inventory system utilized in filling vacancies and the implementation of another such system did not change the working conditions of the union employees involved; and concluded that the activity had no duty to bargain with the union concerning the impact of implementing the new system and therefore did not violate section 19(a)(1) and (6) of the Order as alleged by the union. The Authority found, contrary to the ALJ, that there was

a change in working conditions brought about by the new system and that the activity had an obligation, upon request, to negotiate with the union on the impact and implementation of the replacement. However, the Authority noted that the union, despite having knowledge of the change, failed to request to negotiate with the activity. On that basis, the Authority found that the activity did not violate its bargaining obligation under the Order, and dismissed the union's complaint. (Decision and Order attached.)

NEGOTIABILITY CASE

2 FLRA No. 15 (November 29, 1979)

National Treasury Employees Union, Chapters 103 and 111 and U.S. Customs Service, Region VII, Case No. 0-NG-16. The dispute involved the negotiability of a union proposal that would establish a procedure for the arbitration of the suspension of employees. The Authority held that the proposal did not violate section 7106 of the Statute, and therefore set aside the agency's allegation to the contrary. (Decision attached.)

ARBITRATION CASES

2 FLRA No. 10 (November 15, 1979)

Internal Revenue Service, Buffalo District and National Treasury Employees Union, Chapter 58 (Murphy, Arbitrator), FLRC No. 78A-172. The arbitrator, as part of his award, determined that the grievant was entitled to a special achievement award under the parties' agreement. The agency filed a petition for review of that part of the award under E.O. 11491, alleging as an exception that the disputed portion violated applicable law and appropriate regulation. The Authority accepted the agency's petition for review insofar as it related to the agency's exception. The Authority also granted the agency's request for a stay (FLRA Report No. 3). The Authority, based upon an interpretation rendered by the Office of Personnel Management, found that the arbitrator's award did not violate applicable law or appropriate regulation and, therefore, sustained the award and vacated the stay. (Decision letter attached.)

2 FLRA No. 11 (November 21, 1979)

American Federation of Government Employees, Local 1857 and Sacramento Air Logistics Center, McClellan Air Force Base (Anderson, Arbitrator), Case No. 0-AR-4. The arbitrator found that the activity did not comply in a timely and reasonable manner with a recommendation, approved by the activity commander, of a joint labor-management grievance committee concerning the grievant's continuous detail to higher graded duties. As a remedy, the arbitrator awarded the grievant a temporary retroactive promotion for a particular period. The agency filed a petition for review of the arbitrator's award, contending that the award violated applicable law and appropriate regulation. The agency also requested a stay of the award. The Authority found that the agency's petition did not contain a description of facts and circumstances to support its exception. Accordingly, the Authority denied the agency's petition because it failed to meet the requirements for review set forth in the applicable rules of procedure. The Authority likewise denied the agency's request for a stay. (Decision letter attached.)

Attachments (6)

2 FLRA No. 12

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Department of Health, Education
and Welfare, Social Security
Administration, Great Lakes Program
Service Center, Chicago, Illinois

Respondent

and

Assistant Secretary
Case No. 50-17077(CA)

American Federation of Government
Employees, Local 1395, AFL-CIO

Complainant

DECISION AND ORDER

On April 12, 1979, Administrative Law Judge Garvin Lee Oliver issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire

record in this case, and noting particularly that no exceptions were filed, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation. */

ORDER

IT IS HEREBY ORDERED that the complaint in Assistant Secretary Case No. 50-17077(CA), be, and it hereby is, dismissed.

Issued, Washington, D.C., November 29, 1979

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the instant case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
1111-20th Street, N.W., Suite 700
Washington, D.C. 20036

In the Matter of DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SOCIAL SECURITY ADMINISTRATION GREAT LAKES PROGRAM SERVICE CENTER CHICAGO, ILLINOIS Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1395 Complainant	Case No. 50-17077(CA)

William H. Holman
Management Representative
HEW, Social Security Administration
Bureau of Retirement and
Survivors Insurance
1220 West High Rise Building
6401 Security Boulevard
Baltimore, Maryland 21235

For the Respondent

Walter McKibbin
Marc Zaltman
American Federation of Government
Employees, AFL-CIO, Local 1395
600 West Madison Street
Chicago, Illinois 60606

For the Complainant

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This case arose pursuant to Executive Order 11491, as amended, as a result of an unfair labor practice complaint filed on November 3, 1978 by the American Federation of Government Employees, AFL-CIO, Local 1395 (hereinafter called the Complainant or Union), against the Department of Health, Education and Welfare, Social Security Administration, Great Lakes Program Service Center, Chicago, Illinois (hereinafter called the Respondent or Activity).

The complaint alleged, in substance, that the Respondent violated Sections 19(a)(1) and (2) of the Executive Order when it terminated Sharon Tyler, a probationary employee, because she requested the assistance of the Union in retaining her position and was a friend of a Union steward. The Respondent denied the allegations.

A hearing was held in this matter before the undersigned in Chicago, Illinois. Both parties were represented and afforded full opportunity to be heard, to adduce relevant evidence, and to examine and cross-examine witnesses. Post-hearing briefs have been received from both parties and duly considered.

Based on the entire record herein, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, and the briefs, I make the following findings of fact, conclusions of law, and recommendation.

Findings of Fact

At all times material herein The National Council of Social Security Payment Center Locals, American Federation of Government Employees, AFL-CIO has been the exclusive representative of a unit consisting of all non-supervisory employees at six Social Security Administration Program Centers. The individual locals at the Program Centers act for the Council at their respective Program Centers. Local 1395, AFGE is the local at the Great Lakes Program Center.

Sharon Tyler was hired by the Great Lakes Program Center on

February 12, 1978 as a Clerk-Typist, GS-3 subject to a probationary period of one year. The purpose of the probationary period is outlined in the Federal Personnel Manual, Subchapter 8, Probation, in part, as follows:

> The Commission regards the probationary period described in this subchapter as a final and highly significant step in the examining process. It provides the final indispensable test, that of actual performance on the job, which no preliminary testing methods can approach in validity.
>
> During the probationary period, the employee's conduct and performance in the actual duties of his position may be observed, and he may be separated from the service without undue formality if circumstances warrant. Thus, the probationary period, properly employed, provides protection against the retention of any person who, in spite of having passed preliminary tests, is found in actual practice to be lacking in fitness, and capacity to acquire fitness, for permanent Government service. (R.A. Ex. 2-3).

Sharon Tyler received on-the-job training in the clerk-typist functions in Module 24. When she entered Module 22 in February 1978, her permanent work location, she was under the direct supervision of Mr. Eric Muceus, assistant module manager. Ms. Rosie Sutton, assistant module manager, became her first line supervisor in May 1978 and remained so until her termination in September 1978. Ms. Savoldi Silas, module manager, was her second line supervisor throughout the entire period. Ms. Tyler was a work associate and sat in close proximity to Ms. Rita Snorton, Chief Steward, AFGE Local 1395.

On February 17, 1978 Eric Muceus interviewed Ms. Tyler informing her of Respondent's expectations concerning work movement, the requirement of 95% accuracy, and leave. Mr. Muceus noted that Ms. Tyler had displayed a very bad attitude on one occasion when she was asked to help the file clerks prong file material. (Tr. 84-85, Res. Ex. 2).

On March 22, 1978 Mr. Muceus interviewed Ms. Tyler again

concerning her performance as a typist. He pointed out that her productivity was poor and her accuracy was far below expectations. He noted that she was making poor use of her time by extending lunch and break periods and engaging in non-work related conversations. (Tr. 86-88; Res. Ex. 3).

On April 26, 1978 Mr. Muceus conducted his final interview with Ms. Tyler. He pointed out that even though her production and accuracy had improved, both areas still needed improvement. He again criticized her extended lunch and break periods and and non-work related conversations. (Tr. 88-89; Res. Ex. 4). Mr. Muceus testified that one of the individuals that Ms. Tyler engaged in a lot of non-work related conversation with was Ms. Snorton. (Tr. 90-91).

On June 2, 1978 Ms. Tyler's new supervisor, Rosie Sutton, interviewed her concerning her work. She pointed out that Ms. Tyler's average daily production of 20 cases per day must come up to no less than 30-40 cases per day and have 95% accuracy, instead of 78% accuracy. She also noted that Ms. Tyler must begin and end her breaks timely and limit the time spent in conversation with other employees. (Tr. 104; Res. Ex. 5).

Sometime in June 1978 Ms. Tyler asked Rita Snorton, Chief Steward and her co-worker, for help concerning her job. Ms. Snorton suggested that she go to the Union about her problem. Rita Snorton and Ms. Tyler met with local Union president, Donald Jones. (Tr. 20-21; 38).

On June 23, 1978 Ms. Sutton interviewed Ms. Tyler and pointed out she had still not achieved the productivity goals. (Tr. 108; Res. Ex. 6). On July 18, 1978 Ms. Sutton met with Ms. Tyler and her Union representative. Ms. Sutton advised Ms. Tyler that her production was 29.8 cases, still below expectation, and she was still not limiting her lunch and break periods or lengthy conversation with other personnel. Ms. Tyler was informed that if she did not meet expectations by August 18, 1978, her termination would be recommended. (Tr. 110; Res. Ex. 8).

On approximately July 25, 1978 Walter McKibbon, Chief Steward, met with John Bednor, Section manager, concerning Sharon Tyler. (Tr. 13). Mr. McKibbon testified that Mr. Bednor stated that Rita Snorton was the problem in the case and that she exerted a bad influence on Sharon Tyler. (Tr. 13, 18). Mr. Bednor testified that he doesn't know whether or not he used the words "bad influence", but his statement was based on information from

Ms. Tyler's supervisor's, Rosie Sutton and Savoldi Silas, that Sharon Tyler and Rita Snorton talked an awful lot, which created a problem with Sharon Tyler's production. Mr. Bednor testified that his statement had nothing to do with Rita Snorton being a Union representative. (Tr. 152-153). Mr. Bednor's testimony is consistent with the record as a whole, and I credit his testimony concerning the circumstances under which he made the statement to Mr. McKibbon.

On August 22, 1978 Ms. Sutton reviewed Ms. Tyler's daily work statistics with Ms. Tyler and her Union representative. Ms. Sutton concluded that inasmuch as Ms. Tyler's case production was 31.5 cases with 85 percent accuracy, her work products were marred by erasures and white-outs, and her utilization of time had not improved, she would be recommended for termination. (Tr. 113-114; Res. Ex. 9).

Ms. Sutton testified that Ms. Tyler spent a lot of time talking to Ms. Snorton in non-work related conversations, but also a lot of time in talking to other friends and co-workers as well. (Tr. 116). I credit Ms. Sutton's testimony that Ms. Tyler was not taken off of review earlier in view of the lack of consistency in the quality and quantity of her work, and that the standards she established were consistent with the production of other personnel in the unit. (Tr. 111, 115).

Subsequent to the August 22, 1978 meeting, Walter McKibbon, Chief Steward, met with Savoldi Silas concerning Sharon Tyler's proposed termination. Mr. McKibbon testified that he requested Ms. Silas to reconsider the termination, and remarked that a person shouldn't be evaluated by their associations. Mr. McKibbon testified that Ms. Silas replied that it showed weak character to be influenced by another. Mr. McKibbon believed that Ms. Silas was referring to Sharon Tyler's association with Rita Snorton. (Tr. 15). Ms. Silas denied making such a statement; however, she acknowledged reporting earlier to John Bednor, the Section chief, that a lot of time was being wasted by typists talking and not working. Ms. Silas testified that Sharon Tyler talked excessively, but that she recommended the termination of Sharon Tyler because she failed to meet her expectations as an employee and not because she was friends with Ms. Snorton. (Tr. 143-144). Ms. Silas testimony is consistent with the record as a whole and I credit her testimony.

On September 22, 1978 Ms. Tyler was terminated. The September 8, 1978 termination letter stated that she had failed

to "consistently attain acceptable levels of competence in the areas of quantity and accuracy of cases produced." (R.A. Ex. 2-1).

Ms. Tyler appealed her termination to the Federal Employee Appeals Authority pursuant to FPM Chapter 315. She alleged, among other things, that the Activity used a system of evaluation which discriminated against her because of race, sex, color, national origin, religion, and age. She also alleged that she was discriminated against because of her relationship with an official of the Union. (R.A. Ex. 2-5, 2-4; Res. Ex. 1).

Discussion, Conclusions, and Recommendations

Section 19(d) of the Order states that "Issues which can properly be raised under an appeals procedure may not be raised under this section." An appeals procedure within the meaning of Section 19(d) must be a procedure in which the unfair labor practice issue can be raised and, second, it must provide for third party review. Department of the Navy, Aviation Supply Office, Philadelphia, Pennsylvania, 4 A/SLMR 620, A/SLMR No. 434 (1974). FPM Chapter 315 gives probationary employees the right to appeal to the Civil Service Commission on grounds limited to race, color, religion, sex, national origin, partisan political reasons, marital status, or physical handicap. It has previously been held that this appeals procedure is not one in which the unfair labor practice issue properly can be raised and, therefore, the use of this procedure to contest a termination does not foreclose consideration of an unfair labor practice complaint concerning the same discharge. Veterans Administration, Veterans Benefits Office, 3 A/SLMR 444, A/SLMR No. 296 (1973).

Section 1(a) of the Order guarantees to each employee of the executive branch of the Federal government the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity. Section 19(a)(1) provides that agency management shall not interfere with, restrain, or coerce an employee in the exercise of rights assured by the order. Agency management's abridgment of these rights by discrimination in regard to hiring, tenure, promotion, or other conditions of employment is violative of Section 19(a)(2) of the Order. To find a Section 19(a)(2) violation of the Order, the evidence must show that agency management has discriminatorily affected employee terms and conditions of employment based on union considerations. Further, such a violation will be found in "mixed motive" situations, i.e., where a legitimate basis for the management action exists,

but where union considerations also are shown to have played a part. Department of Health, Education and Welfare, Social Security Administration, San Juan, Puerto Rico, A/SLMR No. 1127 (Sept. 22, 1978).

Applying the foregoing principles to the instant case, the Complainant has failed to prove by a preponderance of the evidence that Respondent's termination of Sharon Tyler was based on union considerations, in whole or in part.

In making the above findings, I gave greater weight to the testimony of Respondent's witnesses, including Erick Muceus, Rosie Sutton, and Savoldi Silas, than to Complainant's witnesses. The testimony of Sharon Tyler, Donald Jones and Rita Snorton was largely speculative and conclusionary. On the other hand, the testimony, particularly of Erick Muceus and Rosie Sutton, contained essential facts and details which were corroborated in large part by documentary evidence.

Coercive or intimidating statements by agency management implying adverse consequences for employees seeking or accepting union assistance and representation concerning grievances, personnel policies and practices, or other matters affecting working conditions would constitute separate and independent violations of Section 19(a)(1) of the Order. Department of Transportation, Tampa, Florida, 6 A/SLMR 521, A/SLMR No. 725 (1976). Here, however, there is no persuasive evidence that any criticism directed at Sharon Tyler because of her association with Rita Snorton was because Rita Snorton was connected with the Union. Rather, the evidence demonstrates that one consistent area of concern to management, in addition to Sharon Tyler's failure to consistently attain acceptable levels of production quantity and accuracy, was her poor utilization of time by non-work related conversations with other typists. One of the individuals with whom she had such conversations was the Union steward, Rita Snorton. There is no evidence that any such conversation considered by management was during an official representational session. Cf. General Services Administration, National Archives and Records Service, A/SLMR 1113 (Sept. 1, 1978). Nor is there any persuasive evidence of disparate treatment or anti-union animus. The Executive Order does not preclude agency management from insisting that employees abide by the terms of the negotiated agreement concerning the use of official time for employee representational activities, and certainly does not preclude agency management from directing employees in their assigned duties. Department of the Air Force, Base Procurement

Office, Vanderburg Air Force Base, California, FLRC No. 75A-25 (1976).

The Respondent's actions have not been shown to interfere with rights assured by the Order, and Complainant has failed to carry its burden of proving that part of the Repondent's motivation for terminating Tyler during the probationary period was for reasons violative of the Order, rather than for work related causes. Cf. Department of Health, Education and Welfare, Region IX, San Francisco, California, A/SLMR No. 1156 (December 11, 1978); Department of Transportation, Federal Aviation Administration, Houston, Texas, A/SLMR No. 1039 (May 11, 1978); Internal Revenue Service, Memphis Service Center, A/SLMR No. 989 (Feb. 22, 1978).

Recommendation

Having found that Respondent has not engaged in conduct prohibited by Sections 19(a)(1) and (2) of the Executive Order, as amended, it is hereby recommended that the complaint herein be dismissed in its entirety.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: April 12, 1979
Washington, D.C.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Department of the Air Force,
Oklahoma City Air Logistics Center,
Tinker Air Force Base, Oklahoma

Respondent

and

Assistant Secretary
Case No. 63-8033(CA)

Local 916, American Federation
of Government Employees, AFL-CIO

Complainant

DECISION AND ORDER

On May 7, 1979, Administrative Law Judge Steven E. Halpern issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that

no exceptions were filed, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation. */

ORDER

IT IS HEREBY ORDERED that the complaint in Assistant Secretary Case No. 63-8033(CA) be, and it hereby is, dismissed.

Issued, Washington, D.C., November 29, 1979

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E. O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
San Francisco Regional Office
Suite 600 – 211 Main Street
San Francisco, California 94105

Area Code 415 556-0555

In the Matter of DEPARTMENT OF THE AIR FORCE OKLAHOMA CITY AIR LOGISTICS CENTER TINKER AIR FORCE BASE, OKLAHOMA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 916 TINKER AIR FORCE BASE, OKLAHOMA Complainant	CASE NO. 63-8033(CA)

Claude V. Sumner
Attorney at Law
American Federation of Government
Employees, Local 916
4444 South Douglas Boulevard
Oklahoma City, Oklahoma 73140
For the Complainant

Major William Cregar
U.S. Air Force Central Law Office
Randolph Air Force Base
San Antonio, Texas 78148
For the Respondent

Before: STEVEN E. HALPERN
Administrative Law Judge

DECISION AND ORDER

Procedural History

This proceeding under Executive Order 11491, as amended, was initiated by complaint filed December 20, 1977. Notice of Hearing was initially issued on September 27, 1978, by the Regional Administrator of the United States Department of Labor, Labor-Management Services Administration, Kansas City Region. The Regional Administrator previously having dismissed the complaint, said notice was issued pursuant to an August 22, 1978, remand by the Assistant Secretary, on appeal from the dismissal, based upon his finding that:

Contrary to the Regional Administrator, I find that a reasonable basis for the instant complaint, which alleges that the Respondent unilaterally changed a past practice and, by such conduct, discriminated against an employee because of his union and/or other protected activity, has been established.

Pursuant to a rescheduling notice a hearing was held at Oklahoma City, Oklahoma, on January 10-11, 1979, as to the alleged violations of section 19(a)(1)(2)(4) and (6) of the Order.

The parties have been afforded full opportunity to be heard, to adduce evidence, to examine and cross-examine witnesses, to make oral argument and to file briefs. 1/ Based upon the evidence of record, having observed the witnesses and assessed their credibility and having considered the arguments of the parties, I make the within:

Findings and Conclusions

Motion to Dismiss

Respondent has moved to dismiss the instant action on the ground that the issues presented here have been litigated in a grievance proceedng and therefore there is present a section 19(d) bar. However, the record discloses that the arbitrator, before whom was a grievance based upon an incident subsequent to the one here at issue, excluded Complainant's proofs as to the circumstances of the prior October 1977 incident which is the subject matter of the case now before me. Complainant's petition for review of the arbitrator's decision was denied by the Federal Labor Relations Council on December 28, 1978, FLRC No. 78A-113.

It is apparent therefore that Complainant did not have the opportunity in the grievance proceeding to fully litigate the matters here at issue in connection with the now subject October 1977 incident. The following statement which appears

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1/ Due to a delay in receipt of transcript the parties were given until April 13, 1979, to post their briefs. Subsequently, further evidence and comments were filed to supplement the record; these have been dealt with in a separate order. The record was finally closed on May 1, 1979.

at page 4 of the August 1, 1978, arbitrator's award is pertinent:

> This case concerns only the question of whether the grievant should be paid for the one hour that he left his duty station on February 8, 1978, to conduct personal business. That was the only issue addressed in the formal grievance and the only issue before the arbitrator. Article XIII, Section D of the Labor-Management Agreement limits the arbitrator's authority to the issues raised in the formal grievance. Thus, the grievant's absence on October 28, 1977, (sic) the issue of break time, the grievant's reprimand, and the allegations of reprisal are all beyond the scope of this case.

In light of the foregoing Respondent's motion to dismiss is denied.

The Merits

At all material times Complainant union was in appropriate representative status.

It is not in dispute that Mr. Wayne Sain, a steward of said union, departed his duty station on the morning of October 27, 1977, without first obtaining from his supervisor an administrative permit and being placed on "official" time; and, that he was charged with being absent without official leave ("AWOL") for 15 minutes. I find the preponderance of the evidence to disclose that he did not return to his duty station for in excess of 15 minutes; indeed, although the evidence is less than conclusive as to the precise amount of time he was absent it would not be unreasonable to find that such was for a substantially longer period.

It is agreed by the parties, and in any event I find, that in practice the controlling collective bargaining agreement (Article XI Section C) 2/ requires a union steward acting on a union matter during duty hours to do so only with prior managerial approval of "official" time and having been issued an administrative permit.

It is undisputed that Mr. Sain's activities during his absence from duty were in an effort to obtain a document needed in connection with a prior pending ULP. Whether or

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2/ "Administrative permits will be utilized for release of stewards from their official work assignments or locations."

not he was then engaged in a union activity is contested and I have found herein that he was.

Union Exhibit 3, received pursuant to a post-trial motion, constitutes evidence that the prior ULP in connection with which Mr. Sain sought to obtain such document was a different ULP than that testified to by him at the hearing. I shall discuss Complainant's contentions in relation to both prior ULP's; however, in so doing, I note preliminarily that there apparently were four additional ULP's then pending in which Mr. Sain was involved; and, which one he in fact was pursuing at the time in issue remains less than certain.

A. The Prior ULP as testified by Mr. Sain at the hearing

The following excerpt from the union's August 26, 1977, letter signed by its president, sets forth the charge involved in said prior ULP:

> This letter constitutes the filing of an Unfair Labor Practice charge against management of Tinker Air Force Base by the American Federation of Government Employees, Local 916.
>
> . . .
>
> AFGE Local 916 hereby charges that Management has violated Section 19(a)(1) of the Executive Order by not allowing proper release of steward(s) for the purpose of employee representation as outlined in the Labor Management Agreement, Article XI, Section F. On 13 July 1977 and again on 18 August 1977, Mr. Britt was notified by various supervisors that their employees requested a Union representative (Mr. Wayne Sain). On both occasions, Mr. Britt denied the release of the Union representative.
>
> The Union charges Mr. Britt is intentionally delaying the processing of grievances, therefore interfering with the rights of the employees attempting to utilize their negotiated grievance procedure.

It is the circumstance that Mr. Sain was the union representative involved in the said prior ULP that gives rise to Complainant's contention that, at the time in question, he was acting on personal rather than union business and that such business was properly conducted within the allowable time of his discretionary "break" period and

without supervisory approval of official time and the issuance of an administrative permit.

I cannot accept Complainant's premise. The interest of the union qua union in obtaining a document deemed necessary to a successful prosecution of said ULP is patent and requires no elaboration. While Mr. Sain may have had an interest in said matter since he was the steward named therein, such interest was not personal to him as an individual but rather to him in his official union capacity and therefore was not personal business of the nature argued by Complainant. Although the chief steward was handling said ULP, Mr. Sain's activities in connection with obtaining the document deemed necessary to its prosecution were authorized by him and were on behalf of the union to no lesser extent than if the chief steward had so acted rather than Mr. Sain in his stead. It can hardly be argued that the chief steward would have been acting on Mr. Sain's personal business rather than on union business had he, rather than Mr. Sain, attempted to obtain the document sought by Sain during his absence from duty.

At best, Mr. Sain at the time in question was engaged in a mixed personal and union endeavor. The arguable personal aspect of such dual interest in no way serves to negate the union purpose served and Sain's activity, even viewed in this light, remains within the ambit of union activity.

As aforesaid, under the terms of the controlling collective bargaining agreement, as interpreted and practiced by the parties, it is undisputed that a steward is required to obtain an administrative permit and be placed on official time when performing union business during duty hours. And, the parties are in agreement 3/ that a steward may not engage in union business during a discretionary personal "break" period without complying with the agreement's aforesaid terms. This is so because a "break" (as opposed, for example, to a non-paid lunch period) is paid time.

Furthermore, Mr. Sain, according to his written statement of March 2, 1978 (R-7), 4/ understood the appropriate

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3/ Post-hearing conference conducted telephonically April 25, 1979.

4/ According to said statement, made under affirmation to the investigating compliance officer: "On 27 October 1977, at approximately 0930 hours, I chose to use my ten minute morning break to check on some missing paperwork concerning a previous Unfair Labor Practice."

time for such "break" to be 10 minutes. While there is some conflicting testimony that the allowable time for a break is as much as 15 minutes, since Mr. Sain is the individual directly involved I shall bind him by that statement and for the purposes of this case find the allowable period of time for absence from his duty station on a discretionary "break" period, as established by past practice, to have been 10 minutes. Thus, even assuming arguendo the merit of Complainant's personal business theory (which I reject), Mr. Sain, based upon my prior finding of an absence in excess of 15 minutes, would have exceeded the allowable "break" time and been absent from his duty station without official leave at the time in question. 5/

B. The Prior ULP as represented by Mr. Sain post-hearing in Exhibit U-3.

As to the prior ULP in connection with which, by U-3, Complainant contends Mr. Sain was attempting to obtain a necessary document at the time here in issue I note the following: At a July 28, 1977, meeting with management in an attempt to informally resolve said prior ULP Mr. Sain appeared as "designee for the President AFGE Local 916" (U-3, attachment I B). Thus, to whatever extent he may have been personally concerned he was also then acting on behalf of the union. To no lesser extent was he acting on behalf of the union at the time in question herein; and, I so find. The discussion set forth in A. hereinabove therefore remains applicable even if the prior ULP were the one presently contended by Complainant.

I must further again comment that upon the present contradictory state of the record it is questionable which of the six prior ULP's Mr. Sain in fact was pursing at the time in question and which document he was attempting to secure. While I do not suggest that Mr. Sain has deliberately given false testimony I find that his testimony in that area of major concern reflects a tendency to speculate when he is less than reasonably certain; and, in my opinion, his overall credibility has been diminished.

Having determined that Mr. Sain was AWOL, a determination with which I agree under the circumstances above

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5/ Although there is some question as to whether the AWOL was charged for the correct 15-minute sequence of time on said morning I consider such to be a bookkeeping matter having no real significance or substantive impact upon the merits

described, Respondent, acting through Sain's supervisor, offered to permit him to avoid an AWOL charge by signing for annual leave. Mr. Sain declined the offer whereupon he was charged with a 15-minute AWOL, said amount being the least administratively chargeable; and, although further measures of a disciplinary nature could have been taken they were not. I further credit the testimony of his supervisor that Mr. Sain had been cautioned in the past about engaging in union activities during duty hours without appropriate authorization.

The Complaint

Under these circumstances Complainant has charged that Respondent violated section 19(a)(1), (2), (4), and (6):

> Agency Management violated section 19(a)(2) of the Executive Order 11491 through the discriminating act of withholding pay from an employee because of his activities as a Union Steward of Local 916. Agency Management committed this capricious and vindictive act by discriminately charging Mr. Sain 15 minutes AWOL for being away from his post of duty without an Administrative Permit.
>
> Section 19(a)(4) was violated by taking disciplinary action and discriminating against Mr. Sain because he has filed complaints against Mr. Britt under the Order. This discriminatory act was committed when Mr. Sain was charged with AWOL for not having an Administrative Permit while being away from his post of duty. The practice of requiring employees to have an administrative permit within Mr. Sain's unit is not consistent basewide or within the ACD Division. The Union alleges Mr. Sain was charged AWOL solely because of his filing complaints under the Order and because of his Union activities.
>
> Section 19(a)(6) was violated when Mr. Britt imposed the requirement for Mr. Sain to have an Administrative Permit when being away from his post of duty. The established procedure in Mr. Sain's area is the use of a "Sign-Out" board when being away from the work area. The Agency has never negotiated a requirement to complete an

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5/ (Continued) of this case. I further note that 15 minutes is the least amount of time administratively chargeable for any AWOL, even one of lesser duration.

Administrative Permit when an employee is away from his post of duty. The practice is not consistent throughout the Agency requiring employees to obtain an Administrative Permit prior to leaving their post of duty.

As Complainant in this matter the union, of course, bears the burden of proving its charges by a preponderance of the credible evidence. As I have already indicated I am unable to place any great reliance on the testimony of Mr. Sain, Complainant's major witness. In the final analysis, although Complainant has so suggested and argued, it has factually established neither that the AWOL action taken against Mr. Sain was occasioned by his prior activities in connection with complaints filed against management, nor by his past (proper) participation in union activities, nor that such was other than consistent with the terms of the parties agreement and warranted under the circumstances.

To the extent that Complainant's contention that steward Sain was subjected to disparate treatment is based upon a comparison between the established practice for the release from duty of non-union steward employees, as opposed to union stewards engaged in union-related activities, it is misplaced and spurious.

As to the sign-out board it has not been established that its function was other than for informational purposes so as to enable any absent employee (including a steward engaged in a union activity) to be located if necessary; signing out thereon did not constitute prior supervisory approval of absence from duty. In any case, the parties negotiated agreement superseded whatever practice may theretofor have existed for the release of stewards to pursue union interests during duty hours.

While it is evident that labor-management relations in Mr. Sain's unit are not at a high water mark and that his relationship with his supervisor is strained, it has not been established by a preponderance of the evidence that the AWOL charge was other than warranted and proper under the circumstances or in any manner was discriminatory or motivated by anti-union considerations. Futhermore, if the imposition of the AWOL charge were an ill motivated and vindictive act, it is unlikely that Mr. Sain would have been offered the option to avoid it.

I conclude that the violations of section 19(a)(2)(4) and (6) of the Order alleged have not been proven.

Conclusionary summary

In practice, the governing collective bargaining agreement requires a union steward, who leaves his duty station during duty hours (including "break" periods) to engage in union connected activity, (a) to obtain from his supervisor prior authorization to do so on "official" time and (b) to obtain an administrative permit. Steward Sain, whom I have found to have been engaged in a union connected matter at the time in question, did neither of these things prior to departing his duty station. When apprehended, he declined Respondent's offer to permit him to sign for annual leave and thus avoid the AWOL with which he was properly chargeable; instead, he has chosen to cause to be instituted this ULP action, the basic premise of which is that Respondent committed a discriminatory anti-union act in assigning the AWOL.

To whatever extent, Mr. Sain's relationship with his supervisor and management in general, has been shown to be less than cordial, it has not been demonstrated by a preponderance of the credible evidence in this case that he was charged AWOL for any reason other than that he was in fact AWOL.

Thus, having concluded that Complainant has not established section 19(a)(2)(4) or (6) violations and having found that Respondent's action herein rises to no higher level than proper enforcement of the parties' negotiated agreement, I find that there has been no interference with, restraint or coercion as to the exercise of any rights assured by the Order and conclude that no section 19(a)(1) violation has occurred.

In view of the foregoing I find it unncessary to address any of the other issues introduced into this matter.

Order

The within complaint is dismissed in its entirety

So Ordered, in the name of the Federal Labor Relations Authority, this 7th day of May, 1979, in San Francisco, California.

STEVEN E. HALPERN
Administrative Law Judge

SEH:scm

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

4392 Aerospace Support Group,
Vandenberg Air Force Base, California,
Department of the Air Force

Respondent

and

Assistant Secretary
Case No. 72-7644(CA)

National Federation of Federal Employees,
Local 1001

Complainant

DECISION AND ORDER

On May 25, 1979, Administrative Law Judge Thomas Schneider issued his Recommened Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed timely exceptions to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusion and recommendations as modified below.

The Administrative Law Judge concluded that Respondent did not violate section 19(a)(1) and (6) of the Order. In so concluding, he found that, although there were some minor differences between a Central Automated Inventory and Referral System (CAIRS) and the Automated Career Management System (ACMS), the Respondent's phasing out of CAIRS and its implementation of ACMS did not change the working conditions of the unit employees.

The Authority finds, contrary to the Administrative Law Judge, that there was a change in working conditions brought about by the implementation of the ACMS and that, as a result, the Respondent had an obligation, upon request, to meet and confer with the Complainant on the impact and implementation of ACMS to replace the CAIRS. In the view of the Authority, the replacement of one system with the other resulted in a substantial modification with regard to the filling of vacancies GS-12 and above, by changing the manner in which the final ranking of the ten top names were determined. Thus, where under CAIRS, a panel of local officials including a representative of the Complainant made the final ranking of the top ten names, under ACMS, the computer alone, without relying on the human judgments of the panel, provides the final ranking of the top ten names. Notwithstanding such change, however, the Authority notes that the record clearly establishes that the Complainant, despite having knowledge of the change, failed to request to meet and confer with the Respondent on the impact and implementation of the change. On this basis, the Authority finds that the Respondent did not violate its bargaining obligation to Complainant under the Order in implementing the change from CAIRS to ACMS. 1/ Accordingly, the Authority will order that the complaint herein be dismissed in its entirety. 2/

ORDER

IT IS HEREBY ORDERED that the complaint in Assistant Secretary Case No. 72-7644(CA) be, and it hereby is, dismissed.

Issued, Washington, D.C., November 29, 1979

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite Member

FEDERAL LABOR RELATIONS AUTHORITY

1/ Cf. Supervisor of Shipbuilding, Conversion and Repair, United States Navy, Groton, Connecticut, A/SLMR No. 1147 and Department of the Army, U.S. Military Academy, West Point, New York, A/SLMR No. 1138.

2/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would have been reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
SUITE 700 - 1111 20th Street, N. W.
WASHINGTON, D. C. 20036

In the Matter of 4392 AEROSPACE SUPPORT GROUP, VANDENBERG AIR FORCE BASE, CALIFORNIA, DEPARTMENT OF THE AIR FORCE Respondent and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1001 Complainant	CASE NO. 72-7644(CA)

Major Jerry M. Brasel
Air Force Central Labor Law Office
Randolph AFB, Texas 78184
and
Captain Joseph Swerdzewski
Vandenberg AFB, California 93437
For the Respondent

Bobby Ann Smith and
Thomas P. Christy
P. O. Box 1935
Vandenberg AFB, California 93437
and
Robert W. Brockbank
National Representative
National Federation of Federal Employees
5755 Orange Avenue #2
Long Beach, California 90805
For the Complainant

Before: THOMAS SCHNEIDER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding was initiated under Executive Order 11491, as amended; the Notice of Hearing was issued by a Regional Administrator of the Labor-Management Services Administration, United States Department of Labor; and the proceeding was conducted before the Assistant Secretary for Labor-Management Relations. This decision, pursuant to transition rules and regulations, Federal Register, Vol. 44, No. 1, January 2, 1979, pages 7-8, is issued in the name of the Authority and, in accordance with § 2400.2 (5 C.F.R. § 2400.2) of the transition rules and regulations, shall be processed by the Authority in accordance with the Rules and Regulations of the Assistant Secretary for Labor-Management Relations, Title 29, Code of Federal Regulations, Part 201, et seq., except that the word "Authority" shall be substituted wherever the words "Assistant Secretary" appear in the rules and regulations of the Office of the Assistant Secretary.

Statement of the Case

Local 1001, National Federation of Federal Employees (the "union") filed a complaint against 4392nd Aerospace Support Group (the "activity") located at Vandenberg Air Force Base, charging that the activity violated § 19(a)(1) and (6) of Executive Order 11491 (the "Order"), by failing to negotiate the impact of the implementation of the Automated Career Management System (ACMS) to replace the Central Automated Inventory and Referral System (CAIRS). After investigating, the Regional Administrator, Labor-Management Services, on November 29, 1978, issued a notice of hearing. Said hearing was held before me on January 25 and 26, 1979, in Santa Maria, California. The union and the activity were represented and had full opportunity to present evidence and cross-examine witnesses. The record was closed April 2, 1979, when the last briefs were filed.

Findings of Fact

Background

The activity is a part of Vandenberg Air Force Base, a United States Air Force installation near Lompoc, California. One of Vandenberg's missions is to operate the Pacific Missile Test Center. The Space and Missile Test Center Directorate of Procurement (SAMTEC/PM) provides procurement support for the Pacific Missile Test Center.

At all material times the union was granted exclusive recognition by and had a negotiated agreement with the activity.

At issue here is the transition from one automated computer system (CAIRS) to another automated computer system (ACMS). Both systems are designed to enable the Department of Defense (DOD) to keep an inventory of procurement personnel and of quality and reliability assurance personnel, and to enable DOD components to fill vacancies requiring such personnel from rosters produced from data stored in the system.

CAIRS was in operation from sometime in the sixties to approximately March 1978. It was to be replaced by ACMS immediately, but in fact ACMS was not ready for operation until September 1978. In October 1978, the activity filled its first and only (to the time of hearing) vacancy using ACMS. The union's operations officer, Ms. Smith, found out in July 1978 that ACMS was being implemented, in the course of a conversation on another subject with one of the supervisors at the Test Center. Ms. Smith sought more information, and a meeting was set up for July 14, 1978, at which Ms. Leidecker and Ms. Dulin, from the activity's employment section explained the system. Apparently the union and Ms. Smith were concerned about the effect of ACMS on unit members at grade level GS-5 through 11. In fact, for those grade levels the new system involved only filling out new registration forms which varied from the previous forms in appearance, but only minimally in content and function. This is not an area of significant dispute between the parties. The dispute centers around grade levels GS-12 and above.

There are a number of employees at grade level GS-12 and above who are members of the bargaining unit. There is no contention that the activity bargained on the impact of ACMS. The fact is it did not bargain. The question is, was this a violation of the Order?

Waiver

The activity contends that the union's failure to request impact bargaining at the July 14 meeting, and its failure to present specific proposals at that meeting, constitute a waiver of any rights it had to bargain over the impact of ACMS. I rejected this contention at the hearing (Tr. 304-306) and I reject it still. Waiver is defined as the intentional or voluntary relinquishment of a known right. Black's Law Dictionary, Rev. 4th ed. (1968). The union did not have enough information on or before July 14, 1978, to formulate meaningful questions or proposals. Thus, its failure to do so cannot be a waiver of any of its rights.

If the activity had a duty to bargain regarding the impact of ACMS it had a duty to inform the union of ACMS procedures in sufficient detail to make its impact understandable. This it did not do.

The activity also contends that the union waived its right to negotiate the impact of ACMS in Article XVII, Section 3(a) of the negotiated agreement (Comp. Exh. 1). That section provides:

> Section 3.
>
> a. Requirements. All promotions to positions in the competitive service--and to positions in the excepted service insofar as practicable--which are serviced by the Civilian Personnel Office at Vandenberg Air Force Base will be made in accordance with procedures outlined in this plan unless specifically covered by a higher headquarters plan which takes precedence. Promotions to positions governed by other plans (e.g. Procurement positions filled through CAIRA 1/ procedures, Operation Analyst positions, highgrade positions at GS-15 and above) will be made in accordance with governing higher headquarters' directives and in accordance with this plan to the extent that it does not conflict with mandatory provisions of the higher directive.

It is clear that ACMS was a higher headquarters' directive. The activity argues that since the agreement itself specifies that promotions governed by plans like CAIRA will be made in accordance with governing higher headquarters' directives, and since ACMS is a plan required by higher headquarter's directive, there is nothing to negotiate about. This argument ignores the last 21 words of the section, which specify that promotions governed by plans other than those in the agreement will be made in accordance with governing higher headquarters' directives "and in accordance with this plan to the extent that it does not conflict with mandatory provisions of the higher directive." Thus, the agreement clearly reserved to the parties the right to negotiate to determine the extent to which the ACMS can be reconciled to the plan contained in the agreement.

1/ CAIRA is the body that operates the CAIRS. The acronyms are interchangable.

Impact

The activity contends that the implementation of ACMS had no substantial impact upon the employees represented by the union. I agree with this contention.

The union alleges differences between CAIRS and ACMS in respect to enrollment, mobility, area of consideration, criteria for selection and referral of local candidates. Analysis reveals that the two programs are nearly identical in each of these respects.

Enrollment

Both Ms. Dulin and Ms. Leidecker were experts in their respective fields and gave very credible testimony. Together their testimony showed that precisely the same people were required to be enrolled in both systems. Through the GS-11 level the purpose of enrollment was simply informational. At the GS-12 level and above the purpose was to fill vacancies. Some of the union's witnesses were unsure why they were registered in one or the other or both programs. But I find that this uncertainty was not due to the different requirements of each system, but rather due to their unfamiliarity with the regulations or due to the changing nature of their work.

Mobility

The union contends that ACMS requires the persons enrolled in it to be more mobile than those persons who were enrolled in CAIRS. The evidence showed, however, that ACMS provides an avenue for individual employees to specify the precise geographic base of their choice. A Vandenberg employee who wished not to relocate could specify Vandenberg as the sole location for referral. It was up to the particular activity that had a vacancy to specify whether mobility was a requirement for a specific job, not the ACMS as a whole. It is true that after declining a position under ACMS an employee would have to revise his form 2077 within 20 days to again be considered for referral. Under CAIRS he would continue to be referred even without action on his part. But this is a very minor procedural difference. The important point is that under both programs the employee has control over his prospective assignments, and both programs require mobility in certain training positions.

Area of Consideration

Ms. Dulin testified that the area of consideration under both CAIRS and ACMS was DOD wide (Tr. 290). No persuasive evidence showed otherwise.

Criteria for Selection

One of the union's witnesses, Mr. Baughman, testified that CAIRS used three criteria for the selection of a candidate: the commodity, the years of civil service, and the supervisory appraisal. He said ACMS uses only two: the employee's self-appraisal and the supervisor's appraisal. Other evidence from persons even more familiar with these factors showed that seniority was used in both systems only to break ties, and that commodity and supervisory appraisal are coded into the ACMS. The net effect is that both systems use the same criteria for selection that vary only with the needs of the requisitioning agency.

Referral of Local Candidates

Several union witnesses testified that local vacancies could be filled by local people more readily under CAIRS than under ACMS. This contention is belied most vividly by the fact that the only time ACMS has been used to fill a vacancy at Vandenberg, a local person was selected (Tr. 174). In addition, it is clear that both CAIRS and ACMS produce rosters of eligibles derived DOD wide, including all the qualified local people. Under both systems the vacancy must be filled from such rosters.

One difference, which I find to be insignificant, was brought out. Under CAIRS local officials would make the final ranking of the top ten names produced by the computer, by using such ranking items as awards. Under ACMS such factors are coded into the request prior to final ranking. Thus, under both systems the same factors are considered.

Ministerial Act

Lastly, the activity contends that its implementation of ACMS was a ministerial act which it had no discretion but to follow. This statement leads to the question, discussed in Naval Air Rework Facility, Pensacola, Florida, FLRC No. 76A-37 (May 4, 1977), which level in the chain of command may be held to violate § 19(a) of the Order. Since I conclude that the Order has not been violated for the reasons stated, I need not reach this question.

Conclusion

I therefore conclude that the activity had no duty to negotiate the impact of implementing the Automated Career Management System (ACMS) and therefore did not violate section 19(a)(1) and (6) of the Order.

Recommended Order

I recommend to the Federal Labor Relations Authority that the complaint be dismissed in its entirety.

Thomas Schneider

THOMAS SCHNEIDER
Administrative Law Judge

Dated: May 25, 1979
San Francisco, California

TS:vg

UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

National Treasury Employees Union,
Chapters 103 and 111

(Union)

and

Case No. O-NG-16

U.S. Customs Service,
Region VII

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Proposal

ARTICLE 33, Section 2

A. (No Change)

B. (No Change)

C. (No Change)

D. (No Change)

E. (No Change)

F. Delete: "...fifteen (15) days to file by certified mail or by hand delivery, a grievance pursuant to Article 35. If the employee files a grievance of a suspension the disciplinary action shall be stayed pending exhaustion of the grievance procedure."

Insert: "...five (5) days to invoke arbitration as provided in Paragraph G of this Section by certified mail or by hand delivery. If the Union invokes arbitration of a suspension the disciplinary action shall be stayed. Disciplinary actions not appealed under Paragraphs F and G of this Section may be appealed by filing a grievance pursuant to Article 35."

G. Delete first sentence

1. Delete first sentence and insert: "The following five (5) persons shall serve as arbitrators for cases under this Article:

1._____
2._____
3._____

4._____
5._____

They shall serve on a rotating basis and if the arbitrator who would be selected under the rotational system for a particular case is unable to hold the arbitration within the time limits of Subsection 4 of this Paragraph the next arbitrator will be contacted in turn."

2. (No Change)

3. (No Change)

4. Insert: "A hearing shall be scheduled to commence within fifteen (15) days of the selection of the arbitrator. The hearing shall be concluded within ten (10) days of its opening date. The arbitrator's decision shall be rendered within twenty (20) days of the close of the hearing."

5. Insert: "If the arbitration award is not rendered within fifty (50) days following receipt by the employee of the employer's decision to suspend the employee, the employer may implement the suspension, notwithstanding a stay of suspension. It is understood by the parties that the arbitrator may award back pay if appropriate in such a case. For purposes of computing the fifty (50) day period, delays and/or extensions within the control of the Employer will toll the counting period."

Question Here Before The Authority

The question is whether the proposal violates section 7106(a) of the Federal Service Labor-Management Relations Statute (the Statute) or establishes a negotiable procedure under section 7106(b)(2) of the Statute.1/

1/ Section 7106 of the Federal Service Labor-Management Relations Statute (92 Stat. 1198) provides, in part, as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
(2) in accordance with applicable laws--
(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees . . . .

. . . . . .

(Continued)

Opinion

Conclusion: The proposal establishes a negotiable procedure within the meaning of section 7106(b)(2) of the Statute. Accordingly, pursuant to section 2424.8 of the Authority's Rules and Regulations (44 Fed. Reg. 44740 et seq. (1979)), the agency's allegation that the disputed proposal is not within the duty to bargain because it violates section 7106 of the Statute is set aside.2/

Reasons: The disputed proposal in the instant case establishes a procedure for the arbitration of the suspension of employees. In particular, the proposal provides for staying the agency's suspension action for a maximum of 50 days pending exhaustion of the grievance procedure by the employee. It establishes definite time limits for the completion of the steps of the arbitration process, and allows the agency to implement the suspension action if the arbitration decision is not rendered within 50 days of the employee's receipt of the notice of suspension.

In American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey, Case No. 0-NG-20, decided on this date, the Authority considered the negotiability under section 7106(b)(2) of the Statute of a procedure governing the exercise of management's right to suspend or remove employees similar to the one at issue in the present case. The proposal at issue in Dix-McGuire Exchange provided for a stay of agency action pending exhaustion of the grievance and arbitration process, but in contrast to the disputed proposal herein did not establish time limits for completing the arbitration process or provide for agency action within a definite time period. The Authority, based on the legislative history of section 7106(b)(2) of the Statute,3/ concluded that the proposal in that case was negotiable because it would not prevent the agency from acting at all in the exercise of its statutory right to suspend or remove employees. Since the proposal herein, which is not materially different from the proposal at issue in Dix-McGuire Exchange, would permit the agency to implement the suspension of the employee within a definite time period, even in the absence of an arbitration decision, it would have a more limited effect on the exercise of management's statutory right to suspend employees. A fortiori, it must be found negotiable. That is, the proposal herein clearly does not prevent the agency from acting at all pursuant to its right to suspend employees.

(Continued)

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating--
>
> . . . . . .
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section . . . .

2/ In so deciding that the subject proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

3/ See S. REP. No. 95-1272, 95th Cong., 2nd Sess. 158 (1978).

Accordingly, based on the decision in Dix-McGuire Exchange, the proposal in the instant case sets forth a negotiable procedure under section 7106(b)(2) of the Statute and, therefore, the agency's allegation to the contrary is set aside.

Issued, Washington, D.C., November 29, 1979

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY4/

4/ Member Leon B. Applewhaite did not participate in the present case, which had been processed prior to his confirmation by the United States Senate as a member of the Authority.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

November 21, 1979

Mr. Don A. Dresser
Chief, Labor Relations Division
Directorate of Civilian Personnel
Department of the Air Force
Washington, D.C. 20330

Re: American Federation of Government Employees, Local 1857 and Sacramento Air Logistics Center, McClellan Air Force Base (Anderson, Arbitrator), Case No. 0-AR-4

Dear Mr. Dresser:

The Authority has carefully considered the agency's petition for review and request for a stay of the arbitrator's award in the above-entitled case.1/

According to the arbitrator, the grievant in this case, an employee of McClellan Air Force Base (the activity), was assigned in July 1973 to the position of Worker-Trainee WG-2. She was subsequently promoted to the position of Worker-Trainee, WG-3. However, the grievant claimed that while in these positions she was actually assigned the duties of an Electronics Mechanic Helper, WG-2614-5. Therefore, in approximately June 1976, she filed a grievance requesting that she be promoted to an Electronics Mechanic Helper, WG-2614-5, position.

The grievance was mutually resolved at the third step of the parties' negotiated grievance procedure by the convening of a Joint Labor-Management Grievance Committee. The Committee made five recommendations which were approved by the Base Vice Commander on June 8, 1977.2/

1/ Member Leon B. Applewhaite did not participate in the present case, which had been processed prior to his confirmation by the United States Senate as a member of the Authority.

2/ The Committee's recommendations were as follows:

1. That the grievance be sustained.

2. That, due to legal and regulatory prohibitions, the remedy sought be denied.

3. That immediate action be taken to assign grievant to duties commensurate with her WG-3 grade.

4. That appropriate management steps be taken by MA to prevent recurrence of this serious extended misuse of an employee's services.

(Continued)

Thereafter, in September 1977, the union filed a new grievance, claiming that the activity had not implemented the recommendations of the Joint Grievance Committee. The matter ultimately was submitted to arbitration. The issue before the arbitrator, as stipulated by the parties, was:

A. Has the Commander complied with the 3d Step Committee's Recommendations, signed by the Commander on 8 June 1977[?]

B. If yes, has the Commander done so in a timely and reasonable manner?

C. If not complied with in a timely and reasonable manner; what, if anything, should the remedy be?

In the discussion and opinion accompanying his award the arbitrator addressed each of the Committee's recommendations and the actions that had been taken with respect to them. As to recommendation number 3, that "immediate action be taken to assign grievant to duties commensurate with her WG-3 grade," the arbitrator concluded that the action taken by the activity had not been "immediate." In this regard the arbitrator noted that testimony at the arbitration hearing indicated that the grievant had continued to perform the duties of an Electronics Mechanic Helper, WG-2614-5, from June 8, 1977, the date the Committee's recommendations were approved, until January 15, 1978, when she was reassigned to the position of Supply Clerk, GS-2005-3. Therefore, he found that the Commander had not complied with the Joint Committee's third recommendation in a timely and reasonable manner.

The arbitrator's award was as follows:

1. The Commander has complied with the Joint Labor-Management Grievance Committee recommendations approved by the Base Vice Commander on June 8, 1977, except that, while he took action with respect to recommendation No. 3, such action was not immediate.

2. The Commander complied with all of the Committee's recommendations in a timely and reasonable manner except for recommendation No. 3.

3. The Commander shall effectuate a temporary retroactive promotion of the Grievant for the period from 8 June 1977 to 15 January 1978.

(Continued)

5. That specialists of the Civilian Personnel Office contact grievant for counseling and assistance, if necessary; (a) in the process of submitting an SF-172 for supplemental experience for any appropriate claim for time prior to 19 April 1976, (b) for specific career opportunities for which her experience and training qualify her, (c) for training courses which might improve her abilities to successfully take tests required for competitive promotion.

The agency requests that the Authority accept its petition for review of the arbitrator's award based upon the exception discussed below. The union did not file an opposition.

Pursuant to section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority (44 Fed. Reg. 44741), which are in effect with respect to this case, the rules of procedure set forth in 5 C.F.R. part 2411 (1978) remain operative with respect to arbitration cases, except that the word "Authority" is substituted, as appropriate, wherever the word "Council" appears in such rules.

Pursuant to section 2411.32 of the rules as so amended, review of an arbitrator's award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In its exception to the award, the agency contends that the award violates applicable law and appropriate regulations. In support of this exception, the agency cites a prior decision of the Federal Labor Relations Council and Civil Service regulations regarding overlong details to higher graded jobs and alleges that the grievant's right in this case to a retroactive promotion did not arise until the 121st day of her detail, which according to the agency did not begin for purposes of this case until June 8, 1977. The agency therefore requests that the Authority modify the arbitrator's award so that the grievant's retroactive temporary promotion would be effective the 121st day after June 8, 1977.

The Authority will accept a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates applicable law or appropriate regulations. In this case, however, the agency's petition does not contain a description of facts and circumstances to support its exception. In this regard, while the arbitrator noted that his authority was limited only to the question of compliance with the Joint Grievance Committee's recommendations after the June 8, 1977, date of their approval, the agency cites no law or regulation which would preclude the arbitrator from granting the grievant, in the circumstances of this case, a retroactive temporary promotion for the full period between June 8, 1977, and January 15, 1978. Nor does the agency present any support for its apparent assertion that such a limitation on the arbitrator's authority also limits the length of the grievant's detail to only that period after June 8, 1977. The Authority notes that the agency concedes that the grievant is entitled to the temporary promotion, contesting only the first 120 days thereof. Even if the agency is correct in its assertion that the grievant

is only entitled to a temporary promotion on or after the 121st day of her detail, it is clear from the arbitrator's award that the grievant's continuous assignment to the higher graded duties began more than 120 days before June 8, 1977. In this case the arbitrator found that the activity did not comply with the Joint Committee's recommendation regarding the grievant's continuous assignment to higher graded duties in a timely and reasonable manner and he awarded a remedy for that noncompliance. The facts and circumstances described by the agency do not support its assertion that such an award violates law or regulation. Therefore, the agency's exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules.

Accordingly, the agency's petition for review of the arbitrator's award is denied because it fails to meet the requirements of section 2411.32 of the rules for acceptance by the Authority of a petition for review of an arbitrator's award. The agency's request for a stay of the award is also denied.

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

cc: R. D. King
AFGE

UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

Internal Revenue Service,
Buffalo District

and

FLRC No. 78A-172

National Treasury Employees
Union, Chapter 58

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

According to the arbitrator's award, from March 1974 to December 1976 the grievant, a GS-11 Revenue Officer, was assigned full-time to a compliance program operated by the activity. Apparently contending that during this time the grievant had performed GS-12 duties for which he was entitled to receive a special achievement award under the parties' negotiated agreement, the union filed a grievance on behalf of the grievant. The issue to be resolved by the arbitrator was stipulated by the parties as follows:1/

> [W]hether Grievant was contractually entitled to receive a Special Achievement Award for his work performance in accordance with Article 9, Section 2 [of the agreement].2/ [Footnote added.]

Arbitrator's Award

At the arbitration hearing the activity raised a question of arbitrability. In this regard the activity argued that the gravamen of the issue was the proper grade level at which the grievant worked. The activity maintained that grievances concerning the entitlement to a special achievement award under Article 9, Section 2 of the negotiated agreement were not arbitrable because grievances over the grade level assigned to work is a matter for which a

1/ The parties also submitted an issue to the arbitrator concerning the fairness of a promotion appraisal of the grievant. However, the arbitrator's award as to that issue, set forth in Part (1) of his award, is not before the Authority in this case.

2/ According to the award, Article 9, Section 2 provides:

> Actual work performance is to be evaluated in relation to the reasonable performance requirements of the job for which an employee is paid. Where it has been administratively determined that an employee has performed:

(Continued)

statutory appeal procedure exists and which therefore, under Executive Order No. 11491, may not be raised under the negotiated grievance procedure. However, the arbitrator found that the grievance did not seek to challenge the grade level assigned to the grievant's work, but rather to require the activity to honor the grade level that it had originally assigned to that work. Therefore, the arbitrator found the grievance arbitrable and he proceeded to the merits.

On the merits, the arbitrator explained that nationally the compliance program work was graded at both GS-11 and GS-12 with the difference based on the level of difficulty of the program studies. The arbitrator observed that, during the six years of operation of the program in the Buffalo District, all revenue officers assigned to the program were GS-12's except the grievant. The arbitrator further observed that the grievant and another employee, a GS-12, worked as a team during the period of the grievant's assignment to the program without any distinctions as to the difficulty of the work performed by each. The arbitrator determined that these matters reflected the activity's judgment that for the Buffalo District the compliance program work was of the grade level GS-12. Therefore, he concluded that the grievant had performed sufficient GS-12 level work to be entitled to a special achievement award under the provisions of the negotiated agreement. Accordingly, his award as to this issue, set forth in Part (2) of the award, was: "[The grievant] is entitled to a Special Achievement Award under Article 9, Section 2."

Agency's Appeal

The agency filed a petition for review of the arbitrator's award with the Federal Labor Relations Council. This case was pending before the Council on December 31, 1978. In accordance with section 2400.5 of the transition rules of the Federal Labor Relations Authority (44 Fed. Reg. 44741) and section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215), the rules of procedure of the Federal Labor Relations Council, 5 C.F.R. part 2411 (1978), remain operative with respect to the present case except that the word "Authority" is substituted, as appropriate, wherever the word "Council" appears in such rules. Under section 2411.32 of the rules as so amended, the Authority accepted the agency's petition for review insofar as it related to the agency's exception which alleged that Part (2) of the arbitrator's award, finding that the grievant is entitled to a special achievement award, violates applicable law and appropriate regulation.3/ Both parties filed briefs.

(Continued)

1. higher graded duties for 50% or more of the previous 12 month period,

2. in a manner which fully meets the performance requirements of the higher graded duties,

such performance will be recognized by a Special Achievement Award.

3/ The agency requested and the Authority granted, pursuant to section 2411.47(f) of the rules of procedure, a stay of the award pending determination of the appeal.

Opinion

Section 2411.37(a) of the amended rules of procedure provides:

> (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Authority accepted the agency's petition for review insofar as it related to the agency's exception which alleged that Part (2) of the arbitrator's award, finding that the grievant is entitled to a special achievement award, violates applicable law and appropriate regulations. Since the Civil Servce Commission was responsible for prescribing regulations concerning the matters involved in this case,and since under section 902(b) of the Civil Service Reform Act of 1978[4/] this appeal must be resolved as if the Civil Service Reform Act had not been enacted, the Authority requested from the Office of Personnel Management (the successor agency to the Civil Service Commission with respect to the matters involved herein) an interpretation of Civil Service Commission regulations as they pertain to Part (2) of the arbitrator's award. The Office of Personnel Management replied in relevant part as follows:

> Part (2) of the award deals with the issue of whether the grievant is entitled to a special achievement award in accordance with Article 9, Section 2 of the agreement which provides, in part, the following:
>
> > Where it has been administratively determined that an employee has performed:
> >
> > 1. higher graded duties for 50% or more of the previous 12 month period,
> >
> > 2. in a manner which fully meets the performance requirements of the higher graded duties,
>
> such performance will be recognized by a Special Achievement Award....
>
> The arbitrator found that the grievant had performed sufficient GS-12 level work for a period greater than twelve months for him to be entitled, under Article 9, Section 2 of the negotiated agreement, to a special achievement award.

4/ The Civil Service Reform Act of 1978, Pub. L. No. 95-454, sec. 902(b), 92 Stat. 1224, provides:

> (b) No provision of this Act shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

The agency contends that the arbitrator, in finding that the grievant had performed GS-12 level work, had in effect made a classification determination and had thereby violated 5 CFR 511.603 et seq.

Subpart F of Part 511 of Title 5 of the Code of Federal Regulations relates to an employee's right to appeal the class, grade, or pay system of the official position of record, and the right of the agency to appeal any classification decision made by OPM with respect to any position in the agency.

In the case at bar the grievant did not request a change in the class, grade, or pay system of his officially assigned position; nor did the arbitrator order such changes. Since the classification of the grievant's official position was not at issue in Part (2) of the award, we conclude that the arbitrator did not violate 5 CFR 511.603.*

* In this connection please compare with the Civil Service Commission opinion to the Federal Labor Relations Council, June 1, 1977, in Federal Aviation Administration and Professional Air Traffic Controllers Organization, FLRC No. 76A-133.

Based on the foregoing interpretation of the Office of Personnel Management, we conclude that Part (2) of the arbitrator's award, finding that the grievant is entitled to a special achievement award, is consistent with applicable law and appropriate regulation.

Conclusion

For the foregoing reasons, we find that the arbitrator's award does not violate applicable law or appropriate regulation. Therefore, pursuant to section 2411.37(b) of the rules of procedure, we sustain the arbitrator's award and vacate the stay.5/

Issued, Washington, D.C., November 15, 1979

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

5/ In conformity with section 902(b) of the Civil Service Reform Act of 1978, the instant case was decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision does not prejudge in any manner either the meaning or application of related provisions of the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Order.

Item 1061-G-1 Y3.F31/21-3:9/case 26-28

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FLRA Report of Case Decisions and FSIP Releases

Contents of Package

This package should include the following items:

FLRA Report of Case Decision No. 26

FLRA Report of Case Decision No. 27

FLRA Report of Case Decision No. 28

If any of the above items are not included, please contact the Administrative Office, Federal Labor Relations Authority, 1900 E Street, NW., Room 7469, Washington, D. C. 20424 - telephone 202- 653-8040.

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 26 REPORT OF CASE DECISIONS February 12, 1980

UNFAIR LABOR PRACTICE CASES

1 FLRA No. 48 (December 31, 1979)

Department of Transportation, Federal Aviation Administration, Washington, D.C., Assistant Secretary Case No. 22-08590(CA). The ALJ, upon a complaint filed by the union (Professional Airway System Specialists) under E.O. 11491, found that the activity did not violate section 19(a)(1) and (3) of the Order by refusing to allow distribution of PASS organizational material/letters to employees through the agency's internal mailing system. The Authority adopted the findings, conclusions, and recommendation of the ALJ and dismissed the complaint. (Decision and Order attached.)

2 FLRA No. 51 (December 31, 1979)

National Treasury Employees Union, Washington, D.C., Assistant Secretary Case No. 41-6047(CO). The ALJ, upon a complaint filed by the activity (Bureau of Alcohol, Tobacco and Firearms), found that the union had violated section 19(b)(1) of E.O. 11491, by attempting to coerce a non-union employee to join the union as a condition for being nominated as an EEO counselor by the union. The Authority adopted the findings, conclusions, and recommendations of the ALJ, and issued a remedial order. (Decision and Order attached.)

2 FLRA No. 52 (December 31, 1979)

Social Security Administration, Mid-America Program Service Center, BRSI, Kansas City, Missouri, Assistant Secretary Case No. 60-5757(CA). The ALJ, upon a complaint filed by the union (AFGE Local 1336), found that (1) the activity had not violated section 19(a)(1) and (2) of E.O. 11491 when it lowered an employee's performance rating, and (2) the activity had violated section 19(a)(1) of the Order when it had placed in the employee's file a memorandum criticizing a union steward's representation of the employee. The Authority adopted the ALJ's findings, conclusions and recommendation; dismissed the union's

complaint as to the employee's lowered performance rating; and issued a remedial order as to the portion of the complaint concerning the memorandum disparaging the union's representation of the employee. (Decision and Order attached.)

NEGOTIABILITY CASES

2 FLRA No. 49 (December 31, 1979)

National Federation of Federal Employees, Local 1750 and Department of the Interior, Fish and Wildlife Service, Case No. 0-NG-57. The activity notified the union of its decision to reduce or terminate premium pay for standby duty. The union, without submitting any specific written proposal, advised the activity of its position that the matter of standby pay was negotiable and requested the agency's position. The agency responded by reaffirming its position that its decision was nonnegotiable; the union filed a petition for review with the Authority. The Authority determined that the union's petition did not present a proposal sufficiently specific and delimited in form and content as to permit the Authority to render a negotiability decision. Therefore, for the reasons set forth in its decision in the ACT, Alabama case, Case No. 0-NG-27 (Report No. 25), the Authority held that the union's petition did not meet the requirements for review prescribed in section 7117 of the Statute and section 2424.1 of the Authority's rules of procedure. Accordingly, the Authority dismissed the union's petition. (Decision attached.)

2 FLRA No. 50 (December 31, 1979)

National Federation of Federal Employees, Local 1363 and Headquarters, U.S. Army Garrison, Yongsan, Korea, Case No. 0-NG-94. The activity denied the union's request to negotiate over a change in vehicle safety requirements precipitated by a new traffic regulation of the Republic of Korea, claiming that the matter was nonnegotiable. The union filed a petition for review of the activity's position with the Authority, and also claimed the activity had refused to supply it with certain requested information. The Authority, for the reasons set forth in its decision in the ACT, Alabama case, Case No. 0-NG-27 (Report No. 25), held that since the union's petition did not present a proposal sufficiently specific and delimited in form and content as to permit the Authority to render a negotiability decision, the petition did not meet the requirements for review prescribed in section 7117 of the Statute and section 2424.1 of the Authority's rules of procedure. Accordingly, the Authority dismissed the union's petition. Additionally, the Authority

advised the parties that to the extent they were in dispute as to whether the activity improperly withheld information from the union that was reasonably available and necessary in connection with any bargaining obligation which may exist under the Statute, the proper forum in which to raise such issues was not a negotiability appeal but, rather, an unfair labor practice proceeding pursuant to section 7118 of the Statute. (Decision attached.)

2 FLRA No. 54 (January 4, 1980)

Veterans Administration Medical Center, Salisbury, North Carolina and American Federation of Government Employees, AFL-CIO, Local 1738, Case No. 0-NG-179. The activity appealed to the Authority from a union declaration made during the course of negotiations that two management proposals concerning employees serving as union stewards were "nonnegotiable." The Authority held that there is no basis in the language or legisative history of section 7117(c) of the Statute for an agency to file a negotiability appeal and, further, that the Authority's regulations do not provide such permission. Accordingly, the Authority dismissed the activity's petition. (Decision attached.)

2 FLRA No. 55 (January 9, 1980)

American Federation of Government Employees, AFL-CIO, Local 1617 and Department of the Air Force, Headquarters, Air Force Logistics Command, Kelly Air Force Base, Texas, Case No. 0-NG-39. The union sought to negotiate on the subject of certain activity guidance to supervisors concerning their appraisal of subordinates. The activity responded by stating that the matter was nonnegotiable. The union filed an unfair labor practice charge against the activity and, subsequently, a negotiability appeal. The Authority determined that to the extent the instant case arose out of an alleged unilateral change coupled with a refusal to bargain and a defense, essentially, that no change had occurred, the proper forum in which to raise such issues was not a negotiability appeal but rather, an unfair labor practice proceeding pursuant to sect n 7118 of the Statute. The Authority concluded that the union's negotiability appeal did not present issues that the Authority could appropriately resolve under section 7117 of the Statute and part 2424 of its rules and regulations, and therefore dismissed the appeal. (Decision letter attached.)

Appeals withdrawn:	Case No.	Date
	0-NG-91	January 4, 1980
	0-NG-203	January 4, 1980

ARBITRATION CASE

2 FLRA No. 53 (December 31, 1979)

Bremerton Metal Trades Council and Puget Sound Naval Shipyard (McCaffree, Arbitrator), Case No. 0-AR-61. The Authority dismissed the union's exceptions to the arbitrator's award as untimely filed under the Statute. (Decision letter attached.)

Attachments (8)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Department of Transportation,
Federal Aviation Administration,
Washington, D.C.

Respondent

and

Assistant Secretary
Case No. 22-08590(CA)

Professional Airway System
Specialists

Complainant

DECISION AND ORDER

On July 25, 1979, Administrative Law Judge Eli Nash, Jr. issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly that no exceptions were filed, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation. */

*/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Assistant Secretary Case No. 22-08590(CA) be, and it hereby is, dismissed.

Issued, Washington, D. C., December 31, 1979

Ronald W. Haughton Chairman

Henry B. Frazier III Member

Leon B. Applewhaite Member

FEDERAL LABOR RELATIONS AUTHORITY

FEDERAL LABOR RELATIONS AUTHOR
OFFICE OF ADMINISTRATIVE LAW JUDGE
Suite 700 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
PROFESSIONAL AIRWAY SYSTEM SPECIALISTS Complainant	
and	Case No. 22-08590(CA)
DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION Respondent	

WILLIAM B. PEER, Esq.
Barr & Peer
1899 L Street, NW.
Washington, D.C. 20036
For the Complainant

DOLPH DAVID SAND
and JAMES WHITLOW, Esqs.
Office of the Chief Counsel, AGC-14
Federal Aviation Administration
800 Independence Avenue, SW.
Washington, D.C. 20591
For the Respondent

Before: ELI NASH, JR.
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

This proceeding arose under Executive Order 11491, as amended. It was heard in Washington, D.C. on October 27, 1978, pursuant to a Notice of Hearing issued on August 10, 1978, by the Regional Administrator, Philadelphia Region, Labor-Management Services Administration (LMSA). The matter was initiated by a complaint filed by Professional Airway System Specialists (PASS) on November 2, 1977 alleging that the Federal Aviation Administration (Respondent) violated

Section 19(a)(1), (2), (3) and (5) by interfering wi i restraining the delivering of First Class mail to indiv ual employees in certain Federal Airway Facility units. The 19(a)(2) and (5) allegations were dismissed by the LMSA Regional Office. Subsequently, on July 21, 1978, the Assistant Secretary agreed with the Regional Administrator that the 19(a)(2) and (5) allegations had not been established but found, that a resonable basis existed for the allegation that the Activity violated Section 19(a)(1) and (3) of the Order by refusing to allow distribution of the Complainant's letters through the agency mail system, while at the same time permitting distribution of others. Although this proceeding was conducted before the Assistant Secretary of Labor for Labor-Management Relations, this decision is issued in the name of the Federal Labor Relations Authority pursuant to transition rules and regulations, Federal Register, Vol. 44, No. 1, January 2, 1979 (5 C.F.R. §2400.2).

At the hearing all parties were represented by counsel and afforded a full opportunity to adduce evidence, examine and cross-examine witnesses, argue orally and to file briefs.

Based upon the entire record in the matter, including all of the testimony adduced at the hearing and my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendation.

Findings of Fact

The basic facts in this matter are undisputed, and unless noted to the contrary there is no issue concerning the following matters.

PASS was organized in February 1977 with the purpose of organizing the employees working within the Airways Facilities Division and to represent those employees before Respondent.

The principal organizer for PASS is Howard E. Johannssen, who at the time of the hearing was the PASS president. At the hearing, Mr. Johannssen described his role in attempting to organize FAA employees by traveling throughout the country, meeting with numerous employees of the FAA facilities involved, contacting these employees by telephone, mail or other available means in order to get an interest and build a membership in the organization.

Mr. Johannssen further testified that because of the geographical location of the employees and the network of facilities throughout the nation, it would be impossible for anyone or any group of individuals to get to every facility, and talk to every person involved, and get their signature on a show of interest card. With regard to the centers involved, Mr. Johannssen testified that because of the

georgraphical locations of the facilities, and the period of time his organization had to gain a 30 percent showing of interest, that it would be impossible for any one or any group of individuals to get to every facility and to talk to every person involved. He felt that in remote facilities, for instance, it was impossible to contact the employees other than by mail.

Mr. Johannssen testified that he never talked to the agency officially about the difficulty in reaching employees in the sectors involved. Nor did he ask Respondent's permission to mail the letters in this matter.

The facilities involved are air traffic control centers where large volumes of electrical equipment used for the movement of air traffic through the air space system are located. Other facilities such as towers at airports contain remote navagational equipment used by aircraft and air traffic controllers. The size of these facilities varies from 1 employee to 100 employees.

At the time of PASS' mass mailings, other labor organizations possessed representation status for many of the employees for which PASS was seeking status. The NAGE/FASTA, National Association of Government Employees - Federal Aviation Science and Technical Organization and the American Federation of Government Employees represented approximately 80 percent of the 8000 employees involved.

In addition NABID and the Teamster's represented employees in unit in Oakland Bay Tracon and Chicago O'Hare, respectively. Approximately 2000 employees were represented.

1/ These employees were all included in a national unit found appropriate by the Assistant Secretary in Federal Aviation Administration, Eastern Region, A/SLMR No. 600, including employees in the following locations:

Washington Headquarters, the National Aeronautical Facilities Experimental Center, Atlantic City, New Jersey, the Aeronautical Center, Oklahoma City, Oklahoma, and the Airway Facilities Division employees represented exclusively at the following locations: the St. Paul, Minnesota Airway Facilities Sector; the Farmington, Minnesota Airway Facilities Sector; the Minneapolis, Minnesota Airway Facilities Sector; the Chicago Aurora Airway Facilities Sector; the Chicago Midway Airway Facilities Sector; the

[Continued on next page]

The NAGE/FASTA nationwide unit and the Respondent consummated a collective bargaining agreement on September 27, 1977 which was approved by Respondent's Administrator Langhorne M. Bond on December 1, 1977. A certification existed up to September 21, 1977. AFGE was granted certification on September 21, 1976 and FASTA was granted certification on April 27, 1977.

Sometime prior to September 1977, Mr. Johannsen obtained from Respondent a listing of employees working in various airway sectors and the locations of those sectors. On September 6, 1977 PASS mailed approximately 8000 letters in plain white envelopes to employees in the approximately 90 to 95 facilities. The letter contained a notice, an application for membership, an article from the Federal Times and an employee authorization card. The letters were mailed under a First Class mailing permit.

The record indicates that a secretary in one of the regional offices, who was part of the unit already certified, opened a letter and upon finding that it contained PASS material reported it to her sector manager. The sector manager in turn reported the letter to Mr. Herbert M. Beard, a senior labor relations specialists for Respondent.

At the hearing, Mr. Beard testified that upon learning of the mailings he reviewed certain agency directives concerning mailings, in general, as distinct from mailings that originate from a labor organization. Relying on Department of Transportation Directive 3710.2 2/ and FAA Directive 1770.11A. Mr. Beard advised the sector manager

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1/ [Cont'd]
Chicago O'Hare Airway Facilities Sector, the Longmont, Colorado Airway Facilities Sector, the Tampa, Florida Airway Facilities Sector; the Oakland, California Airway Facilities Sector; the McClellan Air Force Base Airway Facilities Sector; the Albuquerque, New Mexico Maintenance Engineering Field Office, the Oklahoma City, Oklahoma Field Maintenance Party, the Eastern Region Headquarters; the Pacific-Asia Region; the Tulsa, Oklahoma Airway Facilities Sector; the Denver, Colorado Airway Facilities Sector; and the Alaskan Region.

2/ b. Literature. Labor organization house organs, handbills, notices or other literature shall not be distributed within DOT facilities by means of government mail or messenger services. Employees may distribute literature in nonwork
[Continued on next page]

and all other sector managers except the Pacific region that if such mail were identified as mass mailing, whatever action which seemed appropriate should be taken to return the letters through postal channels.

Mr. Beard further testified that two factors entered into ordering the mail returned. First, he was aware of an existing certification bar and that his review of the directives was in the context of that bar. Secondly, although not a primary consideration, the mailing was en mass or bulk.

The record disclosed that employees at many of Respondent's centers receive personal mail including newspapers, magazines and advertising materials on a regular basis in the mails and that the articles are delivered through Respondent's internal mail system. Approximately 2,500 envelopes were returned to PASS and marked "return to sender." Further, the evidence showed that Respondent had on one occasion allowed Professional Air Traffic Controllers Organization (PATCO) to make mass or bulk mailings from Respondent's headquarters. However, at the time of that mailing PATCO was the exclusive representative of the employees involved.

Issues

PASS contends that Respondent violated Sections 19(a)(1) and (3) by frustrating its drive to solicit a 30 percent showing of interest which would have permitted it to challenge FASTA/NAGE with a representative petition. PASS asserts that Respondent's primary defense that PASS lacked "equivalent status" with FASTA/NAGE and thus Respondent could properly reject its' attempts to use the internal mailing system is misplaced. It argues that the 19(a)(3) violation is based not on Respondent's sponsoring, controlling or assisting another labor organization but rather on its denying PASS

2/ [Cont'd] areas during the nonwork hours of the distributing and receiving employees. Non-employee union representative should generally not be granted permission to distribute literature on government property. An exception to this rule occurs when the union has no other practicable means of communicating with the employees. However, when permission is granted to non-employee representatives to enter the property, they should not be authorized to either solicit members or distribute literature in work areas during work time. When the labor organization is an exclusive representative, permission, conditions and restrictions in regard to the distribution of labor organization literature should be contained in the negotiated agreement. (See also paragraphs 7c and 7d.)

access to the employees because PASS had no other reasonable, practical or legitimate means of soliciting employees. As already stated, Respondent urges that the issue in this matter is whether PASS had "equivalent status" with AFGE or FASTA, the two recognized bargaining units for airway facilities employees in regions where the Respondent refused to distribute Complainant's bulk mailing.

DISCUSSION AND CONCLUSIONS

In Department of the Army, U.S. Army Natick Laboratories, Natick Mass., A/SLMR No. 263 and U.S. Department of Interior, Pacific Coast Region, Geological Survey Center, Menlo Park, California, A/SLMR No. 143; Department of the Navy, Navy Commissary Store Complex, Oakland, CA, A/SLMR No. 654 the Assistant Secretary concluded that a union which has not raised a question concerning representation by virtue of its action in filing a representation petition or become an intervenor in such a pending representation petition, does not enjoy "equivalent status" within the meaning of Section 19(a)(3) of the Order. Also, in the absence of "special circumstances" a labor organization not possessing "equivalent status" with an incumbent exclusively recognized representative, may not enjoy the use of the services and facilities of the activity involved for purposes of organizational activities. In the absence of a showing of special circumstances, i.e. a showing that the employees involved are inaccessible to reasonable attempts by a labor organization to communicate with them outside the agency's or activity's premises, the granting of access to a union not enjoying "equivalent status" is violative of Section 19(a)(3) of the Order and constitutes improper pre-election conduct justifying the setting aside of an election. U.S. Army Natick Laboratories and Geological Survey Center, Menlo Park supra; Defense Supply Agency, Defense Contract Administration Services, Region SF, Burlingame, California, A/SLMR No. 247.

The Assistant Secretary noted in "Natick" "that before an agency or activity grants access to its facility by non-employee representatives of a labor organization, it must ascertain that the labor organization involved has made a diligent, but unsuccessful, effort to contact the employees away from the agency or activity premises and that its failure to communicate with the employees was based on their inaccessibility. It appears that irrespective of the existence of "special circumstances", an agency or activity could be engaging in conduct violative of Section 19(a)(3) of the Executive Order if it allow access to its premises without first inquiring into the past efforts of the labor organization which is requesting either use of its premises or facilities.

The cases make it clear that where there is no question concerning representation exists an agency will be compelled to permit use of its facilities and services only in rare cases of inaccessibility to other modes of communication. Further, there appears to be an affirmative responsibility on the agency or activity to ascertain whether a labor organization seeking use of its facilities and services has made a diligent, but unsuccessful effort to contact employees away from the agency or activity's premises and that the failure to communicate with the employees was based on their inaccessibility. There is ample justification for such procedure and the question of whether or not employees are inaccessible should be raised with the activity or agency.

In its brief Complainant urges that it was denied access to employees and that it had no other practical or legitimate means of soliciting employees. Yet it made no effort to communicate this difficulty to the Respondent, who has a responsibility to make such a determination under the case law, but instead sought directly to use the internal mailing system before any such determination could be made. In the circumstances, it is my view that Respondent faced with allowing the use of its facilities without making a determination as to inaccessibility was correct in not distributing the mail through its internal mailing system. Furthermore, Respondent was correct in noting that it would be subject to unfair labor practice complaints from the certified labor organizations had it delivered the mail through its internal mailing system where no question concerning representation had been raised and where it had not made a determination as to the employees accessibility.

With respect to whether or not employees were inaccessible outside the Respondent's premises, the evidence is clear that the facilities involved were geographically scattered. However, there is no showing that Complainant made a diligent effort to contact employees prior to the mailing or that such efforts to contact employees would have been futile. Indeed the evidence shows that after a limited effort by telephone Complainant made its decision to use the mails. Since it has not been established that the employees involved were beyond the reach of reasonable efforts by PASS to communicate with them other than by mail, in view of the existing certification bars and the lack of a question concerning representation, it is found that Respondent did not violate Sections 19(a)(1) and (3) of the Order by returning the mailings.

It is also found that there is no disparity of treatment in this matter with respect to mailing or to distribution of mails for other labor organizations. With regard to the latter, Respondent indeed distributed mailings for PATCO.

however, at the time of that single distribution, PATCO was an exclusive representative in the unit in which the distribution occurred, thus raising an entirely different question. Finally, since it is found that no question concerning representation existed and that Complainant did not exhaust reasonable efforts to communicate with employees other than by mailing, it is unnecessary to pass on the question of what effect Respondent's directives had on its refusal to distribute the PASS organizational material while distributing personal mail at its facilities.

Recommendation

In view of the findings and conclusions made above, I recommend that the Federal Labor Relations Authority dismiss the Complaint herein alleging a violation of Section 19(a) (1) and (3).

Eli Nash, Jr.

ELI NASH, JR.
Administrative Law Judge

Dated: 7/25/79
Washington, D.C.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D. C.

National Treasury Employees Union,
Washington, D.C.

Respondent

and

Assistant Secretary
Case No. 41-6047(CO)

Bureau of Alcohol, Tobacco and
Firearms, Washington, D.C.

Complainant

DECISION AND ORDER

On July 10, 1979, Administrative Law Judge Edwin S. Bernstein issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had violated section 19(b)(1) of Executive Order 11491, as amended, and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, the Authority

hereby adopts the Administrative Law Judge's findings, conclusions and recommendations. */

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the National Treasury Employees Union and NTEU Chapter 88 shall:

1. Cease and desist from:

(a) Coercing non-union members to join National Treasury Employees Union as a condition for being nominated as an Equal Employee Opportunity Counselor by the Union.

(b) In any like manner, interfering with, restraining or coercing employees in the exercise of their rights assured by the Executive Order.

2. Take the following affirmative action to effectuate the purposes and policies of the Executive Order:

(a) Post at the offices of National Treasury Employees Union Chapter 88, and at all places where notices to members and other employees are customarily posted, including facilities provided by the Activity at the Bureau of Alcohol, Tobacco and Firearms offices in the Central Region, copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the President of NTEU and President of NTEU Chapter 88 and shall be posted and maintained by the President of NTEU Chapter 88 in conspicuous places, including bulletin boards and all other places where notices to union members are customarily posted. The President of Union Chapter 88 shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

*/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

APPENDIX

NOTICE TO ALL MEMBERS AND EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR MEMBERS AND OTHER EMPLOYEES OF THE

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, CENTRAL REGION, THAT:

WE WILL NOT coerce non-union members to join the National Treasury Employees Union as a condition for being nominated as an Equal Employment Opportunity Counselor by the Union.

WE WILL NOT in any like manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Executive Order.

_____

President, National Treasury
Employees Union

_____

President, National Treasury
Employees Union, Chapter 88

Dated: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address is: Room 1638, Dirksen Federal Building, 219 South Dearborn Street, Chicago, Illinois 60604; and whose telephone number is: (312) 353-6746.

(b) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., December 31, 1979

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, WASHINGTON, D.C. Complainant	
and	Case No. 41-6047(CO)
NATIONAL TREASURY EMPLOYEES UNION, WASHINGTON, D.C. Respondent	

CARL R. NOLTE, ESQ.
MICHAEL SITCOV, ESQ.
Office of Chief Counsel
THERESE FALLER, Labor Relations Specialist
Bureau of Alcohol, Tobacco and Firearms
United States Treasury Department
Washington, D.C. 20226
For the Complainant

GERI PALAST, ESQ.
Assistant Counsel
National Treasury Employees Union
1730 K Street, NW.
Washington, D.C. 20006
For the Respondent

Before: EDWIN S. BERNSTEIN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

On June 29, 1978, the Bureau of Alcohol, Tobacco and Firearms (BATF) filed a Complaint against the National Treasury Employees Union (NTEU). The complaint alleged that the Union violated subsection 19(b)(1) of Executive Order 11491, as amended (the Executive Order) in that Mr. Martin J. Connell, the President of NTEU's Chapter 88, attempted to coerce Ms. Carol A. Jordan, a non-union member, to join the union as a condition for being nominated as an Equal Employment Opportunity (EEO) counselor by the union.

Pursuant to a Notice of Hearing dated September 5, 1978, a hearing was held before me in Detroit, Michigan on November 14, 1978. Both parties were represented by counsel, examined and cross-examined witnesses, presented evidence, and filed post-hearing briefs. Upon the entire record, I make the following findings of fact, conclusions of law and recommended order.

Findings of Fact

NTEU and NTEU Chapter 88 are the exclusive representatives of the bargaining unit employees of BATF, Central Region. Article 15(2) of the parties' collective bargaining agreement reads:

> "When the Employer finds it necessary to appoint additional EEO counselors for Bargaining Unit employees, or to replace such existing Counselors, the Employer will select the person to fill the vacant counselor position from a list of at least five (5) qualified nominees submitted by the Union."

The EEO Counsel position involved in this complaint is in Detroit. By letter dated January 4, 1978, Mr. L.E. Dallas, Regional Administrative Officer, BATF Central Region requested Mr. Martin J. Connell, President to NTEU Chapter No. 88 to nominate employees for EEO counselor positions in Cleveland and Cincinnati. On January 5, Mr. Dallas again wrote Mr. Connell, this time requesting the union to appoint two representatives to the EEO Affirmative Action Advisory Committee. In subsequent telephone conversations, Mr. Dallas told Mr. Connell that if he could not find 5 nominees he could submit less names. By letter of February 3, 1978, Mr. Connell submitted four names for the Cincinnati position and one for the advisory committee position.

By letter of February 13, 1978, Mr. Dallas informed Mr. Connell that the Detroit EEO Counselor wished to be replaced, requested the union to submit names of nominees, and suggested that the Union consider Ms. Carol Jordan who was interested in the position.

The complaint is based on a five minute telephone conversation between Mr. Connell and Mr. Jordan on March 3, 1978. The participants offered substantially similar accounts. On March 1, Mr. Connell called Ms. Jordan's office and asked her to return his call which she did on March 3.

Ms. Jordan testified that Mr. Connell informed her that he was the Union representative, that her name was given to him for consideration for the position of union counselor, and that he had checked with fellow employees about her and learned that she was not a union member. Mr. Connell stated that it would put him in a bad position to nominate a non-union member if there were union members available and suggested that she join the union. When she stated that she did not realize that union membership was a requirement, he said that it was not but repeated that it would put him in a bad position if he nominated a non-union member.

Ms. Jordan further stated that when she asked him if his conversation meant that he would not nominate her unless she joined the union, he replied, "no, I don't mean I won't put your name in, but you can understand my position, and all you have to do is fill out the form for membership."

Mr. Connell testified that he "recognized that she might have some special qualifications for the job, but I have noted that you are not a union member, and I said while in essence that doesn't preclude my nominating you, it would certainly make it easier for me to nominate you if you were a union member."

The union could not find any other nominees for the Detroit position and Mr. Connell nominated no one for that position. By letter dated May 19, 1978, BATF wrote Mr. Connell that since BATF had not received the required nominees within 90 days of its request, Ms. Jordan had been selected for Detroit. The letter also designated selections for the Cleveland and Cincinnati positions.

At the hearing, Mr. Connell further testified:

> Q. Did you intend to coerce her into joining the union?
> A. I think that's far too strong a word. I would have liked for her to join the union, and I felt it would be a lot easier for me to nominate her.

Mr. Connell admitted that in his conversation with Ms. Jordan he did not ask her about her prior experience as an EEO counselor and that he made no other inquiries about this. He stated that with respect to his prior nominations for EEO counselor, "I don't think I've ever nominated a non-union member". Later in his testimony he stated, "I was

hopeful that the result of my telephone call would be that she would join the union but I sure was not in a position - and didn't put any significant pressure on." [emphasis added]

He further testified in answer to my questions.

> "A. . . . I was not at all happy with the situation where we simply had no nominees from Detroit other than Carol Jordan, and I was hopeful that in my procrastination another nominee would come up, but I was not optimistic and I resigned myself to the fact that if we were to make a nominee it would be Carol Jordan.
> Q. So you hesitated to nominate her?
> A. I was hesitant.
> Q. Delaying as long as you could?
> A. Right, and I planned to wait even longer and felt that I had no rush and in all honesty I was hopeful that she would join the union someplace along the line."

Conclusions of Law

Subsection 19(b)(1) of the Executive Order states:

> "A labor organization shall not interfere with, restrain, or coerce an employee in the exercise of his rights assured by this Order."

Subsection 1(a) reads:

> "Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from such activity; and each employee shall be protected in the exercise of this right." [Emphasis added]

I find that in his telephone conversation with Ms. Jordan on March 3, 1978, Mr. Connell attempted to coerce Ms. Jordan into joining his union in violation of Section 19(b)(1) of the Executive Order. As indicated by his testimony and demeanor at the hearing, his primary interest during the conversation was whether or not she was a union member. He clearly communicated to her that if she joined the union he would nominate her and if she failed to join he probably

would not. As he indicated by his testimony, Mr. Connell did not nominate Ms. Jordan solely because she failed to join the union. She was quite correct in feeling pressured. He intended to pressure her and he did pressure her.

I do not agree with the union that the violation was rendered de minimus or cured by management's subsequent appointment of Ms. Jordan after Mr. Connell's inaction.

The union attempted to justify Mr. Connell's distrust of non-union employees by claiming that such persons might be anti-union. While determining whether an applicant is anti-union is valid, as indicated by FPM Letter 713-29, II B5(2), it is improper to reject a candidate solely because she is not a union member.

The union also argued that BATF lacked standing to assert this complaint based on coercion of an individual employee. I disagree. Section 1(a) of the Executive Order reads in part:

> "The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section, and that no interference, restraint, coercion, or discrimination is practiced within his agency to encourage or discourage membership in a labor union."

In furtherance of this policy, 29 CFR 203.1 reads:

> "§203.1 Who may file Complaints. A complaint that an activity or labor organization has engaged in any act prohibited under section 19 of the order or has failed to take any action required by the order, may be filed by an employee, an activity, agency, or a labor organization."

Recommendation

Having found that Respondent has engaged in conduct prohibited by Section 19(b)(1) of Executive Order 11491, as amended, I recommend that the Federal Labor Relations Authority (the Authority) adopt the following Order designed to effectuate the purposes and policies of the Executive Order.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, 29 C.F.R. 203.26, and Section 2400.2 of the Transition Rules and Regulations. (5 C.F.R. 2400.2), the Authority hereby orders that National Treasury Employees Union shall:

1. Cease and desist from

a. Coercing non-union members to join National Treasury Employees Union as a condition for being nominated as an Equal Employees Opportunity Counselor by the Union.

b. In any like manner, interfering with, restraining or coercing employees in the exercise of their rights assured by the Executive Order.

2. Take the following affirmative actions to effectuate the purposes and policies of the Executive Order.

a. Post at National Treasury Employees Union Chapter 88's office and at Bureau of Alcohol, Tobacco and Firearms offices in the Central Region copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the President of NTEU and President of NTEU Chapter 88 and shall be posted and maintained by the President of Union Chapter 88 in conspicuous places, including bulletin boards and other places where notices to union members are customarily posted. The President of Union Chapter 88 shall take reasonable steps to insure that such notices are not altered, defaced or covered by other material.

b. Pursuant to Section 203.27 of the Regulations notify the Authority in writing within 30 days from the date of the Order as to what steps have been taken to comply with the Order.

Edwin S. Bernstein

EDWIN S. BERNSTEIN
Administrative Law Judge

Dated: 10 JUL 1979
Washington, D.C.

APPENDIX

N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

We hereby notify our members and other employees of the Bureau of Alcohol, Tabacco and Firearms, Central Region that:

WE WILL NOT coerce non-union members to join National Treasury Employees Union as a condition for being nominated as an Equal Employment Opportunity Counselor by the Union.

WE WILL NOT in any like manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Executive Order.

_____

President, National Treasury
Employees Union

_____

President, National Treasury
Employees Union, Chapter 88

Dated:_____

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, whose address is Suite 1201A. Insurance Exchange Building, 175 West Jackson Boulevard, Chicago, Illinois 60604.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Social Security Administration,
Mid-America Program Service Center,
BRSI, Kansas City, Missouri

Respondent

and

Assistant Secretary
Case No. 60-5757(CA)

American Federation of Government
Employees, AFL-CIO
Social Security Local 1336

Complainant

DECISION AND ORDER

On July 3, 1979, Administrative Law Judge Edwin S. Bernstein issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent violated section 19(a)(1) of Executive Order 11491, as amended, when it placed in an employee's file remarks disparaging a union steward's performance of his duty in representing the employee, and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge found further that the Respondent had not violated section 19(a)(1) and (2) of the Order when it lowered an employee's performance rating, and therefore recommended that the remainder of the complaint, relating thereto, be dismissed. Thereafter, the Respondent filed exceptions with respect to that portion of the Administrative Law Judge's Recommended Decision and Order finding a violation.

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of

the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the Respondent's exceptions, 1/ the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendations. 2/

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Social Security Administration, Bureau of Retirement and Survivors Insurance, Mid-America Program Service Center, shall:

1. Cease and desist from:

(a) Publishing memoranda disparaging and deprecating the representation of employees by union representatives.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Order:

(a) Post at its facilities at the Mid-America Program Service Center, Kansas City, Missouri, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Mid-America Program Service Center, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Social Security Administration, Bureau of Retirement and Survivors Insurance, Mid-America Program Service Center shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

1/ The Respondent excepted to the Administrative Law Judge's finding that placing in an employee's file a summary disparaging the union representative's performance of his representational duty constituted publication. The Authority agrees with the Administrative Law Judge's conclusion in that respect, and notes in addition that uncontradicted evidence establishes that the Respondent also gave a copy of the summary directly to the employee.

2/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E. O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

(b) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS HEREBY FURTHER ORDERED that the portion of the complaint in Assistant Secretary Case No. 60-5757(CA) found not violative of the Executive Order be, and it hereby is, dismissed.

Issued, Washington, D.C., December 31, 1979

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT publish memoranda disparaging or deprecating the representation of employees by their union representatives.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, whose address is: City Center Square, Suite 680, 1100 Main Street, Kansas City, Missouri 64105; and whose telephone number is: (816) 374-2199.

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
1111-20th Street, NW., Suite 700
Washington, D.C. 20036

In the Matter of	:	
	:	
SOCIAL SECURITY ADMINISTRATION MID-AMERICA PROGRAM SERVICE CENTER, BRSI, KANSAS CITY, MISSOURI	:	
Respondent	:	
	:	
and	:	Case No. 60-5757(CA)
	:	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, SOCIAL SECURITY LOCAL 1336	:	
Complainant	:	

Francis X. Dippel
Management Representative
Mid-America Program Service Center
Social Security Administration
1220 High Rise Building
6401 Security Boulevard
Baltimore, Maryland 21325
For the Respondent

Barbara M. Vache, Esq.
905 North Seventh Street
Kansas City, Kansas
For the Complainant

Before: EDWIN S. BERNSTEIN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

On June 15, 1978, American Federation of Government Employees, AFL-CIO, Social Security Local 1336 (the Union) filed a Complaint against Social Security Administration, Mid-America Program Service Center, BRSI (the Activity). The Complaint, as amended on October 6, 1978 alleged that the Activity violated Subsections 19(a)(1) and (2) of Executive Order 11491, as amended (the Executive Order) in that Ms. Barbara Reed, the Assistant

Manager of Module 34, (1) defamed in writing Mr. Carl Harper, Head Steward of Section VI and (2) lowered Mr. James Scott's performance rating for the period from October 1, 1976 through September 30, 1977 as a reprisal becaused he obtained Union representation..

Pursuant to a Notice of Hearing dated October 13, 1978, a hearing was held before me in Kansas City, Missouri on December 14, 1978. Both parties were represented by counsel, examined and cross-examined witnesses, presented evidence, and filed post-hearing briefs. Upon the entire record, I make the following findings of fact, conclusions of law, and recommended order.

Findings of Fact

Following a meeting on September 19, 1977 with James H. Scott and his Head Steward, Carl E. Harper, Mr. Scott's supervisor, Barbara Ann Reed issued a lowered performance appraisal for Mr. Scott and issued a memorandum criticizing Mr. Harper's conduct at the meeting. The issues are whether the lowered performance appraisal and/or the criticisms of Mr. Harper violated Subsections 19(a)(1) or (2) of the Executive Order.

Following a February 10, 1977 meeting in which she discussed Mr. Scott's job performance, Ms. Reed summarized her comments in a memorandum to Mr. Scott, stating:

> "I told you that I have no particular criticisms of your work at this time. I feel that you have maintained the high level of performance indicated by your current appraisal. You have the experience and knowledge to be competent in all aspects of your job and carry out all assignments and case work independently and efficiently: You rarely receive a QA error and have need of few consultations with TA or other technicians."

Following another meeting with Mr. Scott on June 6, 1977, Ms. Reed complained that Mr. Scott and others had been engaging in excessive talking and non-productive, bad habits. She suggested that he might find it useful to keep his own private tally of cases worked and non-productive conversations each day. She stated that three weeks earlier the module manager attempted to rearrange desks of persons in the module to alleviate the excessive talking and non-productive activities but since it was met with vigorous opposition it was dropped with the alternative suggestion made by members of the module of allowing for a period of improvement. She further indicated that since the trial period had ended, interviews were being conducted with persons, including him, who presumably had not improved during the trial period.

Following another meeting with Mr. Scott on July 26, 1977, Ms. Reed noted a "very definite decline from your level of efficiency at the end of the last rating period." She indicated that she found 12 errors in 53 of his cases that were reviewed, that the errors seemed to be due primarily to carelessness rather than to lack of knowledge, that others needed to assist him in keeping up with the backlog, that his output had declined, and that he seemed to have suffered a loss of enthusiasm and motivation regarding his work.

Following an August 26, 1977 meeting with Mr. Scott, Ms. Reed again advised him that she did not feel that he was performing at the level of his current appraisal. She complained that occasionally he did not honor dispatch times, that recently numerous non-moving folders were located on his desk. She indicated specifically how she planned to rate him for the current period in each of the various rating categories.

Mr. Scott then discussed the proposed lowered rating with his Union Head Steward, Mr. Carl Harper who by note to Ms. Reed dated September 19, 1977 requested a meeting. The note contained the following language:

> "The nature of the problem is performance related and deals primarily with a performance interview wherein you (illegible) you are contemplating a overall lowering of Mr. Scott's appraisal in every item. Your decision to do so is arbitrary and capricious in light of the supervisory guidelines and current policy and practice as established by our section chief, Mr. Copeland."

Ms. Reed met with Mr. Scott and Mr. Harper later that day. Mr. Scott testified that the meeting was heated and he thought that Ms. Reed believed that Mr. Harper threatened to file a grievance if Mr. Scott's appraisal was not changed. Mr. Harper testified that the meeting was harmonious and that Ms. Reed listened, took notes, but did not provide much feedback.

Ms. Reed prepared a 3 page memorandum in which she set forth her recollection of what transpired at and her views regarding the September 19, 1977 meeting. The memorandum indicated that Mr. Harper threatened that a grievance would be filed unless she changed Mr. Scott's proposed ratings. Her summarized views included opinions that Mr. Scott had a poor knowledge of the facts, was poorly prepared for the meeting, and lied; that the sole purpose of the meeting was to embarrass, intimidate and threaten her; and that Mr. Harper did a poor job of representing Mr. Scott.

Ms. Reed prepared the memorandum on September 19 and gave a copy to her supervisor, Kathleen A. Gorman. On September 21, at Ms. Gorman's direction, Ms. Reed signed and dated the memorandum and placed a copy in Mr. Scott's 7B extension file.

On November 4, 1977, Mr. Scott received his performance ratings for the year from October 1, 1976 through September 30, 1977. The ratings were identical to the ratings that Ms. Reed showed to Mr. Scott at the August 26, 1977 meeting.

The Union filed an informal charge in this matter on March 17, 1978. The Activity's Labor Management Relations Bulletin dated May 1, 1978 contained the following notice to supervisors:

> During the past month, the PSC received an unfair labor practice charge that claimed management violated Section 19(a)(1), (2), (4), and (5) of Executive Order 11491 as amended. Regarding this charge, we would like to remind managers that the disparagement or the exhibition of disdain for a union official or representative while he or she is performing authorized representational activities and in the presence of one or more bargaining unit employees may be an act which is a violation of Section 19(a)(1) of the Executive Order. Such action is held to have a chilling effect upon an employee's exercise of his or her Section 1(a) rights to form, join, or assist a labor organization. Although you can express your opinions candidly in a private conversation between yourself and a union representative acting in an official capacity, you should not in any case disparage or show disdain for a union official or representative acting in an official capacity and in the presence of a bargaining unit employee.

On June 29, 1978, the Activity sent the following letter to the Complainant:

> Despite the fact that you have not indicated any intention to accept any of management's offers for informal settlement of this charge, we have decided to remove the written summary of Ms. Reed's September 19, 1977, meeting with Mr. James Scott and Mr. Carl Harper from Mr. Scott's SF-7B Extension File. By so doing, we are not, even by

> implication, admitting to any violation of the Executive Order. However, we do feel that this summary does not add useful information to the employee's file, and since it is the alleged basis of your Unfair Labor Practice Complaint, we wish to hereby demonstrate further our good faith in attempting to resolve that complaint.

On November 16, 1977, Mr. Scott filed a grievance in which he questioned and sought revision of his recent performance appraisals. After a hearing, the grievance examiner found that the evaluations were just and fair and denied relief to the grievant.

Mr. Harper and the Activity's management had previously disagreed in June 1977 when Ms. Gorman wished to rearrange desks in the module and because of employee opposition, in which Ms. Harper represented the employees, the Activity dropped the plan.

In the summer of 1977, Ms. Reed considered lowering the ratings of two other employees, Richard Gutierrez and Shirley Shaw but after meeting with these employees, Ms. Reed was persuaded not to lower their ratings and these individuals were subsequently promoted. These employees were assisted by the Union although not represented at meetings by the Union in these matters. It is not clear whether or not the Activity knew that the Union assisted the employees.

Conclusions of Law

There is no evidence that Mr. Scott received a lower performance rating because of his union activities or because he obtained union assistance. The rating that he received was identical in all categories to the rating that his supervisor advised him of before the September 19, 1977 meeting and was consistent with warnings that he received in June, July and August. Furthermore, since the issue of the propriety of the performance ratings was raised in a grievance procedure, Section 19(d) of the Executive Order bars consideration of the issue under unfair labor practice procedures. Equal Employment Opportunity Commission, A/SLMR 707 (1976); Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, A/SLMR 570 (1975).

However, I find that in placing Ms. Reed's September 21, 1977 summarization memorandum in Mr. Scott's 7B Extension File, the Activity violated Section 19(a)(1) of the Executive Order. Although Ms. Reed was obviously provoked by Mr. Harper and felt threatened and intimidated, her statements to the effect that Mr. Harper did a poor job of representing Mr. Scott are remarks disparaging a union representative in the performance of his duty which interfere with, restrain, or coerce an employee in the

exercise of rights assured by the Executive Order. See: National Labor Relations Board, Region 17, and National Labor Relations Board, A/SLMR 671 (1976); Internal Revenue Service Center, Philadelphia Service Center, Philadelphia, Pennsylvania, A/SLMR No. 771 (1976); Department of Transportation, Federal Aviation Administration, Airway Facilities Sector, Tampa, Florida, A/SLMR 725 (1976). Ms. Reed had every right to prepare the summarization and show it to her supervisors but when the summarization, which deprecated the union steward's representation of Mr. Scott, was placed in the employee's file, it constituted publication, at least to the employee, and then violated Section 19(a)(1).

I do not agree with the Activity that their removal of the summarization and the issuance of a notice in their bulletin to supervisors rendered the violation de minimus or moot. In support of this argument, the Activity cites Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia, A/SLMR 967 (1977). However, in that case the violation was found to be de minimus because the offending material was removed immediately. In the case at hand, the Activity waited over 9 months before removing the summarization. Although that removal provided part of the remedy, it did not cure the violation or render it de minimus.

Recommendation

Having found that Respondent has engaged in conduct prohibited by Section 19(a)(1) of Executive Order 11491, as amended, I recommend that the Federal Labor Relations Authority (the Authority) adopt the following Order designed to effectuate the purposes and policies of the Executive Order.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26 of the regulations thereunder, the Authority hereby orders that Social Security Administration, Mid-America Program Service Center, BRSI, Kansas City, Missouri shall:

1. Cease and desist from:

(a) Publishing memoranda disparaging and deprecating the representation of employees by union representatives.

(b) In any like manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Executive Order.

2. Take the following affirmative actions to effectuate the purposes and policies of the Executive Order:

(a) Post at its facilities copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the official in charge of the Activity and posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The official in charge of the Activity shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to 29 C.F.R. 203.27 and Section 2400.2 of the transition rules and regulations, notify the Authority in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Edwin S. Bernstein

EDWIN S. BERNSTEIN
Administrative Law Judge

Dated: July 3, 1979
Washington, D.C.

UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

National Federation of Federal
Employees, Local 1750

(Union)

and

Case No. 0-NG-57

Department of the Interior,
Fish and Wildlife Service

(Activity)

DECISION ON NEGOTIABILITY APPEAL

In 1975, National Federation of Federal Employees, Local 1750 (the union) was certified as the exclusive representative of all professional and nonprofessional employees in the National Fish Hatcheries of Region 4, U.S. Fish and Wildlife Service (the activity), but the parties have never negotiated a collective bargaining agreement. Since 1969, management had assigned employees to standby duty according to a schedule designed to meet certain situations (such as fire, theft, vandalism, environmental stress on the fish populations, and monitoring of critical continuing operations) which might arise after normal working hours.

In 1978, based upon a variety of factors, the activity reevaluated its requirements for using standby tours of duty. Thereafter, in April 1979, the activity notified the union of its decision to reduce or terminate premium pay for standby duty effective April 22, 1979. By letter dated April 18, 1979, the union advised the activity of its position that the matter of standby pay "is a negotiable item since it is a change of pay practices affecting conditions of employment." The union also requested the activity's "position in writing as to the negotiability of this question." The activity responded by reaffirming its previously expressed position that such decision was nonnegotiable inasmuch as it involved management's right to determine the numbers, types and grades of employees or positions assigned to an organizational subdivision, work project or tour of duty.

On April 25, 1979, the union filed the instant negotiability appeal with the Authority, alleging, in essence, that the matter of standby pay "is negotiable since it originated in a negotiated manner." In its statement of position, the agency contends, inter alia, that "[t]he negotiability appeal procedures of [s]ection 7117(c)(1) and (2) of the Federal Labor-Management Relations [S]tatute contemplates that a union asserting negotiability must set forth the proposal that is in issue," whereas the union in the instant case has not "reduced to writing any proposals on the matter claimed to be in dispute" and therefore "it is questionable whether there is a negotiability dispute within the meaning of the [S]tatute."

In Association of Civilian Technicians, Alabama ACT and State of Alabama National Guard, Case No. 0-NG-27, 2 FLRA No. 39 (Dec. 28, 1979), Report No. the Authority decided, with respect to a question substantially identical to that presented here, that a petition which did not present a proposal sufficiently specific and delimited in form and content as to permit the Authority to render a negotiability decision failed to meet the conditions for review prescribed in section 7117 of the Federal Service Labor-Management Relations Statute (the Statute) and § 2424.1 of the Authority's rules of procedure. For the reasons fully set forth in that decision, the Authority finds that the instant petition does not meet such conditions for review and must therefore be denied.

In conclusion, the instant negotiability appeal does not meet the conditions for review under section 7117 of the Statute and Part 2424 of the Authority's rules and regulations. Accordingly, the appeal is denied.

Issued, Washington, D.C., December 31, 1979

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

National Federation of
Federal Employees, Local 1363

(Union)

and

Case No. 0-NG-94

Headquarters, U.S. Army
Garrison, Yongsan, Korea

(Activity)

DECISION ON NEGOTIABILITY APPEAL

Since 1969, the union has been the exclusive representative for a unit of civilian employees of the activity located in Seoul, Korea. To date, the parties have never negotiated a collective bargaining agreement. A Status of Forces Agreement between the United States and the Republic of Korea, which Agreement resulted from the Mutual Defense Treaty of 1953 signed by both nations, regulates various aspects of the United States military's presence in Korea. */ On March 27, 1979, a representative of the Korean Government informed his American counterpart by letter that a new traffic regulation issued by the Korean Government required the installation of safety belts in most vehicles and requested that appropriate measures be taken with respect to vehicles belonging to the United States forces in Korea. Subsequently, on May 22, 1979, the activity announced that it was requiring all employees to install safety belts in their privately-owned vehicles. On May 24, the union requested an opportunity "to bargain over this change and its impact" and further requested that a union representative be permitted to meet with the activity "to obtain answers to questions necessary to prepare Local 1363's proposals." By letter dated June 5, the activity reaffirmed in writing its previous statement to the union's representative that the safety belt requirement was a Korean law and, as such, was not a negotiable issue. The union then filed the instant negotiability appeal in which it referred to the safety belt regulation and indicated that it wished to "negotiate on the change and its impact." In its statement of position filed with the Authority, the agency noted, among other things, that the union had never advanced a specific proposal with regard

*/ Article VII of the Status of Forces Agreement provides in pertinent part:

Article VII
Respect for Local Law

It is the duty of members of the United States armed forces, the civilian component, . . . and their dependents, to respect the law of the Republic of Korea. . . .

to the safety belt regulation, and therefore "the Authority would be placed in the position of rendering a negotiability determination in the abstract." The union, in response, contended that management had "disclaimed all duty to bargain in good faith" and that, in a parallel case, the union had filed unfair labor practice charges based upon the activity's refusal to negotiate and to furnish necessary data to the union.

In Association of Civilian Technicians, Alabama ACT and State of Alabama National Guard, Case No. 0-NG-27, 2 FLRA No. 39 (Dec. 28, 1979), Report No. , the Authority decided, with respect to a question substantially identical to that presented here, that a petition which did not present a proposal sufficiently specific and delimited in form and content as to permit the Authority to render a negotiability decision failed to meet the conditions for review prescribed in section 7117 of the Federal Service Labor-Management Relations Statute (the Statute) and § 2424.1 of the Authority's rules of procedure. For the reasons fully set forth in that decision, the Authority finds that the instant petition does not meet such conditions for review and must therefore be denied.

Additionally, to the extent that the parties may be in dispute as to whether the activity improperly withheld information from the union which was reasonably available and necessary in connection with any bargaining obligation which might exist under the Statute, the proper forum in which to raise these issues is not a negotiability appeal, but would be an unfair labor practice proceeding pursuant to section 7118 of the Statute. See American Federation of Government Employees, Local 1931 and Department of the Navy, Naval Weapons Station, Concord, California, Case No. 0-NG-55, 2 FLRA No. 19 (Dec. 5, 1979), Report No. , and National Federation of Federal Employees, Local 1141 and Department of the Interior, Bureau of Mines, Albany Metallurgy Research Center, Albany, Oregon, Case No. 0-NG-80, 2 FLRA No. 28 (Dec. 13, 1979), Report No. .

In conclusion, the instant negotiability appeal does not meet the conditions for review under section 7117 of the Statute and Part 2424 of the Authority's rules and regulations. Accordingly, the appeal is denied.

Issued, Washington, D.C., December 31, 1979

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

Veterans Administration Medical Center,
Salisbury, North Carolina

(Activity)

and

Case No. 0-NG-179

American Federation of Government
Employees, AFL-CIO, Local 1738

(Union)

DECISION ON NEGOTIABILITY APPEAL

During the course of negotiations between the Veterans Administration Medical Center, Salisbury, North Carolina (the activity) and American Federation of Government Employees, AFL-CIO, Local 1738 (the union), the activity submitted two related proposals to the union concerning employees serving as union stewards. In response, the union declared the two proposals "nonnegotiable." The activity thereafter filed the instant negotiability appeal with the Authority, asserting that nothing in the Federal Service Labor-Management Relations Statute (the Statute) specifically precludes agency management from seeking review of proposals determined by the union to be nonnegotiable. In its statement of position, the union contended that the activity lacks standing to file the appeal herein under the Statute and the Authority's regulations. The Authority concludes that the activity's petition for review must be dismissed.

Section 7117(c)(1) of the Statute provides, in pertinent part, that ". . . if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection." [Emphasis added.] Section 7117(c)(2) further provides that "[t]he exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal. . . ." [Emphasis added.] The foregoing provisions of the Statute, as finally enacted and signed into law, are identical to section 7117(c)(1) and (2) in the final version of the bill passed by the House, 1/ as added by the "Udall substitute" during floor consideration of H.R. 11280. In offering this amendment, Representative Udall stated: 2/

1/ 124 CONG. REC. H 9629 (daily ed. Sept. 13, 1978).

2/ 124 CONG. REC. H 9635 (daily ed. Sept. 13, 1978).

> Section (c) of the substitute provides an expedited appeals system for resolving negotiability disputes other than those involving "compelling need" determinations. The reported Title VII provides that such disputes be resolved through the unfair labor practice mechanism. The substitute provides that an exclusive representative may appeal an agency's allegation of non-negotiability to the Authority. The appeal may be filed, on or before the 15th day after the date on which the agency first makes its allegation, by filing a petition with the Authority and furnishing a copy to the head of the agency. On or before the 15th day after the agency head receives the copy of the petition, the agency must file a statement with the Authority either withdrawing the allegation or setting forth in full its reasons supporting the allegation. A copy is to be furnished to the exclusive representative, which then has 15 days to file a response with the Authority. The Authority shall expedite proceedings to the extent practicable and shall issue a written decision and supporting reasons at the earliest practicable date. [Emphasis added.]

The clear language and related legislative history of section 7117(c) provide that an exclusive representative may appeal an agency's allegation of nonnegotiability to the Authority. Nothing contained therein, however, suggests that Congress intended to permit an agency to file a negotiability appeal with the Authority. Consistent with the foregoing, § 2424.2 of the Authority's regulations 3/ specifies "[w]ho may file a petition" as follows:

> A petition for review of a negotiability issue may be filed by an exclusive representative which is a party to the negotiations.

Therefore, since there is no basis in the language or legislative history of section 7117(c) of the Statute for an agency to file a negotiability appeal and the Authority's regulations do not provide that an agency may do so, the activity's petition is not properly before the Authority for review in the instant case and is hereby dismissed.

Issued, Washington, D.C., January 4, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

3/ 44 Fed. Reg. 44765 (1979).

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

January 9, 1980

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: American Federation of Government Employees, AFL-CIO, Local 1617 and Department of the Air Force, Headquarters, Air Force Logistics Command, Kelly Air Force Base, Texas, Case No. 0-NG-39

Dear Mr. King:

Reference is made to your petition for review filed on behalf of the union, the agency's statement of position and the union's response thereto, in the above-entitled case. For the reasons stated below, the Authority has determined that the petition for review must be dismissed.

The basic facts, as set forth in the record, are as follows: By letter dated March 7, 1979, Headquarters, Air Force Logistics Command, Kelly Air Force Base, Texas (the activity) notified American Federation of Government Employees, AFL-CIO, Local 1617 (the union), that the activity had reminded its supervisors of their "responsibilities to realistically appraise their subordinates . . . by distributing to [supervisors] the attached guidance" entitled the "1979 Appraisal/Evaluation Guide." The union's return letter dated March 9 stated that the activity's guidance to its supervisors ". . . change[s] past practice . . . and has a direct impact on [u]nit [e]mployees . . . ," and requested negotiations on the subject. In its letter of response dated March 15, the activity took the position that "the matters contained within our letter of 7 Mar 1979 are not negotiable." On March 20, the union filed an unfair labor practice charge with the Authority's Dallas Regional Office (docket no. 6-CA-32) alleging that the activity had implemented a new regulation regarding the procedures for accomplishing supervisory appraisals and evaluations of unit employees without negotiating with the union, thereby violating sections 7116(a) and 7117 of the Statute. Several weeks later, on April 9, the union filed the instant negotiability appeal in which it advised the Authority of the pending unfair labor practice proceeding and expressed its belief that management's appraisal and evaluation instructions to supervisors "impact upon 'conditions of employment' . . . [and] at least some of the material is of a mandatory nature for bargaining."

In its statement of position, the agency contends, inter alia, that the "1979 Appraisal Evaluation Guide simply reminds rating officials of existing

evaluation standards, solicits their support in maintaining the integrity of the existing standards, and does not change existing working conditions." Hence, according to the agency, no change in "conditions of employment" has occurred requiring collective bargaining. In any event, the agency asserts, the union is essentially alleging a failure or refusal to bargain which is more appropriately resolved in an unfair labor practice proceeding. In its response, the union argues that, whether described as a "get tough" policy to have the supervisors lower the appraisal scores of unit employees or as a "new scheme for appraisals which substantially deviates from previous practice," the "prerequisite to implementation is bargaining upon demand."

In the Authority's opinion, the union's petition for review herein must be dismissed. Thus, based upon the record in this case, it is clear that the essence of the contentions and arguments of the parties principally relates to whether, under the particular circumstances here presented, the activity has unilaterally changed a past practice and established a new working condition with regard to supervisory appraisals and evaluations of bargaining unit employees. It does not, however, focus on issues appropriate for resolution under the procedures set forth in section 7117 of the Federal Service Labor-Management Relations Statute (Statute) and part 2424 of the Authority's Rules and Regulations concerning whether particular union proposals are themselves nonnegotiable, i.e., inconsistent with law, rule or regulation.[1/] Rather, the substance of the union's allegations concerns unfair labor practice issues which would be appropriate for resolution under the procedures set forth in section 7118 of the Statute (92 Stat. 1707-8). See American Federation of Government Employees, AFL-CIO, Local 1931 and Department of the Navy, Naval Weapons Station, Concord, California, Case No. O-NG-55, 2 FLRA No. 19 (Dec. 5, 1979), Report No. ____, and National Federation of Federal Employees, Local 1141 and Department of the Interior, Bureau of Mines, Albany Metallurgy Research Center, Albany, Oregon, Case No. O-NG-80, 2 FLRA No. 28 (Dec. 13, 1979), Report No. ____.

That is, to the extent that the instant case arose out of an alleged unilateral change coupled with a refusal to bargain and a defense, essentially, that no change has occurred, the proper forum in which to raise these issues is not a negotiability appeal, but would be an unfair labor practice proceeding pursuant to section 7118 of the Statute. In this regard, resolution of the instant dispute is dependent upon the resolution of factual issues related to the parties' conduct. Such factual determinations can best be accomplished through use of the investigatory and formal hearing procedures set forth in part 2423

1/ In this regard, § 2424.1 of the Authority's Rules and Regulations (44 Fed. Reg. 44765 (1979)), which sets forth conditions governing review of negotiability issues, states in pertinent part as follows:

> The Authority will consider a negotiability issue under the conditions prescribed by 5 U.S.C. 7117(b) and (c), namely: If an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter proposed to be bargained because, as proposed, the matter is inconsistent with law, rule or regulation, the exclusive representative may appeal the allegation to the Authority....

of the Authority's Rules and Regulations which govern unfair labor practice proceedings (44 Fed. Reg. 44760 et seq. (1979)).2/

Based on the foregoing, your negotiability appeal does not present issues that the Authority can appropriately resolve under section 7117 of the Statute and part 2424 of its rules and regulations. Accordingly, your appeal is dismissed.

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In this regard, as previously noted (supra p. 1), the union has filed an unfair labor practice charge with the Authority's Dallas Regional Office regarding the activity's alleged unilateral implementation of a new regulation on the procedures for supervisory appraisals and evaluations of bargaining unit employees. The unfair labor practice proceeding is currently pending.

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

1900 E STREET NW. ● WASHINGTON, D.C. 20424

December 31, 1979

Mr. William K. Holt
Representative
Bremerton Metal Trades Council
P. O. Box 488
Bremerton, Washington 98310

Re: Bremerton Metal Trades Council and Puget Sound Naval Shipyard (McCaffree, Arbitrator), Case No. 0-AR-61

Dear Mr. Holt:

This refers to your exceptions to the arbitrator's award in the above-entitled case, filed with the Authority on December 12, 1979.

For the reasons indicated below, it has been determined that your exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the regulations of the Federal Labor Relations Authority (copy enclosed) provides:

> (b) The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in your submission, is dated September 28, 1979. Therefore, under section 2425.1(b) of the Authority's regulations, your exceptions were due in the office of the Authority no later than October 29, 1979.* However, as stated above, your exceptions were not filed with the Authority until December 12, 1979. In this regard, the Authority is not empowered to extend or waive the time limit for filing exceptions to arbitrators' awards.

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*/ In this regard, you state in your exceptions that the union did not receive a copy of the arbitrator's award until October 25, 1979. Even were the 30-day period for filing exceptions in these circumstances to begin on the date of receipt by the union of a copy of the arbitrator's award, an issue as to which we express no opinion, those exceptions would have been due in the office of the Authority no later than November 23, 1979.

Accordingly, as your exceptions were untimely filed, and apart from other considerations, your appeal is hereby dismissed.

For the Authority.

Sincerely,

Samuel A. Chaitovitz
Executive Director

Enclosure

cc: D. B. Franey
Navy

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 27 REPORT OF CASE DECISIONS February 14, 1980

REPRESENTATION CASES

2 FLRA No. 61 (January 17, 1980)

Federal Deposit Insurance Corporation, Assistant Secretary Case No. 22-09040(RO). Upon a representation petition filed by the union (NTEU) under E.O. 11491, the Authority found that the unit sought by the union, to include field liquidation employees, was appropriate for the purpose of exclusive recognition; that Associate Supervising Liquidators were supervisors within the meaning of section 2(c) of the Order and should be excluded from the unit; and that the Federal Women's Program Manager was engaged in non-clerical Federal personnel work for the activity and, under section 10(b)(2) of the Order, should be excluded from the unit. The Authority thereupon directed an election in the unit found appropriate. (Decision and Direction of Elections Attached.)

2 FLRA No. 63 (January 17, 1980)

U.S. Department of the Treasury, Bureau of the Mint, Assistant Secretary Case No. 22-09512(UC). The Authority, upon a petition filed by the union (AFGE) under E.O. 11491, seeking to consolidate three units, including one composed of guards, found that the petitioned for consolidated unit, including guards, was appropriate for the purpose of exclusive recognition under the criteria of section 10(b) of the Order; and directed an election be conducted among the employees in the voting groups described in its decision. (Decision and Direction of Election attached.)

NEGOTIABILITY CASES

2 FLRA No. 56 (January 9, 1980)

American Federation of Government Employees, AFL-CIO, Local 1661 and Department of Justice, Bureau of Prisons, Federal Correctional Institution, Danbury, Connecticut, Case No. 0-NG-43. The activity solicited comments from the union on a policy statement concerning the administration of sick leave.

The union sought to negotiate on parts of the statement. The activity advised the union that it did not believe the matters to be negotiable on the local level, and the union filed a negotiability appeal with the Authority. The Authority determined that the parties were essentially in dispute concerning a threshold question as to whether a master agreement at the national level authorized or precluded bargaining on the matter of sick leave policy administration. The Authority concluded that such a threshold issue was not appropriate for resolution under section 7117 of the Statute and Part 2424 of the Authority's rules of procedure; but, rather, to the extent that the case involved a dispute over the meaning of provisions in the master agreement, the proper forum in which to resolve the dispute would be that which the parties had adopted for such purpose. Accordingly, and apart from other considerations, the Authority denied the union's appeal, but without prejudice to the renewal of its contentions that the matters are negotiable under the Statute in a petition duly filed with the Authority after it is resolved, under applicable procedures, that bargaining on such matters is not precluded by the controlling national agreement. (Decision letter attached.)

2 FLRA No. 57 (January 11, 1980)

American Federation of Government Employees, AFL-CIO, Local 1617 and Headquarters, San Antonio Air Logistics Center, Kelly Air Force Base, Texas, Case No. 0-NG-33. Concommitantly with its negotiability appeal, the union filed an unfair labor practice charge against the activity alleging that it had unilaterally established an uncommon tour of duty for unit employees. The Regional Director (RD) refused to issue a complaint on the unfair labor practice charge, finding that the activity had no duty to bargain over the matter of uncommon tours of duty, inasmuch as the subject was covered by the parties' agreeement, and that the activity had complied with the applicable provisions. The RD also found that the parties had negotiated and reached agreement on the impact and implementation of management's decision; and noted that if there was any disagreement with the activity's interpretation and application of the agreement, the union could have utilized the contractual grievance and arbitration procedure to resolve the matter. The Authority found that the disposition of the unfair labor practice charge had rendered the underlying negotiability issue moot and a negotiability decision would constitute an advisory opinion contrary to section 2429.10 of the Authority's rules. The Authority therefore dismissed the union's appeal. (Decision letter attached.)

2 FLRA No. 58 (January 17, 1980)

American Federation of Government Employees, AFL-CIO, Local 1786 and Marine Corps Development and Education Command, Quantico, Virginia, Case No. 0-NG-4. The dispute involved the negotiability of a provision of the parties' locally negotiated agreement which would establish a union right to representation on wage survey teams designed to gather local prevailing wage data for use in determining the pay of certain hourly-paid, nonappropriated fund employees. The Authority held that the provision did not violate section 7106(a)(2)(B) of the Statute but, rather, concerned a matter within the duty to bargain under the Statute; and therefore set aside the agency's allegation to the contrary. (Decision attached.)

2 FLRA No. 59 (January 17, 1980)

American Federation of Government Employees, AFL-CIO, Local 331 and Veterans Administration Hospital, Perry Point, Maryland, Case No. 0-NG-17. The dispute involved the negotiability of a union proposal concerning the filling of vacant positions. The Authority held that the proposal was within the duty to bargain under the Statute and did not violate setion 7106(a)(2)(C) thereof, and therefore set aside the agency's allegation to the contrary. (Decision attached.)

2 FLRA No. 62 (January 17, 1980)

American Federation of Government Employees, AFL-CIO, Local 1928 and Department of the Navy, Naval Air Development Center, Warminster, Pennsylvania, Case No. 0-NG-13. The dispute arose over a union proposal which would require the activity to provide, without charge, safety shoes for employees required to wear foot protection in the course of their work. The agency (DOD) alleged in its statement of position filed with the Authority that negotiation of the proposal was barred, under section 7117(a)(2) of the Statute, by an internal agency regulation which provided that required personal protective equipment including safety shoes, be provided at Government expense; and that no compelling need issue has been raised and no determination yet made by the Authority as to that regulation. The Authority held that the agency had the burden of coming forward with affirmative support for its assertion that the regulation in question barred negotiation on an otherwise negotiable proposal, but had failed to submit such support. Accordingly, the Authority set aside the agency's allegation. (Decision attached.)

2 FLRA No. 64 (January 18, 1980)

National Treasury Employees Union and NTEU Chapter 12 and Department of the Treasury, Internal Revenue Service, Birmingham District, Alabama, Case No. 0-NG-158. The dispute arose when the activity issued a policy requiring Revenue Agents to assist Tax Auditors in audits under certain circumstances. The activity refused to accede to the union's general request to negotiate over the alleged change in policy and practice, claiming the matter was nonnegotiable under section 7106 of the Statute. The union filed an unfair labor practice charge against the activity and a negotiability appeal. On the negotiability appeal, the Authority found, for the reasons fully set forth in its decision in the ACT, Alabama case, Case No. 0-NG-27 (Report No. 25), that since the union's petition did not present a sufficiently specific and delimited proposal, the petition did not meet the conditions for review prescribed in section 7117 of the Statute and Part 2424 of the Authority's rules of procedure. Additionally, the Authority found that since the case arose out of an alleged unilateral change and essentially involved a claim of a refusal to bargain on procedures related to such change, and a defense that bargaining had not been requested on impact and implementation, the proper forum to raise such issues was not a negotiability appeal but, rather, an unfair labor practice proceeding pursuant to section 7118 of the Statute. Accordingly, the Authority dismissed the union's negotiability appeal. (Decision attached.)

ARBITRATION CASE

2 FLRA No. 60 (January 17, 1980)

United States Army Missile Materiel Readiness Command (USAMIRCOM) and American Federation of Government Employees, Local 1858, AFL-CIO (King, Arbitrator), Case No. 0-AR-7. The arbitrator found that the activity had not violated the parties' agreement when it changed the manner in which Monday holidays were observed by certain employees whose regular tour of duty was Tuesday through Saturday; and denied the union's grievance. The union filed exceptions to the arbitrator's award, contending that the award violated law and regulation, did not draw its essence from the parties' agreement, and was based on a non-fact. The Authority found that the union's exceptions were not supported by sufficient facts and circumstances described in the petition. Accordingly, the Authority denied the union's petition since it failed to meet the requirements for review set forth in the applicable rules of procedure. (Decision attached.)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Federal Deposit Insurance Corporation

Activity

and

Assistant Secretary
Case No. 22-09040(RO)

National Treasury Employees Union

Petitioner

DECISION AND DIRECTION OF ELECTIONS

Upon a petition duly filed under section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officers Daryl F. Stephens and Daniel Sutton. The Hearing Officers' rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, in a matter such as here involved, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Upon the entire record in this case, including briefs submitted by the parties, the Federal Labor Relations Authority finds:

1. The labor organization involved claims to represent certain employees of the Activity.

2. In its petition, Petitioner, National Treasury Employees Union, (NTEU), seeks an election in a unit of all General Schedule and Wage Grade professional and nonprofessional employees assigned to headquarters, excluding management officials, supervisors, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and guards. NTEU contends that a single comprehensive unit, which would include field liquidators, would prevent unit fragmentation, and enhance effective dealings and efficiency of agency operations. The Activity, on the other hand, contends that the employees physically located in headquarters, Washington, D.C. and the field liquidators are two separate functional units. In this regard,

the Activity argues that the field liquidators are assigned to headquarters for administrative convenience and do not share a community of interest with the employees physically located there. It further contends that the petitioned for unit would not promote effective dealings and efficiency of agency operations.

The Activity is headquartered in Washington, D.C. and organizationally consists of a Board of Directors, and seven principal divisions which report directly to the Board of Directors. Two of these divisions, the Division of Liquidation and the Division of Bank Supervision, are involved in field operational functions of the Activity. The Division of Liquidation is charged with the responsibility for the closing of insolvent banks, and the liquidation of their assets. Its two basic functions involve the payoff of insured depositors, and the purchase and assumption of the closed banks. These functions are accomplished presently through approximately 160 liquidators who although assigned to the Division of Liquidation in Washington, D.C., work in 48 field locations established at the time of a bank's closing and at that bank's location. 1/

The record indicates that the general responsibility for the administration of the Activity rests with headquarters which exercises the general authority to plan, direct and coordinate the work of the Activity. All employees of the Activity are subject to similar Activity-wide personnel policies and practices which are established by, and are generally implemented through, the headquarters staff. The headquarters staff is also responsible for budgetary policies, financial disbursements and labor relations policies and procedures, which includes the negotiations of basic labor agreements and any local supplemental agreements.

The Division of Liquidation, located at headquarters, is headed by a Director who is directly responsible to the Board of Directors for the functions of the division. Reporting directly to the Director are the Deputy Director, the Chief Supervising Liquidator, and the Associate Supervising Liquidators. The record reveals that because of its unique functions some of the personnel matters regarding the division have been delegated from the headquarters personnel office to the division, and that the Chief Supervising Liquidator has the authority to recruit, interview, hire, transfer, reassign, and promote all of the division's liquidators-at-large.

The record indicates that the division's liquidators-at-large are engaged in duties involved in the liquidation of the insolvent banks within the field offices which are established at the site of the closings. Each office is headed by a liquidator-in-charge who has the day-to-day supervision of the

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1/ In contrast, the Division of Bank Supervision is responsible for the examination of banks for compliance with regulations to insure their efficient and proper operation, which function is performed by bank examiners located in 14 permanent regional offices and 144 field offices.

employees and is responsible for the functions of the office. 2/ The liquidators-at-large are employed in the "excepted service" category and generally possess the same basic qualifications, share the same skills, and utilize the same technical knowledge. Based in part on their unique functions and constant travel status, liquidators-at-large are assigned to headquarters as their duty station, are carried on the headquarters payroll, and have their personnel records maintained by the personnel office located at headquarters. Further, the division's Chief Supervising Liquidator, located at headquarters, is responsible for recruiting, interviewing, and hiring of prospective liquidators. Requests for transfers and reassignments are channeled through the Chief Supervising Liquidator and it is also his responsibility to make decisions with respect to liquidators-at-large promotions. Any problems arising with regard to discipline or termination of employment rest with the Board of Directors and have not been delegated to the division but its decision may be based in part upon the recommendation of the Director of the division.

Based on the foregoing circumstances, the Authority finds that the petitioned for unit, including the liquidators-at-large located in the field liquidation offices, is appropriate for the purpose of exclusive recognition. Thus, the record shows that all employees are under the general direction of the headquarters, share a common mission and are subject to the same general working conditions and uniform personnel policies. Further the Chief Supervising Liquidator, in consultation with the Director of Liquidation, retains the authority to hire, assign, transfer, reassign, and promote all division employees including its field liquidators. Under these circumstances, the Authority finds that the petitioned for employees share a community of interest. Further, noting that all personnel policies and practices are established and implemented at the headquarters level, and that the claimed unit conforms to an integrated organizational structure of the Activity, sharing a common overall mission, the Authority finds that such a unit would promote effective dealings and efficiency of agency operations. Moreover such a unit is consistent with the policy of the Order of preventing further fragmentation of bargaining units, as well as reducing existing fragmentations, and promoting a more comprehensive bargaining unit structure. 3/ Certain eligibility questions were raised herein. 4/

Associate Supervising Liquidators, GG-1160-13, 14, and 15

The Activity contends that these employees are supervisors and/or management officials and should be excluded from the unit found appropriate, whereas the Petitioner argues to the contrary.

2/ The parties stipulated to and presented evidence at the hearing that liquidators-in-charge are supervisors within the meaning of section 2(c) of the Order. Accordingly, the Authority finds that the liquidators-in-charge should be excluded from the unit found appropriate.

3/ Department of State, Passport Office, Chicago Passport Agency, Chicago, Illinois, A/SLMR No. 698, as supplemented by A/SLMR No. 929 and 1108, FLRC No. 76A-149 (12/28/78).

4/ The parties stipulated at the hearing, without evidence, that liquidators whose grade levels are below GG-11 may be assigned supervisory responsibilities under certain circumstances. In the absence of such evidence, the Authority makes no findings as to the eligibility of these employees.

The record reveals that there are approximately ten Associates assigned and physically located at headquarters. These employees coordinate the establishment of field offices at the sites of bank closings. Initially, they are in the field and have the responsibility for setting up the entire operation and are primarily responsible for and direct the substantive operations of the liquidation office under their jurisdiction. Under normal procedures, the Associates will, after approximately two to three weeks, return to Washington and the Liquidator-in-Charge will then become responsible for the field office operation and the day-to-day supervision of the employees. Organizationally, the Associate is the next level above the Liquidator-in-Charge in the chain of command. The record discloses that the Liquidator-in-Charge of the particular liquidation under the jurisdiction of the Associate is in daily contact with the Associate who responsibly directs him regarding any problems which may arise. The Associate's decision with regard to such problems is considered final. Further, the Associates have the authority to hire locally temporary or intermittent employees, terminate such employment and have effectively recommended to the Chief Supervising Liquidator that certain intermittent employees who meet the qualifications for becoming a liquidator-at-large, be hired. On one occasion an Associate effectively recommended that a liquidator-at-large not be promoted.

Based on the foregoing, as the record reveals that the Associates using independent judgment responsibly direct the liquidators-in-charge under their jursidiction, and have the authority to hire, or terminate temporary or intermittent employees, or to effectively recommend such actions, the Authority finds that they are supervisors within the meaning of section 2(c) of the Order and should be excluded from the petitioned for unit. 5/

Federal Women's Program Manager, GG-0301-13

The Activity further contends that Marcia K. Mau, Federal Women's Program Manager, GG-0301-13 employed in the Office of Employee Relations (Office of the Director) should be excluded from the petitioned for unit as a management official. The evidence establishes that her full time duties include providing liaison and representation for the Activity on the women's program with other organizations. She makes decisions as to which women's organizations should be provided with vacancy announcements; she reviews the Activity's newsletter; she is engaged in preparing monthly program series in the areas of preretirement planning, safety for men and women, child-care selection, and minority women. The record discloses that she has during the past year, and will in the future, have substantial involvement and input in the recruitment area as a representative of the Activity's recruitment program from the Office of Personnel and Employee Relations. Mau has assisted in the development of the Affirmative Action Plan, and is expected to continue in such function especially in those areas pertaining to the Women's Program.

5/ In view of the foregoing, it was considered unnecessary to decide whether the Associates should be excluded from the unit on the basis that they are management officials.

Based on the foregoing, the Authority finds the character and extent of Mau's involvement in personnel matters warrants the conclusion that she is engaged in non-clerical Federal personnel work for the Activity. 6/ Section 10(b)(2) of the Order specifically excludes from bargaining units employees engaged in Federal personnel work in other than a purely clerical capacity. On such basis, we find that Marcia K. Mau should be excluded from the unit found appropriate. 7/

Based on the foregoing, the Authority finds that the following unit is appropriate for the purpose of exclusive recognition under section 10(b) of Executive Order 11491, as amended: 8/

> All General Grade, (General Schedule), 9/ and Wage Grade professional and nonprofessional employees assigned to Headquarters of the Federal Deposit Corporation, Washington, D.C., excluding guards, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors.

As stated above, the unit found appropriate includes professional employees. However, the Authority is prohibited by section 10(b)(4) of the Order from including professional employees in a unit with nonprofessional employees unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. The Authority shall therefore direct that separate elections be conducted in the following groups:

6/ Cf. U.S. Department of Agriculture, Farmers Home Administration, Colorado, 6 A/SLMR 652, A/SLMR No. 752 (11/18/76).

7/ In view of the above, it was considered unnecessary to pass upon whether Mau should be excluded from the unit on the basis that she is a management official.

8/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the instant case was decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and direction of elections does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Order.

9/ The Activity is not subject to the Classification Act, but has formally adopted it. The General Graded (GG) scale is, therefore, equivalent to the Federal-wide GS wage scale.

Voting Group (a): All General Graded and Wage Grade professional employees assigned to Headquarters of the Federal Deposit Insurance Corporation, Washington, D.C., excluding guards, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors.

Voting Group (b): All General Graded and Wage Grade nonprofessional employees assigned to Headquarters of the Federal Deposit Insurance Corporation, Washington, D.C., excluding guards, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors.

Employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented for the purpose of exclusive recognition by the National Treasury Employees Union.

Employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether they wish to be represented for the purpose of exclusive recognition by the National Treasury Employees Union. In the event that a majority of the valid votes of voting (a) are cast in favor of inclusion in the same unit as nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued by the Regional Director indicating whether or not the National Treasury Employees Union was selected by the professional employee unit.

The unit determination in the subject case thus is based in part upon the results of the election among the professional employees. However, the Authority makes the following findings in regard to the appropriate unit.

1. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, the Authority finds the following units appropriate for the purposes of exclusive recognition within the meaning of section 10(b) of the Order:

(a) All General Graded and Wage Grade professional employees assigned to Headquarters of the Federal Deposit Insurance Corporation, Washington, D.C., excluding guards, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors.

(b) All General Graded and Wage Grade nonprofessional employees assigned to Headquarters of the Federal Deposit Insurance Corporation, Washington, D.C., excluding guards, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors.

2. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, the Authority finds the following unit appropriate for the purpose of exclusive recognition within the meaning of section 10(b) of the Order:

All General Graded and Wage Grade professional and nonprofessional employees assigned to Headquarters of the Federal Deposit Insurance Corporation, Washington, D.C., excluding guards, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors.

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among the employees in the units found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Regional Director shall supervise the elections, subject to the Authority's Regulations. Eligible to vote are those in the units who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are all employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the National Treasury Employees Union.

Issued, Washington, D.C., January 17, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Federal Deposit Insurance Corporation

Activity

and

Assistant Secretary
Case No. 22-09040(RO)

National Treasury Employees Union

Petitioner

ERRATA

On January 19, 1980, the Authority issued its Decision and Direction of Elections in the above-entitled proceeding. The classification "internal audit employees" and "confidential employees" which the parties stipulated to be excluded were inadvertently omitted from the unit and voting group descriptions. Accordingly, the voting group descriptions and unit determinations are hereby corrected to read as follows:

Voting Group Descriptions

All General Grade, (General Schedule), and Wage Grade professional and nonprofessional employees assigned to Headquarters of the Federal Deposit Insurance Corporation, Washington, D.C., excluding guards, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors, internal audit employees, and confidential employees.

Voting Group (a): All General Graded and Wage Grade professional employees assigned to Headquarters of the Federal Deposit Insurance Corporation, Washington, D.C., excluding all nonprofessional employees, guards, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors, internal audit employees, and confidential employees.

Voting Group (b): All General Graded and Wage Grade nonprofessional employees assigned to Headquarters of the Federal Desposit Insurance Corporation, Washington, D.C., excluding all professional employees, guards, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors, internal audit employees, and confidential employees.

Unit Determinations

(a) All General Graded and Wage Grade professional employees assigned to Headquarters of the Federal Deposit Insurance Corporation, Washington, D.C., excluding all nonprofessional employees, guards, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors, internal audit employees, and confidential employees.

(b) All General Graded and Wage Grade nonprofessional employees assigned to Headquarters of the Federal Deposit Insurance Corporation, Washington, D.C., excluding all professional employees, guards, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors, internal audit employees, and confidential employees.

All General Graded and Wage Grade professional and nonprofessional employees assigned to Headquarters of the Federal Deposit Insurance Corporation, Washington, D.C., excluding guards, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors, internal audit employees, and confidential employees.

In view of the above change, the elections directed herein shall be conducted among the employees in the units found appropriate as early as possible, but no later than 60 days from the date below.

Issued, Washington, D.C., February 29, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. Department of the Treasury,
Bureau of the Mint

Activity

and

Assistant Secretary
Case No. 22-09512(UC)

American Federation of Government
Employees, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon an amended petition duly filed under section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Collen Duffy Raap. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Upon consideration of the entire record in this case, including briefs filed by the parties, the Authority finds:

The Petitioner, the American Federation of Government Employees, AFL-CIO (AFGE), filed the instant petition seeking to consolidate the three units within the Department of the Treasury, Bureau of the Mint (the Mint), for which it is the current exclusive representative. The AFGE is the exclusive representative for one unit consisting of all the nonprofessional employees of the Mint, for another unit consisting of all the professional employees of the Mint, and for a third unit consisting of all the guard employees of the Mint, excluding the guards at the Philadelphia Mint.

The Mint does not oppose the proposed consolidation of the professional and nonprofessional units represented by the AFGE. However, the Mint opposes the inclusion of the guards in the proposed nationwide unit. The Mint contends that, as the primary responsibility of its guard employees involves security, they are a functionally distinct group whose inclusion in the proposed consolidated unit would be inconsistent with the criteria for exclusive units set forth in section 10(b) of the Order. The AFGE, on the other hand, argues that

the guard employees of the Mint share a community of interest with the other Mint employees, which is manifested by the common mission, common overall supervision, and similar personnel and labor relations policies established by the Mint's headquarters, which they share. Also, the AFGE notes that the proposed consolidated unit would promote a more comprehensive bargaining structure, while reducing unit fragmentation. 1/

The Mint's mission includes the production of coins, both domestic and foreign; the custody, processing, and movement of bullion; and the manufacture of various numismatic items. Headed by a Director, who is supported by a headquarters staff located in Washington, D.C., the Mint operates seven field facilities. These facilities include the United States Mints in Philadelphia and Denver, the United States Assay Offices in San Francisco and New York, the United States Bullion Depositories in Fort Knox and West Point, and the Old Mint in San Francisco. The facilities are involved primarily with either production or storage. They are all characterized by a mix of Wage Grade and General Schedule employees.

There are guards employed at each of the Mint's field facilities. They are the employees primarily responsible for the security of property and the valuables stored at the facilities, a task whose magnitude is obviously greater than for guard employees at many other Federal activities. The guards are responsible for screening or controlling access to the buildings operated by the Mint, and through a variety of techniques, for screening the Mint's own employees in the course of their daily activity. The guards wear uniforms in performing their function, including an identifying badge. They carry firearms and must demonstrate continued proficiency with them. They provide 24-hour coverage for the Mint's facilities on a year-round basis. In most of the facilities they have been provided with separate eating and locker room facilities so as to discourage fraternization with nonguard employees. The Mint has recently begun a program of converting its guard employees from guard to police officer classifications, and in so doing they have provided some guard employees with extensive training available through the Federal Law Enforcement Training Center. However, the record reveals that guard employees often seek promotional opportunities to nonguard positions with the Mint, as evidenced by the fact that nine guard employees have transferred to nonguard positions at the San Francisco Assay Office in the recent past, and some 12 to 15 employees have made similar moves at the Philadelphia Mint.

Under Executive Order 10988, labor organizations were allowed to be recognized as the exclusive representative of units which included both guard and nonguard employees. During that period, AFGE locals gained recognition for units of all nonprofessional employees, including guards, at the Denver Mint and the New York, N.Y. and San Francisco Assay Offices, and for a unit of all nonsupervisory employees, including guards, at the Philadelphia Mint. In all of these locations, there were negotiated agreements which covered guard and nonguard employees. Executive Order 11491, effective January 1, 1970, required separate units for

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1/ As the parties, in effect, bilaterally agreed to the proposed consolidation of the professional and nonprofessional units, the testimony adduced at the hearing in this matter was primarily limited to the appropriateness of including the guards in the proposed consolidated unit.

guards, and it permitted new units of guards to be represented only by labor organizations which represented guards exclusively. However, mixed units, such as the four noted above, were allowed to continue as they had existed prior to January 1, 1970. In 1971, as the result of a timely petition and subsequent election, Fraternal Order of Police Lodge No. 81 (FOP) was certified as the exclusive representative of the guard employees of the Philadelphia Mint, replacing AFGE. The AFGE petitioned for a nationwide unit of Mint employees in 1972. They were required by Executive Order 11491 to exclude guard employees from their petition. On September 23, 1973, AFGE was certified as the exclusive representative for separate nationwide units of the Mint's professional and nonprofessional employees, thereby leaving most guard employees unrepresented.

Executive Order 11838, dated February 6, 1975, amended Executive Order 11491, in part, by eliminating the requirement that guards be represented in separate units and only by labor organizations which represented guards exclusively. In its Report and Recommendations which accompanied the issuance of Executive Order 11838, the Federal Labor Relations Council indicated that the experience acquired under Executive Order 11491 had "demonstrated no need for the special treatment of guards." In this regard, they noted that "Mixed units of guards and other employees, which were recognized prior to 1970, have continued to provide effective representation for all members." 2/ On July 7, 1976, AFGE petitioned for, and was certified as the exclusive representative of a nationwide unit of the Mint's nonsupervisory special police and guards, exclusive of the guard employees represented by the FOP at the Philadelphia Mint. The AFGE Mint Council presently has a negotiated agreement with the Mint covering the Mint's professional and nonprofessional employees, other than guards, represented by AFGE, which was effective December 15, 1977. In addition, the AFGE Mint Council has a Memorandum of Understanding with the Mint covering the Mint's guard employees represented by the AFGE, which was effective April 28, 1977, and provides for union representation of guard employees and voluntary dues allotment.

Based on the particular facts and circumstances presented, the Authority concludes that the petitioned for consolidated unit, including guards, is appropriate for the purpose of exclusive recognition under the criteria of section 10(b) of the Order. 3/ As indicated above, the unit sought encompasses all the employees within the Mint represented by the AFGE. These employees

2/ Labor-Management Relations in the Federal Service (1975), at 30.

3/ Veterans Administration, Washington, D.C., 1 FLRA 55, and the cases cited therein at footnote 9. Although there have been findings, as relied on by the Activity herein, that guard employees might be represented in separate guard units in situations where they form a functionally distinct group, this does not preclude a finding, under other circumstances, that guards should appropriately be included in a mixed unit, consolidated or otherwise, which is sought by a particular petitioner, noting especially the current policy regarding guard representation cited above. See Naval Air Test Center/Naval Air Station, Patuxent River, Maryland, A/SLMR No. 1019 (April 13, 1978); General Services Administration, Region 4, 7 A/SLMR 856, A/SLMR No. 911 (1977); and Department of the Navy, Naval Support Activity, Long Beach, California, 6 A/SLMR 150, A/SLMR No. 629 (1976). In Department of the Navy, A/SLMR No. 629, while the Assistant Secretary rejected intervenor International Federation of Professional and Technical Employees'

(Continued)

share a common mission, commmon job classifications and common working conditions, and work under similar personnel and labor relations policies as established by the Director of the Mint. More particularly, with respect to the guard employees of the Mint, the evidence indicates that they are covered by the same personnel policies which affect all Mint employees, and that guards have been able to seek promotional opportunities by moving to nonguard positions within the Mint. Thus, the employees in the petitioned for unit share a community of interest.

Further, the record reveals that all personnel and administrative authority for the Mint lies with the Director of the Mint. The Personnel Office establishes, through the Personnel Manual, centralized policies applicable to all employees concerning personnel and labor relations matters. There is currently a negotiated agreement between the Mint and the AFGE Mint Council which deals with working conditions for the professional and nonprofessional employees of the Mint nationwide, and a Memorandum of Understanding between the Mint and the AFGE Mint Council providing for representation and voluntary dues checkoff for all guard employees, except for guard employees of the Philadelphia Mint. The record indicates that guards were effectively represented in mixed units for varying periods of time prior to the necessity of their being excluded from the AFGE's nationwide units, and there is no evidence that they could not be effectively represented in a mixed unit again, now that the requirement for their exclusion no longer exists. Under these circumstances, the Authority finds that the proposed consolidated unit will promote effective dealings and efficiency of the Activity's operations. Further, it is concluded that effective dealings and efficiency of Agency operations will be enhanced by the proposed consolidated unit, which covers all of the employees represented by the AFGE within the Mint, as it will provide for bargaining in a single unit rather than in the existing three bargaining units, thereby reducing fragmentation and promoting a more effective, comprehensive bargaining unit structure.

Accordingly, the Authority finds that the following unit 4/ is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended: 5/

(Continued)

(IFPTE) argument that the guards had accreted to their unit of all the activity's nonprofessional GS employees with the amendment of the Executive Order in 1975, the Direction of Election therein gave the guard employees the option of choosing the petitioner International Brotherhood of Teamsters as their exclusive representative for an exclusively guard unit or of choosing the IFPTE and becoming part of their existing unit.

4/ Insofar as the actual state of the exclusively recognized units at the time of the consolidation election may differ, if at all, from the unit found appropriate herein, the unit description should be so modified.

5/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the instant case was decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor Management Relations Statute

(Continued)

> All professional and nonprofessional employees of the Department of the Treasury, Bureau of the Mint, including special police and guards, excluding special police and guards assigned to the Philadelphia Mint, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, and supervisors as defined in the Order.

The Activity requested that in the event the proposed consolidated unit was found appropriate, an election be held to determine whether or not the employees involved desire to be represented in the proposed consolidated unit by the AFGE. As noted above, the unit found appropriate includes professional employees. However, the Authority is prohibited by section 10(b)(4) of the Order from including professional employees in a unit with nonprofessional employees unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees must be ascertained, and the Authority will direct that separate elections be conducted in the following voting groups:

> Voting group (a): All professional employees of the Department of the Treasury, Bureau of the Mint, excluding all nonprofessional employees, special police and guards, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, and supervisors as defined in the Order.

> Voting group (b): All nonprofessional employees of the Department of the Treasury, Bureau of the Mint, including special police and guards, excluding all professional employees, special police and guards assigned to the Philadelphia Mint, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, and supervisors as defined in the Order.

Employees in the nonprofessional voting group (b) will be polled whether they desire to be represented for the purpose of exclusive recognition in the proposed consolidated unit by the American Federation of Government Employees.

Employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether they desire to be represented for the purpose of exclusive recognition in the proposed consolidated unit by the American Federation of Government Employees, and (2) whether they desire to be represented in a separate consolidated professional unit if the proposed consolidated unit is approved by a majority of all the employees voting.

Continued

(92 Stat. 1191) had not been enacted. The decision and direction of election does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would have been reached by the Authority if the case had arisen under the Statute rather than the Order.

The valid votes cast by all the eligible employees will be tallied to determine if a majority of the valid votes has been cast in favor of the proposed consolidated unit. If a majority of the valid votes has not been cast in favor of the proposed consolidated unit, the employees will be taken to have indicated their desire to continue to be represented in their current units of exclusive recognition. If a majority of the valid votes is cast in favor of the proposed consolidated unit, the ballots of the professional employees in voting group (a) will then be tallied to determine whether they wish to be included in the same consolidated unit with the nonprofessional employees. Unless a majority of the valid votes of voting group (a) is cast for inclusion in the same consolidated unit as the nonprofessional employees, the professional employees will be taken to have indicated their desire to constitute a separate consolidated professional unit and an appropriate certification will be issued by the Regional Director.

The unit determination in the subject case thus is based in part upon the result of the election among the professional employees. However, the Authority makes the following findings in regard to the appropriate unit:

1. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, the Authority finds the following units appropriate for the purpose of exclusive recognition within the meaning of section 10 of the Order:

> All professional employees of the Department of the Treasury, Bureau of the Mint, excluding all nonprofessional employees, special police and guards, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, and supervisors as defined in the Order.
>
> All nonprofessional employees of the Department of the Treasury, Bureau of the Mint, including special police and guards, excluding all professional employees, special police and guards assigned to the Philadelphia Mint, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, and supervisors as defined in the Order.

2. If a majority of the professional employees votes for inclusion in the same consolidated unit as the nonprofessional employees, the Authority finds the following unit appropriate for the purpose of exclusive recognition within the meaning of section 10 of the Order:

> All professional and nonprofessional employees of the Department of the Treasury, Bureau of the Mint, including special police and guards, excluding special police and guards assigned to the Philadelphia Mint, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, and supervisors as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the voting groups described above, as early as possible, but not later than 60 days from the date below. The appropriate Regional Director shall supervise the election, subject to the Authority's transition rules and regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition in the proposed consolidated unit by the American Federation of Government Employees.

Issued, Washington, D.C., January 17, 1980

Ronald W. Haughton,
Ronald W. Haughton, Chairman

Henry B. Frazier III,
Henry B. Frazier III, Member

Leon B. Applewhaite,
Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

January 9, 1980

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: American Federation of Government Employees, AFL-CIO, Local 1661 and Department of Justice, Bureau of Prisons, Federal Correctional Institution, Danbury, Connecticut, Case No. O-NG-43

Dear Mr. King:

Reference is made to the union's petition for review, the agency's statement of position and the union's response thereto, in the above-entitled case.

The relevant facts of this case, as set forth in the record, are as follows: The petitioner herein, American Federation of Government Employees, AFL-CIO, Local 1661 (the union), is one of the local unions comprising the AFGE Council of Prison Locals (the Council). The Council has negotiated with the Federal Prison System, of which the Danbury Federal Correctional Institution (the activity) is a component, a master agreement covering a unit of virtually all eligible employees of the Federal Prison system nation-wide. Article 9 of the master agreement, entitled "Negotiations at the Local Level" (set forth in an appendix to this letter insofar as relevant) provides for the negotiation of local supplementary agreements and prescribes the matters which are appropriate for local bargaining. Section g of Article 9 provides a mechanism for assuring that supplemental agreements are in compliance with the master agreement as well as with applicable laws and regulations, and specifically provides that "[d]isputes as to whether a matter is improper for inclusion in a supplemental agreement shall be resolved by arbitration . . . ."

In January 1979, management of the activity solicited comments from the union on a policy statement concerning the administration of sick leave which was intended for publication. The union responded by identifying four paragraphs of the policy statement on which it requested an opportunity to negotiate, but did not set forth any specific bargaining proposals. The activity thereafter advised the union that, ". . . based upon . . . our interpretation of the issues that are negotiable at the local level, we do not believe the [sick leave policy] items to be negotiable." Further efforts by the union to negotiate on the identified paragraphs were unsuccessful, and the activity

ultimately implemented the new sick leave policy. The union then filed the instant negotiability appeal.1/

In its statement of position, the agency contends, inter alia, that the instant negotiability appeal was prematurely filed, in that it involves a threshold question concerning the applicability and controlling effect of a higher level agreement. In this regard, the agency asserts that "the terms of the Master Agreement support the [agency's] view that the [union] was precluded by contract from seeking to negotiate the substance of the Policy Statement contained [in the four identified paragraphs]; and, thus, that the underlying questions concerning the controlling effect of [agency regulations and provisions of the Federal Personnel Manual] need not necessarily be reached by the Authority if an arbitrator were to agree with the [agency's] construction of the Master Agreement." The union essentially contends, on the other hand, that the master agreement expressly contemplates local bargaining concerning the provisions of a policy statement which, as here, are intended to implement the agreement at the local level and cover matters more practicably negotiated at the activity level. For the reasons set forth below, the Authority concludes, in agreement with the agency, that the instant dispute is not properly before the Authority for resolution.

As indicated above, the parties are essentially in dispute concerning the threshold question as to whether or not the master agreement negotiated at the national level authorizes bargaining at the local level on the matter of sick leave policy administration. In the Authority's opinion, such threshold issue is not appropriate for resolution under the procedures set forth in section 7117 of the Federal Service Labor-Management Relations Statute and Part 2424 of the Authority's Rules and Regulations, which procedures are designed to resolve whether particular union proposals are themselves nonnegotiable-- i.e., inconsistent with law, rule or regulation.2/ Rather, to the extent that the instant

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1/ Shortly thereafter, the union also filed an unfair labor practice charge with the Authority's Boston Region which alleged that the activity's implementation of the policy violated section 7116(a)(5) and (8) of the Statute. The unfair labor practice proceeding is currently pending.

2/ In this regard, § 2424.1 of the Authority's Rules and Regulations (44 Fed. Reg. 44765 (1979)), which sets forth conditions governing review of negotiability issues, states in pertinent part as follows:

> The Authority will consider a negotiability issue under the conditions prescribed by 5 U.S.C. 7117(b) and (c), namely: If an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter proposed to be bargained because, as proposed, the matter is inconsistent with law, rule or regulation, the exclusive representative may appeal the allegation to the Authority when--
>
> (a) It disagrees with the agency's allegation that the matter as proposed to be bargained is inconsistent with any Federal law or any Government-wide rule or regulation . . . .

case involves a dispute over the meaning of provisions contained in the master agreement, the proper forum in which to resolve the dispute would be that which the parties themselves have adopted for such purpose.3/

In a negotiability dispute such as the instant case which involves issues both as to the interpretation of a controlling agreement and as to other matters on which negotiability questions may arise, there are sound policy reasons for requiring the parties first to resolve the issue involving the interpretation of the controlling agreement. For example, the resolution of the issue involving the interpretation of the controlling agreement could result in a determination that the matter in dispute is inconsistent with the provisions of the controlling agreement, thereby obviating the need for an Authority decision under section 7117 of the Statute by rendering moot the negotiability issues and avoiding an unwarranted proliferation of cases before the Authority. Moreover, were the Authority to decide that a disputed matter is negotiable while an issue involving the interpretation of the controlling agreement remained to be resolved, such Authority decision would lack finality.4/ That is, a later determination under the procedures of the parties' controlling agreement that the matter is inconsistent with the controlling agreement would be dispositive of the parties' negotiability dispute even though the Authority had previously ruled that the matter was negotiable.

Consequently, until there is a resolution, under the procedures established by the parties, that the controlling agreement does not preclude bargaining at the activity level concerning the matter of sick leave policy administration, the Authority will not decide any related negotiability issues arising under the Statute pursuant to its exclusive responsibility as set forth in section 7105(a)(2)(E) of the Statute to "resolve issues relating to the duty to bargain in good faith under section 7117(c) . . . ." That is, the Authority finds that the instant appeal has been prematurely filed and the conditions for review of such issues pursuant to section 7117 of the Statute and Part 2424 of the Authority's Rules and Regulations have not been met.

Accordingly, and apart from other considerations, the union's appeal is hereby denied, without prejudice to the renewal of its contention that the matters in dispute are negotiable under the Statute in a petition duly filed with the

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3/ In this connection, it is noted that section 7114(c)(4) of the Statute provides:

> A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

4/ In this regard, § 2429.10 of the Authority's Rules and Regulations (44 Fed. Reg. 44771) provides that "[t]he Authority . . . will not issue advisory opinions."

Authority after it is resolved, under applicable procedures, that bargaining on such matters is not precluded by the controlling agreement.5/

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

cc: A.E. Ross
DOJ

5/ In so concluding, however, the Authority reiterates that the union, in requesting negotiations concerning certain paragraphs of the activity's proposed policy statement on sick leave administration, did not set forth its position in any specific proposals. If matters proposed to be negotiated are not specifically delimited and articulated, it is frequently difficult if not impossible for the Authority to render a negotiability determination pursuant to section 7117 of the Statute that would be of assistance both to the parties and the public. In this regard, as previously noted (supra n. 2), § 2424.1 of the Authority's Rules and Regulations speaks in terms of "the matters as proposed to be bargained."

APPENDIX

ARTICLE 9 - NEGOTIATIONS AT THE LOCAL LEVEL

Section a. It is understood by the parties to this Agreement that this is the Master Agreement and that only a local supplemental agreement in accordance with this Article may be negotiated.

Section b. The Master Agreement is governing and controlling at the local level. The purpose of a local supplemental agreement shall be to implement the Master Agreement and cover those other appropriate matters which are more practicably negotiated at the local level. It shall not:

(1) Define management rights.

(2) Renegotiate those matters negotiated at the national level.

(3) Include matters negotiated at the national level whether or not such matters have been incorporated into this Agreement.

(4) Incorporate, duplicate, or paraphrase any provisions of a controlling law, regulation signed at a higher level or this agreement.

(5) Concern a matter that is not within the discretion of the Employer locally.

(6) Concern a matter that is not subject to mandatory negotiations under Executive Order 11491, as amended. Exceptions may be granted by the Employer at the national level.

Section c. To the extent that they are not already covered and limited by this Agreement and to the extent that they are in accordance with E.O. 11491, as amended, the following matters may be negotiated locally and included in any local supplemental agreement:

. . . . . .

(11) Policy Statements and Operations Memoranda which effect local working conditions, personnel policies, and practices for members of the unit except that in those situations necessitating immediate issuance, the Employer in advance of such issuance shall, in good faith, endeavor to contact the Union for the purpose of notification and consultation. Otherwise, the Union will have up to seven working days for review of the proposed issuance and sub- mission of the Union's comments and/or requesting negotiations. It is understood by the parties that changes in the Employer's policy issuances which affect working conditions or personnel policies and practices for employees in the unit may not be made through the use of oral or written directives outside of the Employer's formal policy issuance system.

(12) Other working conditions and practices which are within the discretion of the employer locally, and which have not been limited or excluded by provisions of this Agreement.

Section d. In any case where a provision of a Local Supplemental Agreement conflicts with any provision of this Agreement, such provision will be null and void.

. . . . . .

Section g. Once an agreement has been reached at the local level it shall not be final for thirty (30) days following signature of the parties. During this period the proposed agreement shall be forwarded to the Assistant Director for Correctional Programs for review to determine if the proposed agreement complies with the provisions of this Agreement and applicable laws and regulations. If the proposed agreement conforms with the provisions of this Agreement and applicable laws and regulations, it shall be approved. Disputes as to whether a matter is improper for inclusion in a supplemental agreement shall be resolved by arbitration in accordance with Article 30. At the end of thirty (30) days, the proposed agreement will take effect except for any matters in dispute which will not be effective until resolved by the arbitrator.

. . . . . .

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

January 11, 1980

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: American Federation of Government Employees, AFL-CIO, Local 1617 and Headquarters, San Antonio Air Logistics Center, Kelly Air Force Base, Texas, Case No. 0-NG-33

Dear Mr. King:

Reference is made to your petition for review filed on behalf of the union, the agency's statement of position and the union's response thereto, in the above-entitled case. For the reasons indicated below, the Authority has determined that the petition for review must be dismissed.

The basic facts, as set forth in the record, are as follows: During the term of an agreement between the San Antonio Air Logistics Center (activity) and the American Federation of Government Employees, AFL-CIO, Local 1617 (union), the activity notified the union of its intent to establish an "uncommon tour of duty," i.e., a seven-day staggered shift operation to meet increased work load requirements. The parties met to discuss the impact on adversely affected unit employees. At that time, however, the activity refused to bargain on its decision to establish the new tour or duty. Following the activity's implementation of the uncommon tour of duty, the union filed an unfair labor practice charge with the Dallas Regional Office of the Authority alleging that the activity had "implemented a change in past practices, policies and working conditions by establishing [u]ncommon [t]ours of [d]uty for [u]nit employees without giving the exclusive representative . . . an opportunity to bargain on its merits or the impact on [u]nit employees," in violation of section 7116(a)(1), (2), (5), (7) and (8) and section 7117 of the Federal Service Labor-Management Relations Statute (Statute). At the same time, the union filed the negotiability appeal herein.

In the circumstances of this case, the negotiability issue sought to be raised by the union in its appeal, i.e., whether the establishment of uncommon tours of duty is a negotiable matter under the Statute, has been rendered moot. As previously indicated, the union filed an unfair labor practice charge alleging, in part, that the activity violated the Statute by "establishing [u]ncommon

[t]ours of [d]uty for [u]nit employees without giving the exclusive representative . . . an opportunity to bargain on its merits. . . ." The Regional Director (RD) refused to issue a complaint on the unfair labor practice charge, finding, in effect, that the activity was under no obligation to bargain on the matter of uncommon tours of duty inasmuch as it was covered by the parties' negotiated agreement[1/] and the activity had complied with the provisions contained therein. The RD also found that the parties had negotiated and reached agreement on the impact and implementation of management's decision to establish the uncommon tours of duty. He further noted that, if there was any disagreement with the activity's interpretation and application of the agreement, the union could have utilized the contractual grievance and arbitration procedure to resolve the matter. The General Counsel, pursuant to section 2423.9(e) of the Authority's Rules and Regulations (44 Fed. Reg. 44761 (1979)), affirmed the RD's refusal to issue a complaint. San Antonio Air Logistics Center, Kelly Air Force Base, Texas, Case No. 6-CA-33 (Dec. 21, 1979).

In view of the finding that the activity was under no obligation to bargain in these circumstances, were the Authority to issue a decision under section 7117 (c) of the Statute, such decision would constitute merely an advisory opinion contrary to the Authority's Rules and Regulations.[2/]

Therefore, inasmuch as the disposition of the union's related unfair labor practice charge has rendered the underlying negotiability issue moot, the union's petition for review is dismissed pursuant to section 2424.8 of the

1/ As found by the RD, Article X, Section 2 of the parties' agreement states:

> "Shifts and tours of duty already established by the Employer will remain in effect except as follows. Changes to these shifts and tours of duty will be kept to the minimum possible and will be made only when dictated by mission requirement. The Union will be given the opportunity to have its views considered by management prior to the implementation of a change...."

San Antonio Air Logistics Center, Kelly Air Force Base, Texas and AFGE, Local 1617, Case No. 6-CA-33 (Aug. 29, 1979).

2/ In this regard, section 2429.10 of the Authority's Rules and Regulations (44 Fed. Reg. 44771 (1979)) provides that "[t]he Authority . . . will not issue advisory opinions."

Authority's Rules and Regulations (44 Fed. Reg. 44740 et seq. (1979)), without passing upon the merits of the appeal.

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

cc: D. Dresser
Air Force

2 FLRA No. 58

UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

American Federation of Government
Employees, AFL-CIO, Local 1786

(Union)

and

Case No. 0-NG-4

Marine Corps Development and Education
Command, Quantico, Virginia

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Provision[1]

(Article XVII) Section 3. Data for the Administrative Support and Patron Services surveys will be collected by joint Union-Management teams, as is Crafts and Trades data, and will be presented to the Local Wage Survey Committee.

Question Here Before the Authority

The question is whether the disputed provision of the parties' locally negotiated agreement violates section 7106(a)(2)(B) of the Federal Service Labor-Management Relations (FSLMR) Statute,[2] as alleged by the agency.

1/ The parties negotiated the disputed provision as part of their local collective bargaining agreement. During the review process pursuant to section 15 of Executive Order 11491, as amended, the agency disapproved the provision. The parties subsequently negotiated a Memorandum of Understanding in which they agreed to delete the disputed provision from the collective bargaining agreement and in which the activity agreed to reopen the contract to negotiate the provision if the Authority were to find it to be within the duty to bargain.

2/ Section 7106(a)(2)(B) of the Federal Service Labor-Management Relations Statute provides in pertinent part as follows:

(Continued)

Opinion

Conclusion: The provision does not violate section 7106(a)(2)(B) of the Statute. Thus, the agency's allegation that the provision is not within the duty to bargain was improper and, pursuant to section 2424.8 of the Authority's Rules and Regulations (44 Fed. Reg. 44,740 et seq. (1979)), is set aside.3/

Reasons: The provision here in dispute would establish a union right to representation on wage survey teams which gather local prevailing wage data for use in determining the pay of certain hourly-paid nonappropriated fund (NAF) employees.

Hourly-paid NAF employees are grouped into three job classifications as follows:4/ Crafts and Trades (CT) workers such as cooks, electricians, janitors, plumbers, and warehousemen; Administrative Support (AS) employees such as receptionists, secretaries, and audit, file, or payroll clerks; and Patron Service (PS) employees such as cashier-checkers, customer service clerks, sales clerks and ticket sellers. Although such NAF employees are excepted generally from laws administered by the Office of Personnel Management,5/ the provisions of title 5 U.S.C. concerning the determination of pay for hourly-paid employees of the Federal government (i.e., 5 U.S.C. § 5341 et seq.) specifically apply to NAF CT employees.6/ These statutory pay setting procedures and the implementing regulations contained in Federal Personnel

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(Continued)

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws--

. . . . . .

(B) . . . to determine the personnel by which agency operations shall be conducted.

3/ In so deciding that the subject provision is within the duty to bargain, the Authority makes no judgment as to the merits of the provision.

4/ See Department of Defense (DOD) Manual 1401.1-M, Personnel Policy Manual for Nonappropriated Fund Instrumentalities, Chap. III and Appendix B (1978).

5/ 5 U.S.C. § 2105(c).

6/ 5 U.S.C. § 5342(a)(2)(C).

Manual Supplement 532-2 establish that the pay of hourly-paid personnel, including NAF CT employees, will be determined through the use of local wage surveys of like private sector jobs. Further, the statute and regulations specifically provide that unions representing such hourly-paid employees will participate at every stage of the pay determination process including representation on local wage survey teams.7/

The Department of Defense has administratively extended certain of the principles of the statutory pay setting procedures applicable to CT employees, such as, for example, the use of local wage surveys of like private sector jobs, to AS and PS employees. However, certain statutory entitlements granted to unions representing CT employees, i.e., as relevant in this case, the right to representation on local wage survey teams, were not administratively extended to unions representing AS and PS employees. As a result, a union representing CT, AS and PS employees in one bargaining unit would have a statutory right to representation on local wage survey teams gathering wage data to be used in determining the pay of CT employees but no similar right to representation on other wage survey teams gathering wage data to be used in determining the pay of AS and PS employees.

The agency contends, in this case, that the determination of pay of AS and PS employees constitutes an operation of the agency and thus, the right to determine the personnel by which that operation is conducted, including the portion concerning the collection of local prevailing wage data, is specifically reserved to agency management by section 7106(a)(2)(B) of the Statute.

The agency position lacks merit. It is clear that the collection by the wage survey teams of local prevailing wage data is an essential part of the process for determining the pay of AS and PS employees and directly affects the working conditions of such employees. Further, irrespective of whether the use of such wage survey teams constitutes a part of the operation of the agency or is a procedure by which the pay determination operation is carried out, nothing in the disputed provision would interfere with the agency's right to determine the personnel who will represent the agency's interests on such wage survey teams. The union's provision merely provides that there will be union representation on such already established wage survey teams. Moreover, the disputed provision is entirely consistent with the public policy as expressed by Congress in 5 U.S.C. § 5343(c)(2), of providing labor organizations a direct role in the determination of pay for certain hourly-paid employees of the Federal government.

In summary, the agency has not demonstrated that the disputed provision, within the circumstances of this particular case, would interfere with the agency's right to determine the personnel by which an agency operation is carried out.

7/ See, e.g., 5 U.S.C. § 5343(c)(2) and Federal Personnel Manual Supp. 532-2, subchapters S3-3.b. and S5-6.e.(b).

Therefore, the provision at issue concerns a matter within the agency's duty to bargain under the Statute, and the agency's allegation to the contrary is set aside.

Issued, Washington, D.C., January 17, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

American Federation of
Government Employees, AFL-CIO
Local 331

(Union)

and

Case No. O-NG-17

Veterans Administration
Hospital, Perry Point,
Maryland

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Union Proposal

Article 25, Promotion, Section A - It is agreed that an employer will utilize, to the maximum extent possible the skills, and talents of its employees. Therefore, consideration will be given in filling vacant positions, to employees within the bargaining unit. Management will not solicit applications from outside the minimum area of consideration or call for a Civil Service Register of candidates if three or more highly qualified candidates can be identified within the minimum area of consideration. This will not prevent applicants from other VA field units applying provided they specifically apply for the vacancy being filled, and that they are ranked and rated with the same merit promotion panel as local employees.

Question Here Before the Authority

The question is whether the union's proposal concerning the filling of vacant positions is a matter outside the duty to bargain established by the Federal

Service Labor-Management Relations Statute (FSLMR Statute) or violates section 7106(a)(2)(C) of the Statute,1/ as alleged by the agency.2/

Opinion

Conclusion: The subject proposal is within the agency's duty to bargain under the FSLMR Statute and does not violate section 7106(a)(2)(C) thereof. Accordingly, pursuant to section 2424.8 of the Authority's Rules and Regulations (44 Fed. Reg. 44740 et. seq. (1979)), the agency's allegation that the disputed proposal is not within the duty to bargain is set aside.3/

Reasons: 1. The agency's allegation of nonnegotiability herein asserts that the union's proposal might be interpreted as applicable to the filling of positions outside the bargaining unit, whereas "[t]he only obligation that Management has to bargain regarding promotions is the filling of positions within the bargaining unit . . . [which] does not include the filling of first-line supervisory positions or any other 'Management' position . . . ." However, the union expressly concedes in its negotiability appeal to the Authority that the instant proposal was not intended to apply to the filling of supervisory or other Management positions outside the bargaining unit, and the language of the proposal does not require an interpretation inconsistent with the union's stated intent. Accordingly, apart from other considerations, the

1/ Section 7106(a)(2)(C) of the Statute (92 Stat. 1198) provides:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws--

. . . . . .

(C) with respect to filling positions, to make selections for appointments from--

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source . . . .

2/ Based upon the record as submitted by the parties, it appears that the agency's statement of its position in response to the union's appeal was not filed within the time limits set forth in section 7117(c)(3) of the Statute (92 Stat. 1206) and has therefore not been considered by the Authority.

3/ In so deciding that the subject proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

instant proposal is not a matter outside the agency's duty to bargain under the Statute.

2. Further the union's proposal does not conflict with section 7106(a)(2)(C) of the Statute, which guarantees management's right, with respect to filling positions, to make selections from among properly ranked and certified candidates for promotion or from any other appropriate source. This provision of the Statute is identical to section 7106(a)(2)(C) in the final version of the bill passed by the House,[4/] which was added as part of the "Udall substitute" during floor consideration of H.R. 11280. In offering this amendment, Representative Udall stated:[5/]

> The intent of this provision is to preserve as bargainable (to the extent permitted by applicable laws and regulations) the standards, criteria, and procedures for establishing promotion certificates, while ensuring management's right to make the actual selection from the certificate, or to make the appointment from any other appropriate source.

Thus, Congress intended to preserve management's right to select in filling a position, but to afford the parties an opportunity to negotiate concerning standards, criteria and procedures to the extent that bargaining on such matters would not prevent management from exercising the right to make the actual selection.[6/]

The union's proposal in the instant case would not prevent management from exercising its reserved right to select. Rather, it would require only that "consideration will be given, in filling vacant positions, to employees within the bargaining unit," and that the "minimum area of consideration" (i.e., the area of intensive search for eligible candidates) will not be expanded if it yields three or more eligible, highly qualified candidates. Thus, the proposal is concerned only with limiting the area of such intensive search: It would expressly permit agency employees from outside the minimum area of consideration to apply for positions covered by the provision, and would not limit management consideration of such applicants. Moreover, it would not prevent

4/ 124 CONG. REC. H 9625 (daily ed. Sept. 13, 1978).

5/ 124 CONG. REC. H 9634 (daily ed. Sept. 13, 1978).

6/ As the Authority previously noted in National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District Office, Case No. O-NG-9, 1 FLRA No. 102 (Aug. 23, 1979), Report No. 15, while section 7106(a) of the Statute specifies various rights reserved to agency management, subsection (b) provides that management's exercise of any rights contained in subsection (a) does not preclude negotiations on the procedures which management officials will observe in exercising those rights. In this regard, the legislative history of the Statute reflects the intent, with respect to the duty to bargain on the procedures that management will observe in exercising any reserved rights under the Statute, to authorize unions to negotiate fully on such procedures unless such negotiations would prevent the agency from acting at all. See S. REP. No. 95-1272, 95th Cong., 2d Sess. 158 (1978).

management from expanding the area of intensive search for eligible candidates or from making selections from any appropriate source once the minimum area of consideration was considered and exhausted as the source of a sufficient number of highly qualified candidates.

Therefore, the proposal at issue is a matter within the agency's duty to bargain under the Statute, and the agency's determination of nonnegotiability must be set aside.

Issued, Washington, D.C., January 17, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

American Federation of Government
Employees, AFL-CIO, Local 1928

(Union)

and

Case No. O-NG-13

Department of the Navy
Naval Air Development Center
Warminster, Pennsylvania

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Union Proposal

[C]ivilian and officer personnel who are engaged in foot hazardous operations and who are required to wear foot protection [shall] be provided with safety shoes without charge.

Question Here Before the Authority

The question is whether the union's proposal falls within the duty to bargain under the Federal Service Labor-Management Relations Statute (the Statute), or whether, as alleged by the agency, the duty to bargain does not extend to the proposal in view of published agency regulations, pursuant to section 7117(a)(2) of the Statute.1/

1/ The Federal Service Labor-Management Relations Statute, § 7117(a) (92 Stat. 1205) provides as follows:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(Continued)

Opinion

Conclusion: The agency has failed to support its allegation that the union's proposal falls outside the duty to bargain under section 7117(a)(2) of the Statute. Accordingly, pursuant to section 2424.8 of the Authority's Rules and Regulations (44 Fed. Reg. 44740 et seq. (1979)), the agency's allegation is set aside.2/

Reasons: The proposal at issue essentially would require the activity to provide, without charge, safety shoes for employees required to wear foot protection in the course of their work. The Department of Defense (the agency) alleges that negotiation of this proposal is barred, under section 7117(a)(2)

(Continued)

> (2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.
>
> (3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

2/ In so deciding that the subject proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

of the Statute, by an agency regulation (DOD Instruction 6055.2)3/ which, according to the agency, "requires that components of the Department of Defense provide any required personal protective equipment at Government expense . . . [including] safety shoes for employees required to wear foot protection." This particular regulation was raised for the first time by the agency in its statement of position to the Authority, in response to the union's petition for review.4/ The agency's sole argument in support of its allegation is as follows:

3/ DOD Instruction 6055.2, "Personal Protective Equipment" (May 3, 1978), provides, in relevant part:

B. APPLICABILITY AND SCOPE

1. The provisions of this Instruction apply to the . . . Military Departments . . . (hereafter referred to as "DoD Components")

. . . . . .

C. POLICY

1. Wherever feasible, occupational hazards will be eliminated through engineering or management controls. . . .

2. Personal protective equipment appropriate to the work situation will be provided by the DoD Component concerned at Government expense in those situations:

a. Where engineering and/or management controls are not feasible.

b. Where development or installation of engineering controls are pending.

c. That involve short term, nonroutine operations for which engineering controls are not practicable.

d. Which involve emergencies; . . . .

D. RESPONSIBILITIES

Heads of DoD Components shall include and enforce the following provisions in their safety and occupational health programs:

1. Evaluate workplaces, including applicable hazardous material data, to determine personal protective equipment requirements. Qualified safety and health personnel should perform these evaluations.

. . . . . .

4/ The union's petition for review resulted from an allegation by the activity that the proposal violated a Department of the Navy regulation. The agency no longer relies on the Navy regulation as a bar to negotiation in this case.

> No determination has been made by the Authority that no compelling need exists for DoD Instruction 6055.2; no union has raised a question as to the compelling need for that regulation; and therefore the duty to bargain, pursuant to 5 U.S.C. 7117(a)(2), does not extend to the matter at issue here.

In this connection, the agency does not explain why the union should have been expected to anticipate a question regarding the compelling need for this agency regulation which, as indicated, had not previously been relied upon by the agency. Further the agency does not advert to any conflict between the proposal and the regulation. Moreover, the agency does not make any showing whatsoever to support a finding by the Authority that a compelling need does exist for the regulation in question to bar negotiations on the union's proposal.

The duty to bargain in good faith under section 7117 of the Statute extends in general to matters which are the subject of agency rules and regulations which are not Government-wide rules and regulations, to the extent they are not inconsistent with federal law.5/ When there is a "compelling need," however, for particular internal agency rules and regulations to prevail vis a vis particular conflicting union bargaining proposals, such rules and regulations will stand as bars to negotiation on such proposals. Therefore, internal agency rules and regulations, such as the DoD Instruction involved in the present case, may bar negotiations on conflicting collective bargaining proposals when, under the Statute, a compelling need for such a result is determined to exist by the Authority pursuant to subpart B of its rules.6/

Hence, in a proceeding before the Authority such as the instant case involving an allegation by an agency that a union proposal is not within the duty to bargain under section 7117(a)(2) of the Statute because of an internal agency regulation raised specifically for the first time in the agency's statement of position, the agency bears the burden of coming forward with affirmative support for its assertion that the regulation in question bars negotiations because, implicitly, a compelling need exists for the regulation. This is consistent with the requirement in the Authority's rules concerning the review of negotiability issues that an agency's statement of position filed with the

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5/ Section 7117(a)(1) of the Statute. Note 1, supra.

6/ Section 7117(a)(2) and (3) of the Statute, note 1, supra, and section 2424.11 of the Authority's Rules and Regulations (44 Fed. Reg. 44766 (1979)) which provides:

> § 2424.11 Illustrative criteria.
>
> A compelling need exists for an agency rule or regulation concerning any condition of employment when the rule or regulation meets one or more of the following illustrative criteria:

(Continued)

Authority shall set forth "in full its position on any matters relevant to the petition which it wishes the Authority to consider in reaching its decision, including a full and detailed statement of its reasons supporting the allegation." Furthermore, with regard to its own regulations, the agency obviously should have the greatest familiarity with the circumstances under which the particular regulation involved was developed and issued and the purpose it was intended to serve. Consequently, since the agency is relying on the regulation to bar negotiations on an otherwise negotiable proposal, the agency properly is required to adduce such relevant circumstances in the statement of its position before the Authority.

In this case, as already indicated, the agency has submitted no affirmative support to the Authority upon which the Authority could base a finding that a compelling need exists for the regulation in question to bar negotiations on the union's proposal. Therefore, based on the foregoing reasons, we find that the agency has failed to support its allegation that the union's proposal falls

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(Continued)

(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission of the agency or primary national subdivision;

(b) The rule or regulation is essential, as distinguished from helpful or desirable, to the management of the agency or the primary national subdivision;

(c) The rule or regulation is necessary to insure the maintenance of basic merit principles;

(d) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature; or

(e) The rule or regulation establishes uniformity for all or a substantial segment of the employees of the agency or primary national subdivison where this is essential to the effectuation of the public interest.

outside the duty to bargain under section 7117(a)(2) of the Statute because of an internal agency regulation.

Accordingly, the agency allegation is set aside.

Issued, Washington, D.C., January 17, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

National Treasury Employees Union
and NTEU Chapter 12

(Union)

and

Case No. O-NG-158

Department of the Treasury,
Internal Revenue Service,
Birmingham District, Alabama

(Activity)

DECISION ON NEGOTIABILITY APPEAL

In June of 1979, IRS, Birmingham District (the activity) issued a policy requiring Revenue Agents to assist Tax Auditors in audits under certain circumstances. Thereafter, NTEU, Chapter 12 (the union) sought to rescind the agency memorandum setting forth the alleged new policy and generally requested "that the change in practice and policy be negotiated as provided for in the contract." The agency response to that request included the allegation that "the work assignment practice . . . is not negotiable" under section 7106 of the Statute.

On September 5, 1979, the union filed a petition for review with the Authority. In its petition, the union contests the agency allegation, which it described as stating that "any potential proposals by the Union regarding the procedures for determining which Revenue Agents would be assigned to conduct office audit interviews would be nonnegotiable." In this regard, neither the union's letter to the agency requesting an allegation nor the petition for review contains a more explicit proposal indicating the precise matter sought to be negotiated.

In its submission to the Authority, the agency asserts that the petition does not present a proper negotiability issue and, therefore, should be dismissed.1/

1/ In this regard, the agency cites the negotiability procedures set forth in section 7117 of the Federal Service Labor-Management Relations Statute (92 Stat. 1205) and part 2424.1 of the Authority's Rules and Regulations (44 Fed. Reg. 44765 (1979)) setting forth conditions governing review of negotiability issues, which states in pertinent part as follows:

> The Authority will consider a negotiability issue under the conditions prescribed by 5 U.S.C. 7117 (b) and (c), namely: If an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter proposed to be bargained because, as proposed, the matter is inconsistent with law, rule or regulation, the exclusive representative may appeal the allegation to the Authority . . . .

In support of this assertion, the agency argues that no bargaining proposal is pending between the parties. The agency concludes, in this regard, that the union is essentially attempting to resolve an unfair labor practice charge through the use of negotiability procedures.[2/] Further, the agency alleges that assignment of work is nonnegotiable, and, although procedures pertaining to assignment might be negotiable, the union has never requested to negotiate the impact and implementation of the policy.

Responding to the agency's submission, the union asserts that the negotiability procedures set forth in the Statute and the Authority's rules are appropriate for the resolution of the matter at issue. As to the merits of the dispute, the union argues that it "has not questioned the right of the agency to assign Revenue Agents the work in question. What NTEU maintains is that the methods for determining which Revenue Agent is assigned are negotiable." It further contends that it "very clearly requested to negotiate the matter in question."[3/]

In Association of Civilian Technicians, Alabama ACT and State of Alabama National Guard, Case No. O-NG-27, 2 FLRA No. 39 (December 28, 1979), Report No. ____, the Authority decided, with respect to a question substantially identical to that presented here, that a petition which never presented a proposal sufficiently specific and delimited in form and content as to permit the Authority to render a negotiability decision did not meet the conditions for review. For the reasons fully set forth in that decision, the Authority finds that the instant petition does not meet the conditions for review prescribed in section 7117 of the Statute and part 2424.1 of the Authority's rules of procedure.

Additionally, it is clear from the record in this case that the parties' contentions and arguments focus principally on whether, and on what, the union has requested negotiation in the particular circumstances presented, rather than on issues appropriate for resolution under the negotiability procedures set forth in section 7117 of the Statute and part 2424 of the Authority's Rules and Regulations concerning whether particular union proposals related to the assignment of audits to Revenue Agents are themselves nonnegotiable, i.e., inconsistent with law, rule or regulation. Hence, the essence of the parties' contentions and arguments concerns unfair labor practice issues appropriate for resolution under the procedures set forth in section 7118 of the Federal Service Labor-Management Relations Statute (92 Stat. 1207-8).

That is, since the instant case arose out of an alleged unilateral change and essentially involved a claim of a refusal to bargain on procedures related to

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2/ Concurrently, the union filed an unfair labor practice charge with the Atlanta Regional Office (4-CA-217) alleging a § 7116(a)(5) violation of the agency's duty to bargain concerning the same agency action.

3/ In this regard, the parties apparently are in agreement that the agency has the right under the Statute to assign Revenue Agents the work in question, and that impact and implementation of the policy are generally proper subjects for negotiation.

such change and a defense that bargaining had not been requested on impact and implementation, the proper forum in which to raise these issues is not a negotiability appeal, but was an unfair labor practice proceeding pursuant to section 7118 of the Statute. In this regard, as previously noted (note 2, supra), the union filed an unfair labor practice charge concerning these issues. On December 14, 1979, the Regional Director for the Atlanta Region refused to issue a complaint on the unfair labor practice charge based upon his finding that the union had not requested negotiation on the impact and implementation of the agency policy.

In conclusion, the union's appeal does not meet the conditions for review under section 7117 of the Statute and part 2424 of the Authority's Rules and Regulations. Accordingly, the appeal is dismissed.

Issued, Washington, D.C., January 18, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES ARMY MISSILE
MATERIEL READINESS COMMAND
(USAMIRCOM)

Activity

and

Case No. 0-AR-7

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1858, AFL-CIO

Union

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator J. Thomas King filed by the union under section 7122(a) of the Federal Service Labor Management Relations Statute (5 U.S.C. §7122(a)).

According to the award, the grievance arose when the agency changed the manner in which Monday holidays were to be observed by certain commissary employees who have a regular tour of duty of Tuesday through Saturday, with Sunday and Monday as their nonwork days. Prior to the schedule change, when a holiday occurred on a Monday, the commissary was closed on the preceding Saturday, the employees were given Saturday off for the holiday, and they had Sunday and Monday off as their designated nonwork days. Because Saturday was such a busy shopping day, however, the agency decided that the commissary should be kept open on Saturdays. Therefore a schedule change was effected such that when a Monday holiday occurred, the employees were scheduled to work on the preceding Saturday, they were given Sunday and Tuesday off as their designated nonwork days, and Monday off for the holiday. The union grieved the change in the work schedule, contending that the agency had violated Article XIII,[1/] Section 4

1/ According to the arbitrator, Article XIII of the parties' agreement states in pertinent part:

> Section 1. Basic Tour of Duty
>
> The normal basic tour of duty will consist of five consecutive eight-hour days, 0800 to 1630 hours, Monday through Friday, - - - - -. A period of seven consecutive days beginning at 0001 hours on Sunday ending at 2400 hours the following Saturday constitutes a normal administrative work week.

(Continued)

of the parties' collective bargaining agreement. The matter ultimately went to arbitration. The issue before the arbitrator was:

> Did the establishment by the command of Tuesday as a non-work day in lieu of Saturday as a holiday when a holiday occurs on a Monday violate Article XIII, Section 4., of the agreement since the tour of duty was not continued for at least two pay periods?

Finding that the agency did not violate the agreement when it established Tuesday as a nonwork day in lieu of Saturday as a holiday when a holiday occurred on a Monday, the arbitrator denied the grievance. He held that employees had neither gained nor lost the benefit of having a day off, and that the employees had suffered no economic loss and were therefore not entitled to economic relief. The arbitrator noted that the Commissary Officer, acting pursuant to instructions from his superiors, had the prerogative to establish the days off during a holiday season.

(Continued)

Section 2. Changes in Tour of Duty and Administrative Work Week

Changes in the prescribed basic regular tour of duty or normal administrative work week for specified individuals or for special groups of employees may be approved by the Commander, MICOM or the Director, USACC Agency-Redstone in those cases where a regular tour of duty or normal administrative work week would seriously handicap the performance of a function or would result in substantially increased cost.

Section 3. Coverage

a. Tours of duty will cover a minimum of 40 hours per administrative work week for all full time employees, except for fire fighters.

b. Unless mission requirements dictate otherwise, the basic 40-hour work week will be scheduled over five days, Monday through Friday, so that the two days outside the basic work week will be consecutive. As a minimum, one regular day off - preferably Sunday - will be provided.

Section 4. Exceptions

Tours of duty will be established or changed at least two weeks in advance, announced in writing, and continued for a period of at least two pay periods. The MICOM Command or the Director, USACC Agency-Redstone can make exceptions to this requirement when unusual circumstances preclude compliance. Exceptions to the 2-weeks advanced notice will not be made, however, when the change in tour is for the sole purpose of avoiding or creating the necessity for payment of overtime, night differential or holiday pay.

Based on his interpretation of the terms "normal basic tour of duty," "basic regular tour of duty," "normal tour of duty," and "tours of duty" as used in the collective bargaining agreement, the arbitrator found that there had been no change in the tour of duty of the employees. He added that had a determination been made that a change in the tour of duty had taken place, the need to keep the commissary open on Saturdays would be considered an unusual circumstance as provided for in the agreement.

The union filed a petition for review of the arbitrator's award pursuant to the rules of procedure set forth in 5 C.F.R. part 2411 (1978), which, to the extent consistent with the provisions of section 7122(a) of the Federal Service Labor Management Relations Statute (5 U.S.C. §7122(a)) and as amended by section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority (44 Fed. Reg. 44741), remain operative with respect to this case. The union seeks Authority acceptance of its petition on the basis of the exceptions discussed below. The agency filed an opposition.

Pursuant to section 2411.32 of the amended rules and section 7122(a) of the Statute, the Authority will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award is deficient because it is contrary to law or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations.

In its first exception the union contends that the award violates law. In support of this exception the union asserts that when a Monday holiday occurs, the provisions of section 6103(b)(2) of title 5, United States Code,[2/] mandate the establishment of the preceding Saturday as the holiday for employees whose regular workweek is Tuesday through Saturday, and that in sanctioning the schedule change, the arbitrator is approving a violation of 5 U.S.C. §6103(b)(2). The union also contends that by not awarding premium pay to employees who worked on these Saturdays, which should have been designated

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2/ 5 U.S.C. §6103(b)(2) provides:

§6103. Holidays

. . . . . .

(b) For the purpose of statutes relating to pay and leave of employees, with respect to a legal public holiday and any other day declared to be a holiday by Federal statute or Executive order, the following rules apply:

. . . . . .

(2) Instead of a holiday that occurs on a regular weekly nonworkday of an employee whose basic workweek is other than Monday through Friday, except the regular weekly nonworkday administratively scheduled for the employee instead of Sunday, the workday immediately before that regular weekly nonworkday is a legal public holiday for the employee.

holidays, the award is contrary to the provisions of section 5546(b) of title 5, United States Code.3/ Finally, the union argues that the award is contrary to this law as interpreted by the Comptroller General.

The Authority will grant a petition for review of an arbitration award where it appears, based on the facts and circumstances described in the petition, that the award violates law. However, in this case the union has not presented sufficient facts and circumstances to support its exception.

The union contends that the arbitrator's award, in which the arbitrator answered the issue before him and found no violation of the negotiated agreement, violates the provisions of 5 U.S.C. §6103(b)(2) and §5546(b) because it sanctions the agency's action in this case. However, without addressing the question of whether a contention directed to an agency's action will support an allegation that an award is contrary to law, the Authority notes that in any event the provisions of 5 U.S.C. §6103(b)(2) would appear to be inapplicable in the circumstances of this case. Thus the record indicates that the agency made the changes in the employees' work schedule under the exception in the provisions of section 6101(a) of title 5, United States Code.4/ It would

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3/ 5 U.S.C. §5546(b) provides:

§5546. Pay for Sunday and holiday work

. . . . . .

(b) An employee who performs work on a holiday designated by Federal Statute, Executive order, or with respect to an employee of the government of the District of Columbia, by order of the District of Columbia Council, is entitled to pay at the rate of his basic pay, plus premium pay at a rate equal to the rate of his basic pay, for that holiday work which is not--

(1) in excess of 8 hours; or
(2) overtime work as defined by section 5542(a) of this title.

4/ 5 U.S.C. §6101(a)(3) provides in pertinent part:

(3) Except when the head of an Executive agency, a military department, or of the government of the District of Columbia determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to each employee in his organization, that--

(A) assignments to tours of duty are scheduled in advance over periods of not less than 1 week;

(B) the basic 40-hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive;

. . . . . .

(E) the occurrence of holidays may not affect the designation of the basic workweek . . . . [Emphasis added.]

appear that 5 U.S.C. §6103(b)(2), which pertains to holidays which fall on employees' nonworkdays, is, on its face, inapplicable in the present case since, by means of a schedule change made pursuant to 5 U.S.C. §6101(a)(3), the holiday fell on the employees' workday. Therefore, the provisions of 5 U.S.C. §5546(b) would likewise be inapplicable as would the Comptroller General decision cited by the union. Therefore, the union's first exception provides no basis for acceptance of its petition for review under section 2411.32 of the amended rules.

The union's second exception asserts that the award violates regulation. To support its assertion, the union argues that since the award is contrary to 5 U.S.C. §6103(b), it is also contrary to the provisions of section 610.202(b) of title 5, Code of Federal Regulations (C.F.R.), which provides in part that "[w]hen a holiday falls on a nonworkday outside an employee's basic workweek, the day to be treated as his holiday is determined in accordance with section 6103(b) of title 5, United States Code . . . ."

In effect, the union's second exception merely reiterates the argument made in its first exception, namely that the award violates 5 U.S.C. §6103(b)(2). As previously stated, that contention does not provide a basis for acceptance of the union's petition for review. Thus, the union fails to support its second exception with appropriate facts and circumstances and therefore fails to provide a basis for acceptance of its petition on the ground that the award violates regulation.

In its third exception, the union contends that the award does not draw its essence from the collective bargaining agreement. In support of its contention the union argues that the arbitrator's finding of an unusual circumstance in regard to the agency's need to keep the commissary open on Saturdays is an implausible interpretation of the contract.

The Authority will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents a ground similar to those upon which challenges to arbitration awards are sustained by Federal courts in private sector labor-management relations. Federal courts in private sector cases will sustain a challenge to an arbitrator's award on the basis that the award does not draw its essence from the collective bargaining agreement. United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); Brotherhood of Railroad Trainmen v. Central of Georgia Railway Company, 415 F.2d 403 (5th Cir. 1969). Therefore, the Federal Labor Relations Authority will grant a petition for review of an arbitration award on the ground that the award does not draw its essence from the collective bargaining agreement.

However, the Authority does not find the union's exception in this case supported by the facts and circumstances described in its petition. That is, the union has presented no facts and circumstances to demonstrate that the arbitrator's award "can [not] in any rational way be derived from the agreement," Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3rd Cir. 1969); or is "so unfounded in reason and fact, so unconnected with the wording and purpose of the collective bargaining agreement as to 'manifest an infidelity to the obligation of the arbitrator,'" Brotherhood of Railroad Trainmen, supra, at 415 (footnote omitted); or that it evidences a "manifest disregard of the agreement, " Ludwig Honold Mfg. Co., supra, at 1128; or that,

on its face, the award does not represent a "plausible interpretation of the contract," Holly Sugar Corp. v. Distillery, Rectifying, Wine & Allied Workers Int'l Union, AFL-CIO, 412 F.2d 899, 903 (9th Cir. 1969). Instead the union appears to be disagreeing with the arbitrator's interpretation and application of the provision of the agreement before him. Federal courts in private sector cases have consistently held that this does not constitute a basis for reviewing arbitration awards. "[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 599 (1960). Therefore, the union's third exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules.

In its fourth exception, the union argues that the award is based on nonfacts. In this regard, the union cites as "nonfacts" several statements and findings made by the arbitrator and disagrees with those statements and findings.

Federal courts in private sector cases will sustain a challenge to an arbitrator's award on the basis that the award is based on a nonfact. That is, Federal courts in private sector cases will overturn an award where the central fact underlying an arbitrator's award is concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been reached. Electronics Corporation of America v. International Union of Electrical, Radio and Machine Workers, AFL-CIO Local 272, 492 F.2d 1255 (1st Cir. 1974). Therefore, the Federal Labor Relations Authority will grant a petition for review of an arbitration award on the ground that the award is based on a nonfact.

However, with respect to this ground the Authority notes that in Electronics Corporation the arbitrator had based his award of reinstatement upon the "fact" that there was no pretermination suspension of the grievant. In fact, there had been such a suspension. The court held that "where the 'fact' underlying an arbitrator's decision is concededly a non-fact and where the parties cannot fairly be charged with the misapprehension, the award cannot stand." Thus, in order to support a challenge to an arbitration award on the ground that the award is based on a nonfact, it must be shown that the fact in question is a matter which is objectively ascertainable and is the fact upon which the award is based. Additionally, the parties cannot be responsible for the arbitrator's misapprehension and it must be readily apparent from the arbitrator's award that but for the arbitrator's misapprehension, the arbitrator would have reached a different result.

In this case, the union's exception that the award is based upon a nonfact is not supported by the facts and circumstances described in its petition. Thus the union's petition does not clearly demonstrate that the alleged nonfacts involved facts which were objectively ascertainable, that they were the central facts underlying the award, that they were concededly erroneous, and that but for the arbitrator's misapprehension he would have reached a different result. Instead, the union is merely disagreeing with the arbitrator's findings of fact. Federal courts in private sector cases have held that this does not

constitute a basis for review of arbitration awards. Amalgamated Meat Cutters & Butchers Workmen of North America, District Local No. 540 v. Neuhoff Bros. Packers Inc., 481 F.2d 817, 819 (5th Cir. 1973). Therefore, this exception provides no basis for acceptance of the union's petition for review under section 2411.32 of the amended rules.

Accordingly, the union's petition for review of the arbitrator's award is denied because it fails to meet the requirements of section 2411.32 of the amended rules for acceptance by the Authority of a petition for review of an arbitrator's award.

Issued, Washington, D.C., January 17, 1980.

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 28 REPORT OF CASE DECISIONS February 21, 1980

UNFAIR LABOR PRACTICE CASES

2 FLRA No. 67 (January 25, 1980)

Bureau of Alcohol, Tobacco and Firearms, National Office and Central Region, Assistant Secretary Case No. 53-10665(CA). The ALJ, upon a complaint filed by the union (NTEU) under E.O. 11491, concluded that section 19(d) of the Order precluded consideration of the union's allegations that the activity unilaterally terminated certain past practices (including the use of official or administrative time and the use of Government telephones by a chief steward or union officer for the purpose of conferring with other stewards or officers or representational matters), by reason of a grievance filed by the union under the parties' negotiated agreement prior to the filing of its unfair labor practice charge. In agreement with the ALJ, the Authority found that the issue concerning the use of official time was barred from consideration by section 19(d) of the Order. However, the Authority also found, contrary to the ALJ, that since the union did not raise the issue of the alleged unilateral denial of the use of Government telephones for representational purposes in the grievance procedure, section 19(d) did not preclude raising that issue in the unfair labor practice procedure. In that latter regard, the Authority further found that since the activity terminated that past practice after negotiations for a new agreement had been completed, the action was not unilateral but, rather the result of good faith bargaining by the parties. Accordingly, the Authority dismissed the union's complaint in its entirety. (Decision and Order attached.)

2 FLRA No. 68 (January 25, 1980)

Naval Air Station, Jacksonville, Florida, Assistant Secretary Case No. 42-4571(CA). The ALJ, upon a complaint filed by the union (International Association of Machinists and Aerospace Workers, Naval Air Lodge 1630) under E.O. 11491, found that the activity did not terminate the named probationary employee because of his union activities and that the activities conduct

in that regard was not violative of section 19(a)(1) and (2) of the Order when it terminated the grievant's employment. The Authority adopted the ALJ's findings, conclusions, and recommendation, and accordingly dismissed the union's complaint. (Decision and Order attached.)

2 FLRA No. 70 (January 25, 1980)

Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, Assistant Secretary Case No. 61-3921(CA). The ALJ, upon a complaint filed by the union (AFGE Local 1592) under E.O. 11491, concluded that the activity's reassignment of an employee on a non-competitive basis was not contrary to an arbitrator's award and, therefore, was not violative of section 19(a)(1) and (2) of the Order, as alleged by the union. The Authority adopted the findings, conclusions, and recommendation of the ALJ, and accordingly dismissed the complaint. (Decision and Order attached.)

NEGOTIABILITY CASE

2 FLRA No. 65 (January 18, 1980)

National Treasury Employees Union and NTEU Chapter 95 and Department of the Treasury, Internal Revenue Service, Midwest Region, Case No. 0-NG-150. During the term of the parties' agreement, the union requested negotiations on the matters of work being assigned to Appeals Officers and on the assignment of Legal Research Assistants. The activity responded by stating, generally, that the matters concerned rights reserved to management; and the union appealed to the Authority. The Authority found that the case was substantially identical to the ACT, Alabama case, Case 0-NG-27 (Report No. 25), wherein the petition did not present a proposal sufficiently specific and delimited in form and content as to permit the Authority to render a negotiability decision. Additionally, the Authority determined that to the extent that this case arose out of alleged unilateral changes in working conditions and a defense, essentially, that no changes had occurred, the proper forum in which to raise those issues was not a negotiability appeal but, rather, an unfair labor practice proceeding pursuant to section 7118 of the Statute. The Authority thereupon concluded that the union's petition did not meet the requirements for review under section 7117 of the Statute and Part 2424 of the Authority's rules and, accordingly, dismissed the appeal. (Decision attached.)

ARBITRATION CASES

2 FLRA No. 66 (January 18, 1980)

Pittsburgh Energy Technology Center and American Federation of Government Employees, Local 1916, Case No. 0-AR-54. The Authority dismissed the union's exceptions to the arbitrator's award as untimely filed under the Statute. (Decision letter attached.)

2 FLRA No. 69 (January 25, 1980)

National Labor Relations Board, Office of the General Counsel and National Labor Relations Board Union (Duff, Arbitrator), FLRC No. 78A-175. The arbitrator found that agency's refusal to approve certain provisions in local supplementary agreements violated the applicable national level agreement between the parties, since the disputed provisions did not conflict with the national agreement as contended by the agency. The agency filed exceptions to the arbitrator's award. The Authority found that the agency's petition failed to meet the requirements for review under the applicable rules of procedure and therefore denied the petition. (Decision letter attached.)

Attachments (6)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Bureau of Alcohol, Tobacco and
Firearms, National Office and
Central Region

Respondent

and

Assistant Secretary
Case No. 53-10665(CA)

National Treasury Employees Union

Complainant

DECISION AND ORDER

On May 17, 1979, Administrative Law Judge Garvin Lee Oliver issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismisssed in its entirety. Thereafter, the Complainant filed exceptions to the Administrative Law Judge's Recommended Decision and Order and the Respondent filed a response to the Complainant's exceptions.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions and the Respondent's response to the exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation, as modified below. 1/

1/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

In reaching his conclusion, the Administrative Law Judge found that section 19(d) of the Order precluded consideration of the allegations that the Respondent unilaterally terminated certain past practices. These past practices included the use of official or administrative time and the use of government telephones by a chief steward and/or union officer for the purpose of conferring with union stewards or the union's national office concerning representational matters. In this regard, the Administrative Law Judge found that, prior to the filing of the instant unfair labor practice charge herein, the Complainant filed a grievance alleging that Respondent violated the contract by denying the local union president/chief steward official time for the purpose of conferring by government telephone with a union steward concerning a grievance then in process. Despite the evidence establishing that Complainant's grievance concerned only the issue of the denial of official time and excluded the issue of the denial of the use of the government telephone, the Administrative Law Judge concluded that section 19(d) 2/ precluded consideration not only of the issue of the use of official time, but also the issue of the use of the telephone since both issues arose out of the same incident and could have been raised during the grievance procedure. Although the Authority agrees with the Administrative Law Judge that the issue of the use of official time is barred from consideration in this proceeding by the provisions of section 19(d), contrary to the Adminstrative Law Judge, the Authority does not agree that the issue of the use of government telephones for representational purposes is similarly barred from consideration as an unfair labor practice. Thus, in the Authority's view, section 19(d) reserves to the aggrieved party the option of raising such an issue in either the contractually established grievance procedure or the unfair labor practice procedure. Since the evidence, as found by the Administrative Law Judge, clearly established that Complainant did not raise the issue of the denial of the use of government telephones for representational purposes in the grievance procedure, section 19(d) does not preclude raising this issue as an unfair labor practice under of the Order.

However, in agreement with the further findings of the Administrative Law Judge, the Authority concludes that the evidence presented herein is insufficient to establish that Respondent violated the Order when it terminated the admitted past practice in its Central Region of allowing Complainant the use of certain facilities for representational purposes, such as telephones, mail and copying facilities. Thus, the evidence establishes that such issues were raised and discussed by the parties during negotiations for a new agreement, and in the face of Respondent's refusal to incorporate the Complainant's demands on these issues into the new agreement, as well as Respondent's determination to terminate the established past practices in its Central Region, Complainant, at various stages of the negotiations process, withdrew its demands on these issues and, in

2/ Section 19(d) reads, in pertinent part:

> Issues which can be raised under a grievance procedure may, in the descretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures.

effect, acceded to the Respondent's position with regard to these issues. In these circumstances, the Authority finds that Respondent's action in subsequently terminating the past practices after successful negotiations for a new collective bargaining agreement had been completed was not unilateral, but, rather, as a result of good faith bargaining by the parties. Accordingly, the Authority shall dismiss the subject complaint in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Assistant Secretary Case No. 53-10665(CA) be, and it hereby is, dismissed.

Issued, Washington, D.C., January 25, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
1111-20th Street, N.W., Suite 700
Washington, D.C. 20036

In the Matter of BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, NATIONAL OFFICE AND CENTRAL REGION Respondents and NATIONAL TREASURY EMPLOYEES UNION Complainant	Case No. 53-10665(CA)

Michael Sitcov, Esquire
Therese Faller, Esquire
Bureau of Alcohol, Tobacco
and Firearms
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20226
For the Respondents

Geri Palast, Assistant Counsel
National Treasury Employees Union
1730 K Street, N.W., Suite 1101
Washington, D.C. 20006
For the Complainant

Before: GARVIN LEE OLIVER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arose pursuant to Executive Order 11491, as amended, as a result of an unfair labor practice complaint filed on July 21, 1978 by the National Treasury Employees Union (hereinafter called the Complainant or Union), against the Bureau of Alcohol, Tobacco and Firearms, National Office and Central Region (hereinafter called the Respondents).

The complaint alleged, in substance, that the Respondents violated Sections 19(a)(1) and (6) of the Executive Order by terminating past practices affecting working conditions without negotiating with the Union. The alleged past practices were the use by the Union in the Central Region of Government phones to confer with Union stewards and the NTEU National Office about grievances, other formal actions, and the application and interpretation of the contract; the use of official or administrative time on an as needed basis to handle such matters; and the use of copying and postage facilities for representational purposes.

A hearing was held in this matter before the undersigned in Washington, D.C. Both parties were represented by counsel and afforded full opportunity to be heard, to adduce relevant evidence, and to examine and cross-examine witnesses. Post-hearing briefs have been received from both parties and duly considered except for the attachments to Complainant's brief. These attachments were not considered inasmuch as they raise new matters and were not offered at the hearing.

Based on the entire record herein, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, and the briefs, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Complainant is the exclusive collective bargaining representative of a unit consisting of all non-professional General Schedule and Wage Grade employees employed by the regional offices of the Respondent (Reg. Adm. Exh. 1D). An initial collective bargaining agreement was signed March 5, 1974. Article 6, Section 3, provided as follows:

> ARTICLE 6
>
> Union Representatives
>
> Section 3
>
> A. The representatives designated by the Union in Section 2 of this Article will be excused from duty without charge to pay or leave to administer the terms and conditions of this Agreement as follows:
>
> 1. One (1) representative in each region designated by the Union as Chief Representative will be credited with three (3) hours per pay period.
>
> 2. All other representatives designated by the Union will be credited with two (2) hours per pay period.

3. Representatives will be credited on the operative date of this Agreement and each subsequent anniversary of that date with the total amount of time to which they are entitled under this Subsection for the succeeding year. The time may be used at any time during the year.

4. An affected employee will be on official time to discuss with a Union representative, using time under this Subsection, all matters for which remedial relief may be sought by the employee under the terms and conditions of this Agreement.

B. In addition, a Union representative and an affected employee will be excused from duty without charge to pay or leave for a reasonable period to present grievances and appeals, to prepare replies to notices of proposed adverse action or suspension of thirty (30) days or less, and to interview witnesses and review documents which are otherwise not available during non-duty hours.

C. 1. A representative using time under this Section will check with his immediate supervisor, prior to leaving his work area, and inform him of the approximate time he will be away.

2. A representative who enters a work area and uses time under this Section will check with the supervisor in that work area.

3. That supervisor will allow the representative to leave his work area unless the representative's work requirements or work schedule prohibits his release.

(Emphasis added) (Joint Exh. 2)

In addition, Article 14 (Facilities and Services) provided that the Respondent would provide the Union such specific items as meeting space (Sections 1 and 2), bulletin boards (Section 4), and a listing of the Chapter president in the Agency telephone directory (Section 7).

The parties stipulated that during the life of the first agreement Martin J. Connell, President and Chief Steward, NTEU Chapter 88:

1. Used U.S. Government telephones to confer with designated union stewards in the ATF Central Region about potential and ongoing grievances and other formal actions and about the application and interpretation of the contract;

2. Used the U.S. Government telephones to make calls to the National Office (after charging the calls to his home number) and to receive calls from the National Office of NTEU regarding the matters enumerated in (1) above;

3. Used "bank time" to handle the matters referred to in (1) above (e. g., if 5 minutes were required for a phone call, then 5 minutes of bank time would be logged and charged against the amount of time allotted in the contract; and

4. Used copying and postage facilities for representational purposes; and

5. Management in the Central Region was aware of all of the above practices by Martin Connell. (Joint Exh. 3).

The parties began negotiations on a new agreement in April 1976. (Tr. 71). As relevant here, the Union proposed that "whatever time is spent in the conduct of Union-Employer business is spent as much in the interest of the Employer as in that of the Union"; that, "A steward, Chief Steward or Chapter President may utilize official time, hereinafter referred to as individual bank time, to confer with an affected employee with respect to any matters for which remedial relief may be sought pursuant to the terms, and conditions of this agreement;" and that "Employees serving as Union Stewards shall be deemed as performing 'Other Duties as Assigned'" as phrased in their position descriptions. (Reg. Adm. Exh. 2A, p. 13 & 44, Article 6, Sections 3A & 3B and Article 13, Section 3; Tr. 27, 45-49). Respondent rejected these proposals. Respondent insisted that employees performing Union representational duties were no longer serving in a Governmental capacity and should be on administrative leave. (Tr. 27, 45-48). The parties discussed what they meant by "official time" and "administrative leave." The Union explained that "official time" meant that Union representatives were performing Governmental functions, just as much as if they were performing the jobs for which they were hired. Respondent explained that "administrative leave" meant that the Union representatives would be excused from duty without charge to pay or leave and had no rights to either benefits or services provided by the Government for employees. (Tr. 50).

In discussing the number of hours to be provided for the Chief Steward and Chapter President, the Union proposed an increase in the number of hours per pay period for chief stewards and chapter presidents on the basis that they would confer with stewards on grievances, especially in complex cases. (Tr. 52-53, 63-64). This was also discussed in terms of preparing or processing grievances. (Tr. 29). Respondent rejected the proposal for increased time contending that this was training time which was already provided under the contract and also was in the nature of internal Union business. (Tr. 52-53, 63-64, 93). Throughout the negotiations different Union officials -- steward, chief steward, and chapter president -- were always considered separately in terms of how much time and what functions these persons would have. (Tr. 50-53). This represented a change in some respects from the first contract where Union representatives were to be

excused from duty "to administer the terms and conditions" of the agreement. (Tr. 54-55; Joint Exh. 2, Article 6, Section 3A supra.)

The parties agreed to continue a provision in the previous agreement which provided for the listing of the name, office telephone number, and home telephone number of each Chapter President in the Agency's telephone directory. (Reg. Adm. Exh. 1D, p. 24; Joint Exh. 2, p. 21; Tr. 22, 60-63; 76-77).

A discussion of the use of Government telephones came up during negotiations concerning a Union proposal that each Union steward be provided a telephone. (Tr. 19-20, 62). Respondent took the position that phones for each steward would be expensive, unnecessary, and illegal. (Tr. 21). The Union then advised Respondent that there had been a past practice of Martin Connell using Government telephones in the Central Region. (Tr. 21, 57). This was the first time management outside of the Central Region knew of the practice. (Tr. 56). Respondent stated that they were not going to allow this practice to continue, and it would have to be stopped. (Tr. 35-36, 41-42, 57, 69-70, 72-73, 80).

The utilization of Government telephones was also discussed in terms of what kind of leave Union representatives would use for their representational functions. Respondent's position was that if Union representatives were on administrative leave they would not be able to use Government telephones. (Tr. 57-62).

The Union dropped its proposal for a phone for each steward at the Impasses Panel level, and the matter of telephones was discussed thereafter only in the context of the negotiations concerning official time or administrative leave. (Tr. 71). The Union, in presenting its position to the Impasses Panel on its proposal concerning the use of the internal mail system noted that the use of the internal mail system was necessary, in part, because of "the agency's announced position that Government phones may not be used by stewards and affected employees." (Resp. Exh. 1).

Postage Facilities

During negotiations the Union proposed that Respondent agree to deliver mail via the intra-agency mail system. (Reg. Adm. Exh. 2A, Art. 14, Sec. 13; Tr. 23). Respondent took the position that this would be inappropriate, as use of the mail is limited to official business, and the agency was not going to subsidize the Union's activities. (Tr. 24, 39, 59). The past practice of Martin Connell's use of postage facilities was discussed. (Tr. 40-41, 74). Respondent indicated that these practices would not go on any further and would have to be halted. (Tr. 41, 69-70). The Union dropped its proposal to use the mail during a mediation session at the Impasses Panel (Tr. 71-72).

Copying Facilities

There were no proposals made during the negotiations concerning the use of copying facilities. (Tr. 25). It was only discussed in terms of the types of facilities that would not be made available to employees if they were serving as stewards in an administrative leave capacity. (Tr. 60). The past practice of Martin Connell's use of postage facilites was made known in April 1976 during the negotiations, and Respondent took the position on all these practices that they were not going to go on any further. (Tr. 40-41, 74).

The Agreement

The parties agreed to administrative leave for Union representatives, the types of functions each would perform, and the amount of time they would be allotted at the final session before the Impasses Panel. (Tr. 81, 88). Respondent contends that agreement on administrative leave carried with it the view that had been expressed from April 1976 through April 1977 - that administrative leave meant Union representatives were excused from duty, were not performing official functions, and could not use any official Government services. (Tr. 81).

The agreement contained no language about the past practices involving the use of Government telephones, copying, and postage facilites. (Tr. 41, 43, 72). No proposals were made for continuing the practices. (Tr. 104). Respondent felt that the practices would be stopped as a result of what had been decided during the negotiations, and that the Union was on notice that it intended to put a stop to the practice. (Tr. 69-73, 75). The Union takes the position that the past practices were left intact.

The new agreement was signed September 19, 1977 and became effective in November 1977. Article 6, Union Stewards, Section 3 provided as follows:

> Section 3
>
> A. The stewards designated by the union pursuant to Section 2 of this Article will be granted administrative leave as follows:
>
> 1. Steward positions will have two (2) hours per pay period for the purpose of allowing stewards to discuss with employees potential grievances and preparing grievances. This time will also cover all travel time away from their job where the purpose of the travel is to interview witnesses and review documents otherwise not available during non-duty hours.
>
> 2. The chief steward shall receive three (3) hours per pay period to engage in activities set forth in Subsection 1 of this Section, including

travel to second and third step grievance meetings. The parties agree that if the additional one (1) hour per pay period given to Chief Stewards is not sufficient for travel to second and third step grievance meetings, either side may reopen this section for further negotiations.

3. The Chapter President shall receive two (2) hours per pay period to attend third step grievance meetings and other formal discussions with the Employer.

B. In addition a Union steward and affected employee shall receive a reasonable amount of time to present grievances, prepare and present replies to notices of proposed adverse actions and suspensions of thirty days or less, and to interview witnesses who have expressed an unwillingness or inability to be interviewed after hours, and to review documents not available during non-duty hours.

C. A union steward will receive a reasonable amount of time to travel to grievance meetings, to arbitration hearings, to oral replies, to adverse action hearings where the steward is the representative of an employee within his/her Area Office or his/her Regional Office. It is agreed that if a steward represents an employee outside his/her Area Office or outside his/her Regional Office, the aforecited travel shall be charged to Bank Time.

D. The total time available to each position for the succeeding year under Section 3A of this Article will be credited to the position on the effective date of this Agreement and each year thereafter. The time may be used at any time during the year but may not be carried over to subsequent years. Employees appointed to fill a vacated position have available only the unused time previously credited to that postition.

E. 1. Stewards using time under this Article, or leaving their work site to perform any other representational function, will check with their immediate supervisors, prior to leaving their work site, and inform their supervisors of the approximate time they wish to be away. A steward entering a work area to perform a representational function will check with the supervisor in that work area.

2. Supervisors will allow the steward to leave his/her work area unless the steward's work requirements or work schedule prohibit his/her release.

3. Stewards are responsible for assuring that time used under Section 3A of this Article is recorded on their time cards.

The Respondent held training sessions with its field managers to advise them of the terms of the new agreement. These training sessions led to Mr. Connell's supervisor advising Mr. Connell in January 1978 that he would not be permitted to engaged in the activities set forth above and previously engaged in during the life of the first agreement. (Tr. 73-74; Joint Exh. 3).

On February 3, 1978, Mr. Connell, Chief Steward, NTEU Chapter 88, filed a grievance with his supervisor, James O. Wall, concerning actions taken by Mr. Wall during the period January 30 through February 2, 1978. Mr. Connell alleged that he was entitled to additional bank time under Article 6, Section 3A 1 and 2 of the agreement, and that he had not been allowed time to discuss a grievance in person or by telephone with another steward who was a grievant's representative. In appealing the step one decision, Mr. Connell acknowledged that he had also been denied the use of a Government telephone to call the steward "but I did not make this a part of the issue forming my grievance." (Reg. Adm. Exh. 2C-2-2C-7). Complainant has invoked arbitration on the grievance pursuant to Article 34 of the agreement. (Reg. Adm. Ex. 2C-1).

Mr. Connell, on behalf of NTEU, Chapter 88, filed the charge in this matter on February 7, 1978, and also alleged that the actions arose out of actions by Mr. Wall during the period of January 30 through February 3, 1978. (Reg. Adm. Exh. 1B). The charge, carried over to the complaint, alleged that Mr. Wall had made changes without negotiating with the Union by denying Mr. Connell the use of Government telephones to confer with Union stewards and the NTEU national office about potential and on-going grievances, appeal actions, and the application and interpretation of the agreement; the use of official time instead of annual leave for the purpose of handling such matters; and the use of copying machines, office supplies, and postage facilites for representational purposes. (Reg. Adm. Exh. 1B). As noted, the parties have stipulated to this action by Mr. Wall. (Joint Exh. 3)

Discussion, Conclusions, and Recommendations

There is no inherent right under the Order for employees, in their capacity as union officials or representatives, to use official time for employee representational activities. Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, 4 FLRC 587, 591, FLRC No. 75A-25 (1976). It is further well established that the use of agency facilities and equipment by a union is a privilege and not a right. U.S. Department of the Treasury, Internal Revenue Service, New Orleans District, New Orleans, Louisiana, A/SLMR No. 1034 (1978). A

practice may, if consistently followed, ripen into a working condition which may not be unilaterally changed without affording the exclusive bargaining representative the opportunity to negotiate concerning such proposed change in working conditions. National Labor Relations Board, 3 A/SLMR 88, A/SLMR No. 246 (1973). A collective bargaining agreement also creates mutual rights and obligations which either party may lawfully insist be observed. Department of the Air Force, 4392nd Aerospace Support Group, Vandenberg AFB, California, 7 A/SLMR 989, A/SLMR No. 935 (1977); Veterans Administration Center, Bath, New York, A/SLMR No. 335 (1973).

Complainant contends that Chief Steward Connell's use of telephones, postal services, and copying facilities for representational purposes and utilization of administrative leave for the purposes of conferring with stewards and Union headquarters by telephone constituted past practices and implied terms of the contract in the Central Region, and no waiver of its right to negotiate a change in these practices can be found in the bargaining history, surrounding circumstances, or final language of the second collective bargaining agreement.

Respondent's position is that the unfair labor practice proceeding is barred by Section 19(b) of the Order since the matters were previously raised in a grievance; that the actions relate solely to arguable interpretations of the new contract; that there was no past practice binding on the Respondent; and that it was merely implementing more restrictive language of the new agreement.

Section 19(d) of the Executive Order provides, in pertinent part, "Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure, but not under both procedures." "Issues which can be raised" refers to issues in the same incident. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, A/SLMR No. 1045 (1978); Department of Defense, U.S. Navy, Norfolk Naval Shipyard, 7 A/SLMR 829, A/SLMR No. 908 (1977).

The grievance filed by Martin J. Connell, Chief Steward, NTEU Chapter 88, concerned actions taken by his supervisor during the period January 30 through February 2, 1978 which affected Connell's rights as a duly authorized representative of the labor organization. As noted, Mr. Connell alleged in the grievance that he was entitled to additional administrative leave "bank time" under the agreement and was entitled to use such time for the purpose of discussing a grievance in person or by phone with another steward who was a grievant's representative. Mr. Connell acknowledged that he had also been denied the use of a Government telephone to call the steward, "but I did not make this a part of the issue forming my grievance." Since the issue of the use of a Government telephone by Mr. Connell to confer with a steward as well as the issue of the unilateral change in policy concerning his use of the telephone and bank time for such purpose arose out of the same incident and could have been raised during the grievance

procedure, Section 19(d) of the Order bars these identical issues from being determined in this unfair labor practice proceeding. Cf. U.S. Geological Survey, Gulf of Mexico, OCS Operations and Local 3457, AFGE, Case No. 64-4091(CA), December 22, 1978; Department of Defense, Dependent Schools Europe, Case No. 22-08769 (Sept. 20, 1978); Department of the Navy, Pearl Harbor Naval Shipyard, Assistant Secretary Case No. 73-587(CA), request for review denied, 3 FLRC 596, FLRC No. 75-A-57 (Sept. 18, 1975). Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, 5 A/SLMR 646, A/SLMR No. 570 (1975). Both proceedings involve claims accruing to Mr. Connell by virtue of his status as an official representative of the exclusive bargaining representative. The fact that the grievance was not filed by the exclusive representative is its institutional capacity is not considered to require a different result. Compare Department of Defense, Dependent Schools Europe, and U.S. Geological Survey, supra, with Department of the Treasury, Internal Revenue Service, Fresno Service Center, A/SLMR No. 983 (1978).

Substantive reasons also exist for the dismissal of the complaint. Under the rules and regulations of the Assistant Secretary, 29 C.F.R. Section 203.15, "(a) complainant in asserting a violation of the order shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." This burden has not been met in this case. The evidence supports the position of the Respondent that it did not unilaterally change past practices, but merely implemented the provisions of the new agreement between the parties.

The parties stipulated that during the life of the first contract, Mr. Connell was excused from his duties to confer with designated representatives and the NTEU National Office and was permitted to charge such activity to his bank of time provided in Article 6, Section 3A of the previous contract. As noted under Article 6, Section 3A, of the first agreement, employee representatives were "excused from duty without charge to pay or leave to administer the terms and conditions of the Agreement." Representatives charged the aforecited use of time away from their duties against the bank of time provided for in the same subsection. The conditions under which employee representatives could be excused from their duties under this subsection was virtually unlimited as long as the use of time related to the "administration of the contract." The stipulation reflect that one of the matters Mr. Connell conferred with stewards and the NTEU National Office about was "the application and interpretation of the contract." However, under the current contract a representative's entitlement to use "bank time" is much more limited by specific provisions in the current contract than it was under the previous contract. Article 6, Section 3A 1, 2, and 3 provides for employees to be excused from their duties and to charge the absence to "bank time" only for specific functions.

Nowhere does the current contract provide for the chief steward or chapter president to be excused from their duties to have discussions with stewards or the NTEU National Office, nor is there general language

similar to the previous contract under which such activities could be claimed. Instead, a Chief Steward is provided time for the purpose of "discussing(ing) with employees potential grievances and preparing grievances." He is also provided time for travel and to interview witnesses. A Chapter President is only allowed administrative leave "to attend third step grievance meetings and other formal discussions with the Employer." Union proposals for more general language and for chief stewards and chapter presidents to confer with stewards was discussed and rejected.

Complainant's argument that a steward, chief steward, or Chapter President is allowed to confer with one another or other union officials under Article 6, Section 3A.1 as part of "preparing grievances" or "interview(ing) witnesses," and need not check with the immediate supervisor under Article 6, Section E.1 to use time under the Article unless leaving the work site, are issues involving differing and arguable interpretations of the negotiated agreement which are proper subjects for resolution under the parties' contractual grievance-arbitration procedure rather than through the unfair labor practice procedures of the Exeuctive Order. Cf. Department of the Navy, Naval Weapons Station, Concord, California, A/SLMR No. 1115 (1978).

The record also supports Respondent's position that the denial of Government facilities to Mr. Connell, such as telephones, postage, and copying facilities was based on the fact that the new contract had recently gone into effect and these matters had been negotiated. As found above, the past practices were negotiated in terms of the parties' definitions of official time and administrative leave and the Union's proposals concerning telephones and the use of the internal mail system.

Based on the foregoing findings of fact and conclusions, it is determined that a preponderance of the evidence does not support a violation of Sections 19(a)(1) and (6) of the Executive Order, as alleged.

Recommendation

Having found that Respondents have not engaged in conduct prohibited by Sections 19(a)(1) and (6) of the Executive Order, it is hereby recommended that the complaint herein be dismissed in its entirety.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: May 17, 1979
Washington, D.C.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Naval Air Station
Jacksonville, Florida

Respondent

and

Assistant Secretary
Case No. 42-4571(CA)

Naval Air Lodge 1630, International
Association of Machinists and
Aerospace Workers, AFL-CIO

Complainant

DECISION AND ORDER

On August 7, 1979, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relation under Executive Order 11491, as amended, were transferred to the Authority unde section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfe of functions is implemented by section 2400.2 of the Authority's rules and regu tions (44 F.R. 44741, July 30, 1979). The Authority continues to be responsibl for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, purusant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly that no exceptions were filed, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation. */

*/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (9 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the ne Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Assistant Secretary Case No. 42-4571(CA) be, and it hereby is, dismissed.

Issued, Washington, D.C., January 25, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
Suite 700, 1111-20th Street, NW.
Washington, D.C. 20036

In the Matter of	
NAVAL AIR STATION, JACKSONVILLE, FLORIDA 1/ Respondent	
and	Case No. 42-4571(CA)
NAVAL AIR LODGE 1630, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO Complainant	

ELBERT C. NEWTON
Labor Relations Advisor
Southern Field Division Office, OCP
Box 88, Naval Air Station
Jacksonville, Florida 32212

For the Respondent

THEODORE A. VANDERZYDE
Grand Lodge Representative
International Association of Machinists
and Aerospace Workers, AFL-CIO
1300 Connecticut Avenue, NW.
Washington, D.C. 20036

For the Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

1/ The name of the Employer appears as corrected at the hearing.

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on April 30, 1979 by the Regional Director for the Federal Labor Relations Authority, the Atlanta, Georgia Region, a hearing was held before the undersigned on June 14 and 15, 1979 at Jacksonville, Florida.

This proceeding was initiated under Executive Order 11491, as amended (herein called the Order). A complaint was filed on October 12, 1978 by Naval Air Lodge 1630, International Association of Machinists and Aerospace Workers, AFL-CIO (herein called the Complainant) against Naval Air Station, Jacksonville, Florida (herein called the Respondent). It alleged that, effective August 4, 1978, Frank Cosentino, an employee and union steward, was terminated for his activity on behalf of the Complainant in violation of Sections 19(a)(1)(2),(4) and (6) of the Order.

Subsequent thereto the Complainant amended the original complaint. The second amended complaint, dated November 20, 1978, alleged a violation by Respondent of 19(a)(1),(2) and (4) for having separated Cosentino on August 4, 1978 by reason of his actions as a union steward on behalf of Complainant. The Regional Director's Notice of Hearing recited that the hearing would be held with reference to Sections 19(a)(1) and (2) of the Order. 2/

Respondent submitted a response to the complaint, dated November 3, 1978, in which it denied the commission of any unfair labor practice. It averred therein that Cosentino was terminated for unsatisfactory work performance rather than for any discriminatory reason under the Order.

Both parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence and to examine as well as cross examine witnesses. Thereafter both parties filed briefs which have been duly considered.

Upon the entire record in this case, from my observation

2/ The 19(a)(4) portion of the complaint was withdrawn by Complainant on March 6, 1979.

of the witnessses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

Findings of Fact

1. At all times material herein the Complainant union has been the bargaining representative of all nonsupervisory ungraded employees at the Naval Air Station, Jacksonville, Florida. The said employees were covered by a collective bargaining agreement between the parties which, by its terms, was effective on June 9, 1977 for a period of two years.

2. On September 28, 1977 the Employer herein hired Frank Cosentino as a WG-9, probationary 3/ employee. Cosentino, who was employed as a carpenter, had previously been engaged in the residential construction business in Florida since 1957. He had also been employed for 90 days as a sheet metal trainee by the Naval Air Rework Station.

3. Cosentino was assigned to the Public Works Division of the Employer herein where, at the time of his employment, there were employed 6 other journeymen carpenters as well as two carpenters, Robert Van Lieu and Frank Bialek, who were also probationary employees.

4. Since 1975 William H. Pritchett has been, and still is, the woodcraftsman foreman in charge of the carpenter shop in the Public Works Department, Maintenance Division. Pritchett supervised 12 employees, including Cosentino, and these individuals were classified as either carpenters, cement and block masoners, concrete workers, upholsterers, or floor tilers.

5. On December 15, 1977 Cosentino was appointed temporary steward in the aforesaid department. Subsequently, on January 30, 1978, 4/, Bayne C. Teague, In-Plant Chairman of the union herein, notified management in writing that Cosentino would be installed as steward in the Public Works Department. Respondent was notified in writing on May 17 that, as of May 18, Cosentino would serve as acting chief steward thereat; and on June 19 Nelson F. Voelker, President of Complainant union, advised Respondent in writing that Cosentino would be the chief steward

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3/ The probationary period of employment is one year.

4/ Unless otherwise indicated, all dates hereinafter referred to will be in 1978.

in the said department.

6. Employed at the Public Works and Supply System divisions are 22 stewards and 2 chief stewards. Of this number, there are 10-11 stewards who work in the Public Works Department. The stewards represent employees in respect to grievances or complaints initiated by the workers. They confer with the first line supervisor and if the problems are not resolved, they are handled by the chief steward at the Division level; unresolved grievances would then be handled by the In-Plant Chairman for the union and the commanding officer or his representative.

7. Between January and July Cosentino handled about 8-10 greivances or complaints filed by employees in the Public Works Department regarding working conditions. He represented, as steward or chief steward of the union, these individuals in respect to said grievances.

8. Testimony by Cosentino's supervisor, Pritchett, reflects that he was dissatisfied with this employee's work performance at the outset of his employment. Pritchett began taking notes of Cosentino's work assignments and his deficiencies in December, 1977 after another carpenter solicited the supervisor's opinion of Cosentino. In view of the poor quality of the latter's work, as testified to by Pritchett, the foreman made written notations of Cosentino's performance. He testified, further, that since the other two probationary employees were fine carpenters, he did not make notes of their work record.

9. The criticisms levelled against Cosentino by the foreman, in respect to the tasks performed by the employee, involved the following:

(a) An initial assignment given to Cosentino involved his installing door locks at Building 590. Pritchett claims it took the employee 45 minutes to install one lock, which was an excessive amount of time.

(b) On December 22 or 23, 1977 Cosentino was assigned to install one-half inch sound proofing material on a sheetrock wall at Building 101D. According to the foreman, Cosentino had difficulty installing metal strips to hold the joints of the material together and could not hit on the studs. Pritchett explained to Cosentino that the first piece had to be cut to accomplish the task. He returned later and discovered the piece had not been cut so that the strips did not fit right around the doorway.

(c) On January 3 Cosentino, while working on a truck bed, checked out a drill motor and other tools. The drill motor was left on the bed, and Cosentino discovered on the following morning that the tool was gone. The foreman testified the motor should have been turned back into the tool room. It was never located.

(d) On January 27 Cosentino and another carpenter, Anthram Green, were at Building 103 replacing side gates on a truck. The men measured each board separately and cut the material for each one. Pritchett told them to speed up production, that they could cut 5-6 pieces with the same length at one time. Cosentino objected to doing the task, saying it wasn't carpentry, and the foreman replied they had been doing that work for a long time and it's the accustomed practice.

(e) On February 14 Cosentino and Earl Cox were each assigned to install a double door unit at Building 2 on opposite sides of thereof. Pritchett told Cosentino to remove the screen doors from outside, take two doors down on the inside, install two new doors with hinges, put in a T-astrigal strip between the doors, install a threshold, as well as install a lock and door closure. During the day the supervisor checked to see how Cosentino was faring. The latter said he never hung double doors of this type before, and he requested assistance. Cosentino also said he did not know how to install a T-astrigal and Pritchett showed him the procedure. However, the supervisor told the employee to do the best he could, and he refused to assign someone to assist in the installation. 5/

After the doors were finally installed by Cosentino, the foreman returned to inspect them. He discovered there was a half inch crack between the doors and the door was cut too narrow for the opening. The doors were removed, and a piece of lumber was added by the woodcraftman. The job consumed 20 hours whereas it should have been completed, according to Pritchett, in 8 hours. Roger Willi, maintenance General Foreman in this Department, who was Pritchett's supervisor, testified that he inspected the job; that the doors had different closures; and that the work performed by Cosentino was of poor quality.

(f) On March 23 Cosentino was assigned to build a walkway (small platform) with a handrail on each side of the steps at

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5/ Pritchett claimed he wanted to evaluate Cosentino's abilities and thus declined to assign another carpenter to the job.

Building 769. Both this employee and Hugh D. Tapley, carpenter, drew material for the job. Cosentino worked on this project for three days. Pritchett testified that the 4' x 4' post for the handrail was two inches out of plumb, the rise of the steps was unequal, and the tread on the steps was out of level. The steps had to be rebuilt. Although Cosentino asked for a chance to rebuild them, he was not reassigned to do so. Voelker caused an inspection to be made of the steps by safety officer George Duckworth. His testimony reflects that three were not within the OSHA requirements, and that all were safe except for two of them; that the step tread rise varied, the angles differed, and the handrails were one inch higher than OSHA standards. 6/ Further evidence was adduced by Complainant to show that steps built by other carpenters were deficient and unsafe. 7/

(g) On March 30 Pritchett assigned Cosentino to install a new door at Building 8, and he sent along Jesse Ricks, carpenter, to assist in the task. Cosentino hung the door but he informed the supervisor that the door lock did not work properly. Pritchett discovered that the cylinder was upside down. He offered to show Cosentino how to install the lock properly, but the dental office had the key so the foreman could not instruct him in regard thereto.

(h) On March 31 Cosentino was assigned to put saw benches (horses) together and Pritchett explained the procedure to him. Although the material had been cut, the work was poorly done according to the supervisor. The degree of angle was shortened up -- a piece of plywood was laid across the ends of the legs. Pritchett asked Cosentino to cut the bevel on where the plywood fit against the braces. This was not done.

(i) On May 5 Cosentino was assigned to free windows, which had been painted, and replace window balances. Cosentino was unable to do the job. Pritchett testified that the employee tried to free the windows from the inside rather than outside; that this was a routine job which had never posed a problem for other carpenters.

6/ In view of my conclusions with respect to the alleged discrimination, as hereinafter set forth, I do not consider it necessary to pass on the comparative quality or workmanship of Cosentino's work product.

7/ While Respondent concedes other workers have erred in their work performance, it contends this was occasional and infrequent.

(j) On May 18, 1978 Cosentino was assigned to Hangar 115 to cut two door openings through a 2' x 4' wall. He cut the hinges on the wrong side of the jamb and cut the piece of casing wrong.

Cosentino testified, and I find that at this time a discussion ensued between himself and Pritchett re the grievances filed by this employee. The supervisor remarked that he used to be a chief steward himself and had brought Mr. Tapley into the union; that he knew what the union could or could not do for an individual; that regardless of the outcome of the grievances, Pritchett would give Cosentino a written reprimand whenever he was deficient in his work.

(k) On July 6 Cosentino was assigned to build three pairs of saw benches. He cut the pieces of material too short and took 16 hours to finish the task, which Pritchett testified should be completed in 8-10 hours. The legs of the benches were at different degrees; the height and angle varied on the benches. Willi testified he saw Cosentino building two sawhorses; that he was pushing the lumber between the fence and the saw so that the lumber could kick back; and that Cosentino was working in an unsafe manner. The supervisor talked to Cosentino who commented he had difficulty figuring out what angle to cut the sawhorses. Further, the employee stated he was not familiar with the "bevel square". Willi's testimony indicates that the sawhorses were not uniformly constructed since the legs were not all built at the same angle.

10. As a result of the incident on February 14 re the time spent hanging the doors by Cosentino, as well as the poor work product, Pritchett informed the employee on February 16 that a letter of reprimand would be issued to him. The foreman asked the employee to sign a letter concerning the matter. Cosentino refused, stating he wanted union representation. Pritchett replied that Cosentino was the union and didn't need it; and the employee commented he was merely the union steward.

11. On February 23 the letter of reprimand was issued to Cosentino. A grievance was filed on his behalf on the ground that it was improperly issued under the contract. Management agreed and the reprimand was withdrawn.

12. A second letter of reprimand, based on the same incident, was issued on March 14, and another grievance filed. Respondent decided it had been somewhat harsh on Cosentino and

withdrew this reprimand. However, it gave him a 90 day letter of deficiency. On March 29 Pritchett issued to Cosentino a written notice of Need For Improvement.

13. During 1978, on a particular day, Cosentino left his work station to check the overtime list which the pipe shop foreman had for his own employees. There had been some discrepancy as to the overtime for several workers. Pritchett had approved four hours leave for Cosentino to conduct union business in the afternoon. When the pipe shop foreman advised Pritchett that Cosentino was attending to union business in the morning without a slip, Pritchett went to the union office. He confronted Cosentino and said if he left again without getting permission, he'd be in trouble. Cosentino replied he had a chit (permission), but the supervisor told him that the chit was for the afternoon.

14. Commencing in January Pritchett informed Willi re Cosentino's poor performance. On July 7 they again discussed the employee's work record and agreed that Cosentino did not possess the skills of a WG-9 carpenter. Accordingly, Willi recommended to J. B. Tubbs, Director of Maintenance, that Cosentino be terminated.

15. The record establishes that on March 24 Cosentino was given an automatic pay raise, or step increase, and that his performance was rated as satisfactory or better. Record testimony reflects that Pritchett did not recommend the increase; that the action was taken by the Personnel Department; and that no evaluation 7/ had been made by Pritchett to the office re Cosentino's performance as a carpenter.

16. By letter dated June 8 the Commanding Officer, E. M. Peeks, wrote to the Public Works Division and expressed his thanks to Cosentino and five other carpenters for the good job performed at Hangar 115 during the week of May 22.

17. Record facts disclose that supervisor Pritchett had reprimanded only one other employee; that he never has recommended termination of anyone else.

7/ Probationary employees are not given a regular performance rating until they have completed their probationary period.

Conclusions

The issue presented for determination is whether, as contended by Complainant, probationary employee Frank Cosentino was terminated because of his activities as steward and chief steward on behalf of Complainant union -- all in violation of sections 19(a)(1) and (2) of the Order.

Respondent maintains that Cosentino was discharged as a result of his poor work performance as a carpenter; that the employee did not measure up to the required standards of a journeyman carpenter; and that his activities as a union steward were not a factor which prompted the employer to terminate Cosentino's employment during his probationary period.

Under Section 19(a)(2) of the Order an Employer is forbidden to discharge or otherwise discriminate against an employee by reason of his union activities. A violation of this section will occur where a motive for termination of an employee, albeit it combined with other considerations, rests on the individual's actions on behalf of the union. Thus, the test is whether, as is true also in the private sector, management's conduct was motivated by union animus. See HEW, SSA, Bureau of Hearings and Appeals, Region 2, San Juan, Puerto Rico, A/SLMR No. 1127; VA Hospital, Minneapolis, Minn. A/SLMR No. 1090.

Applying the decisional law to the instant case, I am persuaded that Respondent did not violate sections 19(a)(1) and (2) of the Order. Careful consideration of the record facts convinces me that the employer was not motivated by Cosentino's actions as union steward. Moreover, I am constrained to conclude that Respondent was dissatisfied with the employee's work performance as a carpenter; that Cosentino did, in fact, fail to perform satisfactorily on several job assignments; and that supervisor Pritchett recommended Cosentino's termination as a result thereof.

Record facts disclose that from the onset of his employment in late September 1977 until July 1978, Cosentino had difficulty in fulfilling his job assignments on ten different occasions. Apart from the fact that I do not deem it incumbent upon me to pass upon the quality of his work in each instance, it appears that the employee himself concedes he lacked the experience to perform certain tasks and admitted that errors were made by him in the execution thereof. Thus, Cosentino does not deny his lack of ability to hang the double doors on February 14; he confirms the fact, as does the union representative Voelker, that at

least several steps built by Cosentino on March 23 were unsafe and had variances in the step tread rise as well as differences in the angles. Moreover, no dispute exists that the electric drill motor assigned to Cosentino was never discovered. The general foreman, Willi, attested to the poor quality of the employee's work, particularly in regard to the construction of the sawhorses.

While some discussion ensued between Pritchett and Cosentino in respect to the union, I do not find that the foreman manifested any union animus toward the employee. Pritchett's comments to the effect that he had been a chief union steward and had introduced carpenter Tapley into the union reflect no animosity or hostility to labor organizations. 8/ Further, the record establishes that there were 22 stewards and two other chief stewards at this location, and that 10-11 stewards worked in the same department as Cosentino -- the Public Works Department. There is no indication that management displayed any union animus toward these individuals, harassed them by reason of their union activities, or discriminated against them by reason thereof. The record is barren of any interference or restraint visited upon individuals or stewards for filing grievances or complaints under the agreement between the parties.

Pritchett evidenced his dissatisfaction with Cosentino's work as a carpenter from the outset. He issued letters of reprimand based on his judgment that the employee performed poorly. While Pritchett kept no record of the performance of the other two probationary employees, I do not conclude that his failure to do so was bottomed upon discriminating reasons. Both Van Lieu and Bialek, as probationary carpenters, were capable carpenters and, as testified to by the foreman, no need existed to document their work record.

While Complainant adverts to the "raise" granted Cosentino, as well as the "rating" that the employee performed satisfactorily, these resulted from action taken by the Personnel Department.

8/ There is some evidence that on February 14, at which time Pritchett advised Cosentino he would receive a reprimand letter, the employee requested union representation. Apart from the fact that the record is unclear as to whether Cosentino was denied such representation, the complaint does not allege such denial as an unfair labor practice.

The increase in salary was a step-increase and was automatically granted; and neither Pritchett nor Willi -- both of whom were instrumental in terminating Cosentino -- sanctioned the evaluation attributed to the employee.

Upon careful consideration of all the evidence herein, I conclude that management was not satisfied with Cosentino's performance as a carpenter during his probationary period. The record reveals to the undersigned that the employee's activities as union steward, or chief steward, were not responsible for his termination; that both the woodcraftman foreman and the general maintenance foreman based their recommendations to discharge Cosentino upon his inability to perform as a journeyman carpenter. Accordingly, I conclude the termination of Frank Cosentino disclosed no illegal motivation and hence was not discriminatory.

Recommendation

It having been found that Respondent did not engage in any conduct violative of Sections 19(a)(1) and (2) of the Order, it is recommended that the complaint be dismissed in its entirety.

WILLIAM NAIMARK
Administrative Law Judge

Dated: August 7, 1979
Washington, D.C.

2 FLRA No. 70

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Department of the Air Force,
Ogden Air Logistics Center,
Hill Air Force Base, Utah

Respondent

and

Assistant Secretary
Case No. 61-3921(CA)

American Federation of Government
Employees, AFL-CIO, Local 1592

Complainant

DECISION AND ORDER

On July 2, 1979, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order, and requested a rehearing in this matter. On November 19, 1979, the Complainant filed a "Supplement to Request for Exception."

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire

record in this case, including the Complainant's exceptions, 1/ the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation. 2/

ORDER

IT IS HEREBY ORDERED that the complaint in Assistant Secretary Case No. 61-3921(CA) be, and it hereby is, dismissed.

Issued, Washington, D.C., January 25, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

1/ We find no merit to the Complainant's exceptions. We note that the exceptions are based on newly presented evidence not shown to have been unavailable at the time of the hearing. Moreover, the evidence would not warrant a different outcome. On the same basis, the motion for rehearing is denied.

Further, with respect to the "Supplement to Request for Exception," the Complainant alleges that after the Administrative Law Judge issued his decision, the employee whose reassignment is the subject of this case was promoted. This submission does not affect the finding that the Respondent assessed the promotion potential of the employee with respect to the job as required by the arbitrator's award.

2/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
1111-20th Street, NW., Suite 700
Washington, D.C. 20036

In the Matter of	:	
DEPARTMENT OF THE AIR FORCE OGDEN AIR LOGISTICS CENTER HILL AIR FORCE BASE, UTAH Respondent	:	
and	:	Case No. 61-3921(CA)
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1592 Complainant	:	

CLARE A. JONES, ESQUIRE
Attorney Advisor
Office of the Staff Judge Advocate
Hill Air Force Base, Utah 84056
For the Respondent

MRS. ELMA DENNING
Division Steward, AFGE Local 1592
Building 362
Hill Air Force Base, Utah 84056

For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on March 16, 1978, under Executive Order 11491, as amended, by Local 1592, American Federation of Government Employees, AFL-CIO, (hereinafter called the Union or Complainant), against Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base,

Utah, (hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Regional Director for the Kansas City Region on April 17, 1979.

The complaint alleges that the Respondent violated Sections 19(a)(1) and (2) of the Order by reassigning employee Jeannie Hathenbruck on a non-competitive basis in violation of an outstanding arbitration award.

A hearing was held in the captioned matter on May 8, 1979, in Ogden, Utah. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendation.

Findings of Fact 1/

On October 21, 1977, Arbitrator Reed C. Richardson issued a decision predicated on a grievance filed by the Union on September 3, 1976. The Union alleged in the September 3, 1976 grievance that employee Betty Smith was detailed on a non-competitive basis in violation of the merit promotion plan (OOAMAR-40-6) in effect at Hill Air Force Base and the parties collective bargaining agreement.

Arbitrator Richardson found in his decision that paragraphs 2 and 12 of the merit promotion plan had been violated with respect to employee Betty Smith's detail and ordered the following remedy.

> REMEDY
>
> Management is ordered to cease and desist from allowing details by assignment to be effected without competition in situations that are the purview of the requirements of the last part of Paragraph 12 of OOAMA

1/ Complainant, other than submitting copies of the arbitrator's award, the merit promotion plan in effect at Hill Air Force Base, excerpts from the Federal personnel manual and a "consultation form" indicating that employee Jeannie Hathenbruck was reassigned on a non-competitive basis, presented no other evidence in support of its case.

> Regulation 40-6. When this part of Paragraph 12 applies, Management, first, must conduct an evaluation to determine whether 'long range career opportunities of the employee assigned..would be increased by the move' and, if the evaluation is positive, second, must assign the detail through the competitive process. 2/

Following the issuance of the aforecited arbitrator's decision, Mr. Ralph Petersen, Chief of the Staffing Section in the Civilian Personnel Office, summoned his supervisory personnel to a meeting for purposes of discussing the impact of the arbitrator's decision. During the meeting which was held in November of 1977, Mr. Petersen informed his subordinates that all future details or reassignments were to be reviewed for purposes of determining "whether or not the new position would offer more or increased long-range promotion possibilities than the old position". In the event that the review disclosed future promotion possibilities, then the detail or reassignment was to be made on a competitive basis. The following month, on December 28, 1977, Mr. Petersen issued a memorandum to all his staffing specialists wherein he reiterated in writing the instructions he had orally set forth in the November meeting concerning details and reassignments.

Sometime prior to January 30, 1978, Mrs. Delores Judson, a staffing specialist, received a form 52 vacancy announcement from a supervisor. The form 52 was accompanied by a request from the supervisor that Mrs. Jeannie Hathenbruck be reassigned into the vacancy "if she was qualified and if [Mrs. Judson] could clear the priority". Thereupon Mrs. Judson, pursuant to outstanding instructions, reviewed Mrs. Hathenbruck's file for purposes of determining whether or not the reassignment would increase Mrs. Hathenbruck's long range promotion possibilities. Upon concluding that the reassignment of Mrs. Hathenbruck from a Wage Grade 4 to a GS-5 supply clerk would not improve Mrs. Hathenbruck's promotion possibilities, Mrs. Judson made

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2/ Paragraph 12 of OOAMA Regulation 40-6 provides that "competitive promotion procedures must be applied when initially filling a position with known promotion potential since the employee selected would then be exempt from competing for subsequent career promotions".

the reassignment on a non-competitive basis. 3/ In reaching her conclusion that the reassignment would not improve Mrs. Hathenbruck's promotion possibilities, Mrs. Judson relied primarily upon the fact that GS-5 supply clerks had not been promoted "for upwards of twenty years".

According to the uncontested testimony of Mrs. Judson, since January 30, 1978, when Mrs. Hathenbruck was reassigned, all but one of the Wage Grade-4 employees have been promoted. There have been no promotions given to the GS-5 employees.

With respect to the 19(a)(2) allegation of the Complaint, Complainant's counsel, in response to a question from the undersigned administrative law judge, made it clear that she had no evidence indicating that reassignment of Mrs. Hathenbruck was in anyway related to Mrs. Hathenbruck's membership in, or activities on behalf of, a labor organization.

Discussion and Conclusions

Section 203.15 of the Regulations currently in effect imposes upon the Complainant the burden of proving the allegations of the complaint by a preponderance of the evidence. Complainant has failed to carry this burden. Thus, contrary to the allegations of the complaint, the record supports the conclusion that Respondent did in fact follow the instructions set forth in the "Remedy" section of the arbitrator's decision. The uncontested and credited testimony of Mrs. Judson establishes that Respondent evaluated the promotional possibilities of a GS-5 *vis* a *vis* a WG-4 and sanctioned the reassignment of Mrs. Hathenbruck on a non-competitive basis only after concluding that such reassignment would not increase Mrs. Hathenbruck's future promotional possibilities. Although not pertinent to the resolution of the instant controversy, it is interesting to note that Respondent's evaluation of the promotional possibilities was correct since the only promotions which did subsequently occur involved the WG-4 grade or position from which Mrs. Hathenbruck had transferred.

3/ Inasmuch as a Wage Grade 4 makes more money than a GS-5, the reassignment was not a promotion for Mrs. Hathenbruck. The record further reveals that in April of 1977, Mrs. Hathenbruck had transferred from a GS-4 to a WG-1/4 on a competitive basis.

In view of the foregoing and in the absence of any evidence to support the 19(a)(2) allegation of the complaint, I shall recommend that the complaint be dismissed in its entirety.

RECOMMENDED ORDER

IT IS HEREBY ORDERED that the complaint be dismissed in its entirety.

BURTON S. STERNBURG
Administrative Law Judge

Dated: July 2, 1979
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

National Treasury Employees Union
and NTEU Chapter 95

(Union)

and

Case No. O-NG-150

Department of the Treasury,
Internal Revenue Service,
Midwest Region

(Activity)

DECISION ON NEGOTIABILITY APPEAL

During the term of the parties' agreement, the union requested negotiations on the following matters:

(1) the substance, impact and implementation of the decision to change the employment conditions of Appeals Officers by assigning them work outside the scope of their position descriptions, and

(2) the substance, impact and implementation of the assignment of Legal Research Assistants (LRA's).

The activity responded in writing to the union's request to negotiate on these matters, stating, generally, that there was no obligation to negotiate because the substance of the matters at issue concerned rights reserved to management under 5 U.S.C. § 7106(a)(2).*/ The activity also stated that no change in

*/ Section 7106(a)(2) (92 Stat. 1198)(1978) provides:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws--
(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

working conditions had occurred to give rise to an obligation to negotiate as to either matter concerning which the union had requested bargaining, even with respect to impact and implementation.

The union subsequently petitioned the Authority for a negotiability determination on the impact of (1) the assignment of LRA's, and (2) the use of details. The union alleged that the assignment of LRA's had changed from a test program to a permanent program, and that the working conditions of Appeals Officers had been changed by their assignment to work outside the scope of their position descriptions.

The activity filed a statement with the Authority asserting, among other contentions, that the union had not submitted any specific proposals with respect to the impact and implementation of management's decision to detail Appeals Officers. Moreover, the union did not provide the Authority with any specific proposal on the matters which it seeks to negotiate.

In all material respects, this case is substantially identical to Association of Civilian Technicians, Alabama ACT and State of Alabama National Guard, Case No. O-NG-27, 2 FLRA No. 39 (Dec. 28, 1979), Report No. ___. In that case the Authority decided that a petition which never presented a proposal sufficiently specific and delimited in form and content as to permit the Authority to render a negotiability decision did not meet the conditions for review. For the reasons fully set forth in that decision, the instant petition does not meet the conditions for review prescribed in section 7117 of the Statute and section 2424.1 of the Authority's rules of procedure.

Additionally, to the extent that this case arose out of alleged unilateral changes in working conditions and a defense, essentially, that no changes have occurred, the proper forum in which to raise these issues is not a negotiability appeal, but would be an unfair labor practice proceeding pursuant to section 7118 of the Statute. In this regard, resolution of the instant dispute is dependent upon the resolution of factual issues related to the parties' conduct. Such factual determinations can best be accomplished through use of the investigatory and formal hearing procedures set forth in part 2423 of the Authority's Rules and Regulations which govern unfair labor practice proceedings (44 Fed. Reg. 44760 et seq. (1979)). American Federation of Government Employees, AFL-CIO, Local 1931 and Department of the Navy, Naval Weapons Station, Concord, California, Case No. O-NG-55, 2 FLRA No. 19 (Dec. 5, 1979), Report No. ____; National Federation of Federal Employees, Local 1141 and Department of the Interior, Bureau of Mines, Albany Metallurgy Research Center, Albany, Oregon, Case No. O-NG-80, 2 FLRA No. 28 (Dec. 13, 1979), Report No. ____.

(Continued)

(C) with respect to filling positions, to make selections for appointments from--

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

In conclusion, the union's appeal does not meet the conditions for review under section 7117 of the Statute and part 2424 of the Authority's rules and regulations. Accordingly, the appeal is dismissed.

Issued, Washington, D.C., January 18, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

January 18, 1980

Mr. James G. Diskin
President, Local 1916
American Federation of Government
Employees, AFL-CIO
4800 Forbes Avenue
Pittsburgh, Pennsylvania 15213

Re: Pittsburgh Energy Technology Center and American Federation of Government Employees, Local 1916, Case No. 0-AR-54

Dear Mr. Diskin:

By Authority letter of December 14, 1979, you were advised that preliminary examination of your exceptions to the arbitrator's award in the above-entitled case disclosed a number of apparent deficiencies in meeting various requirements of the applicable interim rules of procedure (a copy of which was enclosed for your information). The pertinent sections of the rules included sections 2425.1(d); 2429.27(a), (b), and (c); 2425.2(b), (c), and (d); and 2429.25.

You were also advised in the Authority's letter:

> Further processing of your exceptions is contingent upon your compliance with the above-designated provisions of the Authority's rules. Accordingly, you are hereby granted until the close of business on January 7, 1980, to take necessary action and file additional materials (in this case, a statement of service of your exceptions on the other party to the arbitration proceeding, a copy of the arbitrator's award, any further submission you would care to make in view of the requirements of section 2425.2(b) and (c) of the rules, and the required additional copies of your exceptions) in compliance with those requirements. Such additional materials should be filed by certified mail or in person in accordance with section 2429.24(e) of the Authority's rules, and should be submitted to the Executive Director, Federal Labor Relations Authority, 1900 E Street, NW., Room 7469, Washington, D.C. 20424.
>
> Moreover, in conformance with section 2425.1(d) of the Authority's rules, you must serve the other party with a copy of any additional material which has not previously been served on that party and which you submit to the Authority in completion of your exceptions, and you must include a statement of such service with your additional submission to the Authority.
>
> Failure to comply with the above requirements within the time limit prescribed may result in dismissal of your appeal.

You have made no submission in compliance with the above requirements, within the time limit provided. In this regard, your request for an extension of time within which to comply with those requirements, dated January 2, 1980, was received by the Authority on January 7, 1980. However, under sections 2429.21 and 2429.23(a) of the Authority's rules of procedure, requests for extensions of time must be received by the Authority no later than 3 days before the established time limit for filing. Hence, any request for an extension of time within which to comply with the requirements specified in the subject letter of the Authority had to have been received by the Authority no later than the close of business on January 4, 1980. However, as indicated above, your request was not received by the Authority until January 7, 1980, and consequently must be denied as untimely filed.

Accordingly, since you have made no submission in compliance with the requirements set forth in the Authority's letter of December 14, 1979, within the applicable time limit, your exceptions are hereby dismissed for failure to comply with the Authority's rules of procedure.

For the Authority.

Sincerely,

Samuel A. Chaitovitz
Executive Director

cc: (w/c AFGE letters of 11/13/79 and 1/2/80)

F. R. Brown
Energy

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

January 25, 1980

Ms. Yvonne T. Dixon
Labor Relations Counsel
Division of Operations Management
National Labor Relations Board
1717 Pennsylvania Avenue, NW., Room 1057
Washington, D.C. 20570

Re: National Labor Relations Board, Office of the General Counsel and National Labor Relations Board Union (Duff, Arbitrator), FLRC No. 78A-175

Dear Ms. Dixon:

The Authority has carefully considered the agency's petition for review of the arbitrator's award and the union's opposition to it filed in the above-entitled case.

According to the arbitrator's award, the dispute in this case concerns certain articles of local supplementary agreements negotiated between Local 6 of the National Labor Relations Board Union (the union) and Region 6 of the National Labor Relations Board (the agency). The union and the agency are parties to two national agreements: one national agreement covers field office professional employees and the other national agreement covers field office clerical employees. Each national agrement provides--subject to express restrictions--that local supplementary agreements may be negotiated between union locals and regional directors. Pursuant to this provision, Local 6 and Region 6 entered into a local supplementary agreement to each national agreement. As required by the national agreements, these local supplementary agreements were submitted to the General Counsel and the Executive Committee of the union for approval.

Each national agreement only allows disapproval of local supplementary agreements that are not in accordance with the restrictions set forth in Section 2 of Article XVIII[1/] of each national agreement. The Board's General Counsel disapproved one article of the local supplementary agreement covering professional employees and three articles of the local supplementary agreement covering clerical employees. Two of the disapproved articles were disapproved as contrary to section 11(b) and section 12(b) of E.O. 11491, as amended, as well as in conflict with the national agreement. Accordingly, the union sought a negotiability determination from the Federal Labor Relations Council as to these two articles.

1/ Articles XVIII, Supplemental and Local Supplementary Agreements, Section 2 of each national agreement provides:

Section 2. Local Supplementary Agreements may be negotiated between Local Unions and Regional Directors and the Officer-in-Charge in Subregion 38

(Continued)

In its decision on the union's negotiability appeal, the Council observed that while section 11(c)(4)2/ of the Order permits an appeal to the Council based on a union's disagreement with an agency head's determination that proposals violate the Order, it does not provide for an appeal to the Council to resolve an issue which involves interpretation of a controlling national agreement. Moreover, the Council stated that when a negotiability dispute involves both section 11(c)(1) matters, pertaining to the interpretation of a controlling agreement at a higher agency level, and 11(c)(4) matters, the parties must first resolve the issue as to the controlling agreement. Therefore, the Council ruled that the union's appeal under section 11(c)(4) was premature. Accordingly, the Council denied the union's negotiability appeal but without

(Continued)

(Peoria, Illinois). Any such agreement shall be subject to the approval of the General Counsel and the Executive Committee of the Union and shall be subject to the restrictions listed below:

(a) All matters covered must be within the administrative authority of the Regional Director;

(b) Only local conditions affecting the employees of that region will be covered;

(c) Provisions negotiated may not modify or be in conflict with any provision of this Agreement or any supplement hereto; nor may such provisions be in conflict with applicable law;* and

(d) Provisions must be consistent with the certification of the Union.

*/ Any determination by a party to this Agreement that a provision should be rejected pursuant to this subsection will not be made until the other party has been notified and been given an opportunity to consult on the matter.

2/ Section 11 of the Order provides in pertinent part:

Sec. 11. Negotiation of agreements.

. . . . . .

(c) If, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows:

(1) An issue which involves interpretation of a controlling agreement at a higher agency level is resolved under the procedures of the controlling agreement, or, if none, under agency regulations;

. . . . . .

(Continued)

prejudice to its renewal should it be appropriately determined that any of the disapproved articles were consistent with the national agreement.3/ Thereafter, pursuant to the procedures of the national agreement and in accordance with the directions of the Council, the parties proceeded to arbitration. As stated by the arbitrator, the issue before him was:

> Does the refusal of the General Counsel to approve certain provisions of the Supplementary Agreements covering Field Office Professional and Clerical Employees in Region Six constitute a violation of Article XVIII of the National Agreements?

In the opinion accompanying his award, the arbitrator discussed the disapproved articles by subject matter. The arbitrator first considered the subject of employee counseling. The agency had disapproved the employee counseling article of both local supplementary agreements. The basis of the agency's rejection had been that the counseling interviews were a guise for an appraisal system which modified and conflicted with the comprehensive appraisal system prescribed by the national agreements. However, the arbitrator found that the articles did not conflict with any provision of the applicable national agreement. Therefore, in §1 of his award, the arbitrator held that the General Counsel's refusal to approve the employee counseling articles violated the applicable national agreement.

The arbitrator next considered the clerical backup article of the local supplementary agreement covering clerical employees.4/ The arbitrator in

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(Continued)

> (4) A labor organization may appeal to the Council for a decision when--
>
> (i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or
>
> (ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order, or are not otherwise applicable to bar negotiations under paragraph (a) of this section.

3/ National Labor Relations Board Union, Local 6 and National Labor Relations Board, Region 6, Pittsburgh, Pennsylvania, FLRC No. 77A-109 (Apr. 12, 1978), Report No. 149.

4/ Article VI, the clerical backup article, provides:

> Section 1. As described further in this Article, the following clerical positions shall have clerical backups:
>
> Secretary to Regional Attorney
>
> Secretary to Assistant to the Regional Director

(Continued)

certain respects agreed with the agency that provisions of the article modified or conflicted with the national agreement. Accordingly, he ordered the "provided further" clause of Section 2 deleted. He also ordered the deletion of the words "equal or higher-graded" from Section 6. However, with these

(Continued)

Secretary responsible for preparation of R case decisions

Compliance Clerk

Election Clerk

Section 2. There will be two (2) clerical backups for each position referred to in Section 1 above, provided that:

a) nothing herein shall preclude Management at its discretion from assigning backups to any clerical position not described in Section 1 above,

b) nothing herein shall preclude Management in its discretion from assigning more than two clericals to serve as backups,

c) nothing herein shall preclude management in its discretion from assigning a clerical employee to act as a backup on more than one position requiring backups, and

d) nothing herein shall require management to assign ten separate clerical employees to serve as backups for those positions referred to in Section 1 above:

provided further, that no clerical employee occupying any of the positions described in Section 1 above shall be assigned to act as a backup for any of the positions described in Section 1 above, unless and until two other clerical employees are assigned as backups for that position.

Section 3. The selection, retention, assignment and utilization of those individuals selected as backups shall be solely determined by Management.

Section 4. Clerical employees in the Regional Office, who have satisfactorily completed their probationary period, may apply for training in any clerical position utilizing backups. Consistent with and subject to the operating needs and the efficiency of the Regional Office, applications for training as a backup, as defined above, may be approved by Management.

Section 5. Consistent with and subject to the operating needs and the efficiency of the Regional Office, clerical employees, if they so request, will be given assistance in their own jobs while training in or performing the duties of another position.

Section 6. No employee can reject management assignment as a backup to any equal or higher-graded position.

deletions, he held that no provision of the article conflicted with the national agreement and that all requirements of the national agreement for local supplementary agreements were fully satisfied. Thus, in §2 of his award, he directed that the General Counsel approve the article as amended.

The agency requests that the Authority accept its petition for review of §1 and §2 of the arbitrator's award on the basis of its four exceptions which are discussed below.5/ The union filed an opposition.

In accordance with section 2400.5 of the transition rules and regulations of the Authority (44 Fed. Reg. 44741) and section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215), the rules of procedure of the Federal Labor Relations Council, 5 C.F.R. part 2411 (1978), remain operative with respect to the present case except that the word "Authority" is substituted, as appropriate, wherever the word "Council" appears in such rules.

Under section 2411.32 of the rules as so amended, review of an arbitrator's award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations.

In its first exception to the arbitrator's award, the agency asserts that §1 of the award, finding that the disapproval of the employee counseling articles violated the respective national agreements, is arbitrary and unreasonable. In its second exception to the award, the agency asserts that §2 of the award, finding that the clerical backup article with specified deletions was fully consistent with the national agreement and directing its approval as amended, is arbitrary, unreasonable, and contrary to law. However, the agency cites no specific law in support of this exception. In support of both exceptions, the agency argues that the arbitrator acted arbitrarily and unreasonably in concluding that these articles were within the restrictions of the applicable national agreement and should therefore be approved.

As to the agency's first and second exceptions, the agency's assertions that §1 and §2 of the arbitrator's award are arbitrary and unreasonable constitute nothing more than disagreement with the arbitrator's interpretation of the various negotiated agreements. As is well established under the Order, a challenge to an arbitrator's interpretation of a negotiated agreement fails to state a ground on which a petition for review of an arbitrator's award may be

5/ In §3 of his award, the arbitrator held that the General Counsel's disapproval of the bridge program article of the local supplementary agreement covering clerical employees was contrary to the national agreement. However, the agency does not seek review of §3 of the arbitrator's award. Accordingly, that portion of the award is not before the Authority in this case.

granted.6/ Likewise, an assertion that an arbitrator's award violates law but without citing any law to support that assertion provides no basis for acceptance of a petition for review of an arbitrator's award.7/ Accordingly, neither the agency's first exception nor the agency's second exception to the arbitrator's award provides a basis for acceptance of its petition for review under section 2411.32 of the rules of procedure as amended.

In its third exception to the award, the agency asserts that §2 of the award, finding that the clerical backup article with specified deletions was fully consistent with the national agreement and directing its approval as amended, violates section 12(b) of the Order. In support the agency argues that in finding that the clerical backup article was improperly disapproved by the General Counsel, the arbitrator failed to adequately consider whether the provisions were in conflict with section 12(b) of the Order. In this respect the agency claims that the article pertains to prohibited subjects of bargaining under section 12(b)(1), 12(b)(2), and 12(b)(5) of the Order8/ and could not have been properly approved.

6/ E.g., Council of American Federation of Government Employees and Department of Health, Education, and Welfare, Social Security Administration Field Operations (Marshall, Arbitrator), FLRC No. 78A-15 (May 25, 1978), Report No. 150.

7/ Department of the Air Force, 4392D Aerospace Support Group (SAC) and National Federation of Federal Employees (NFFE), Local 1001 (Vandenberg Air Force Base, California) (Pollard, Arbitrator), 5 FLRC 327 [FLRC No. 77A-24 (May 4, 1977), Report No. 125].

8/ Section 12(b) of the Order provides in pertinent part:

> Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--
>
> . . . . . .
>
> (b) management officials of the agency retain the right, in accordance with applicable laws and regulations--
>
> (1) to direct employees of the agency;
> (2) to hire, promote, transfer, assign, and retain employees in positions within the agency . . . ;
>
> . . . . . .
>
> (5) to determine the methods, means, and personnel by which [agency] operations are to be conducted[.]

In its fourth exception to the award, the agency asserts that §2 of the award violates section 11(b) of the Order.9/ In support the agency argues that in finding that the clerical backup article was improperly disapproved by the General Counsel, the arbitrator failed to adequately consider whether the provisions were in conflict with section 11(b) of the Order. In this respect the agency claims that the article pertains to matters enumerated in section 11(b) and could not have been properly approved.

Although the Authority will grant a petition for review of an arbitrator's award where it appears, based on the facts and circumstances described in the petition, that the award violates the Order, the agency's petition fails to describe the facts and circumstances necessary to support its exceptions that §2 of the award violates section 12(b) or section 11(b) of the Order. In this regard, the Authority notes that the parties went to arbitration in this case in accordance with the decision of the Federal Labor Relations Council in the National Labor Relations Board Union case, FLRC No. 77A-109, to resolve the question of whether the disputed clerical backup article in the supplementary agreement conflicted with the controlling national agreement. In that case the Council pointed out that the question of the negotiability of the disputed provisions could be raised "in a petition duly filed with the Council after it is resolved . . . that [the] provisions do not conflict with [the] controlling agreement." Thus, the issue before the arbitrator in this case was:

> Does the refusal of the General Counsel to approve certain provisions of the Supplementary Agreements . . . constitute a violation of Article XVIII of the National Agreements?

It appears that it was precisely this issue alone that the arbitrator resolved when, in §2 of his award, he found that the clerical backup article with specified deletions did not conflict with the national agreement. Nothing in the agency's petition for review indicates that the issue before the arbitrator or the arbitrator's award concerned whether the clerical backup article pertained to any matters enumerated in either section 12(b) or section 11(b) of the Order. Further, in his award, apparently responding to the agency's arguments that certain provisions of the clerical backup article were nonnegotiable under the Order, the arbitrator responded:

> [T]he Federal Labor Relations Council is the proper forum to determine that question. Our decision will be directed primarily to the issue whether the National Agreements have been violated.

In view of these circumstances, the agency has failed to demonstrate in what manner the award violates either section 12(b) or section 11(b) of the Order. It appears that in §2 of his award, the arbitrator only determined, on the

---

9/ Section 11(b) of the Order provides in pertinent part:

> [T]he obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty . . . .

basis of his interpretation of the negotiated agreements, that the clerical backup article was consistent with the national agreement. The agency does not demonstrate that the arbitrator meant any more than that when in §2 of his award, he directed the article approved.

For these reasons the agency's petition fails to present the facts and circumstances necessary to demonstrate that in finding the clerical backup article consistent with the national agreement, the arbitrator rendered an award violative of either section 12(b) or section 11(b) of the Order. Therefore, neither the agency's third exception nor its fourth exception provides a basis for acceptance of its petition for review under section 2411.32 of the rules of procedure as amended.10/

Accordingly, the agency's petition for review of the arbitrator's award is denied because it fails to meet the requirements of section 2411.32 of the rules for acceptance by the Authority of a petition for review of an arbitrator's award.11/ Likewise, the agency's request for a stay is denied because it fails to meet the requirements of section 2411.47 (f) of the operative rules.

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

cc: W. G. Kocol
NLRBU

10/ The Authority's decision herein is limited to the question of whether the agency's petition for review of the arbitrator's award provides a basis for acceptance of its petition under section 2411.32 of the rules of procedure. As to the question of the negotiability of the disputed provisions, it is noted that the agency's negotiability determination was made under the provisions of E.O. 11491, as amended, and that neither the union nor the agency has apparently considered the applicability of the Federal Service Labor-Management Relations Statute to the disputed provisions in this case. Questions as to the negotiability of those provisions under the Statute may, if necessary, be raised in accordance with the regulations of the Federal Labor Relations Authority for resolving negotiability disputes.

11/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the instant case was decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision does not prejudge in any manner either the meaning or application of related provisions of the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Order.

* U.S. GOVERNMENT PRINTING OFFICE : 1980 O - 316-864

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FLRA Report of Case Decisions and FSIP Releases

Contents of Package

This package should include the following items:

FIRA Case Decision Number 29

FIRA Case Decision Number 30

If any of the above items are not included, please contact the Administrative Office, Federal Labor Relations Authority, 1900 E Street, NW., Room 7469, Washington, D. C. 20424 - telephone 202- 653-8040.

For sale by the Superintendent of Documents, U.S. Government Printing Office Washington, D.C. 20402. Subscription Price: $36.00 per year; $9.00 additional for foreign mailing.

Federal Labor Relations Authority

1900 E Street, NW
Washington, D.C. 20424

Number 29 REPORT OF CASE DECISIONS February 26, 1980

UNFAIR LABOR PRACTICE CASES

2 FLRA No. 71 (January 25, 1980)

Internal Revenue Service, Austin District, Austin, Texas, Assistant Secretary Case No. 63-8838(CA). The ALJ, upon a complaint filed by the union (NTEU and NTEU Chapter 52) under E.O. 11491, found that the activity had not engaged in conduct prohibited by section 19(a)(1) and (6) of the Order, when it held an employee's grievance in abeyance pending the outcome of his EEO lawsuit, based on essentially the same facts as the grievance, in Federal court. Contrary to the ALJ, however, the Authority concluded that the activity's conduct was violative of the Order. Under the EEO Act, a Federal employee may concurrently pursue an EEO complaint both through agency procedures and U.S. District court procedures; the court acts independently of the administrative process. The previous practice of the parties herein was to hold contractual grievances in abeyance while related matters were being processed through the agency's internal EEO procedures. The Authority held that in this case the activity's extension of such practice to include the holding of a contractual grievance in abeyance while related EEO matters were being processed in a U.S. District court constituted a unilateral change in personnel policies and practices and matters affecting working conditions in violation of section 19(a)(1) and (6) of the Order. Accordingly, consistent with this decision, the Authority issued a remedial order. (Decision and Order attached.)

2 FLRA No. 72 (January 25, 1980)

Department of the Army, Headquarters, Military Traffic Management Command, Assistant Secretary Case No. 22-09049(CA). Upon a complaint filed by the union (AFGE Local 909) under E.O. 11491, the ALJ found that the activity had violated section 19(a)(1) and (2) of the Order, when it reprimanded the union member of a merit promotion rating and ranking panel for his statements to a management member and for the tone of those statements during a meeting of the panel. The ALJ concluded that the activity's reprimand was based solely on the grievant's conduct and was not motivated by union animus, and recommended dismissal of the

union's complaint. The Authority concluded, contrary to the ALJ, that under the circumstances presented in the case, the employee was engaged in protected union activity and did not forfeit his protection because of his behavior in the instant case. Thus, without endorsing the tone of the statements made, the Authority found that the statements themselves represented the legitimate concern of a union representative and did not constitute the kind of flagrant misconduct which is beyond the ambit of protected activity. Accordingly, the Authority held that the activity had violated section 19(a)(1) and (2) of the Order when it reprimanded the employee, and issued a remedial order. (Decision and Order attached.)

2 FLRA No. 73 (January 25, 1980)

Department of Health, Education and Welfare, Social Security Administration, Great Lakes Program Service Center, Chicago, Illinois, Assistant Secretary Case No. 50-17087(CA). Upon a complaint filed by the union (AFGE Local 1395) under E.O. 11491, the ALJ found that the activity was required to bargain, not merely consult, with the union concerning a proposed Individual Assessment System for Trainees; and that the activity violated section 19(a)(1) and (6) of the Order when it refused to negotiate with the union on that matter. The Authority adopted the findings, conclusions, and recommendation of the ALJ, and issued a remedial order. (Decision and Order attached.)

Attachments (3)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Internal Revenue Service
Austin District
Austin, Texas

Respondent

and

Assistant Secretary
Case No. 63-8838(CA)

National Treasury Employees Union
(NTEU) and NTEU Chapter 52

Complainant

DECISION AND ORDER

On March 23, 1979, Administrative Law Judge Joseph A. Matera issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, both parties filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the exceptions filed by the parties, the

Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendations only to the extent consistent herewith. 1/

The Administrative Law Judge concluded that the Respondent had not violated section 19(a)(1) and (6) of the Order when it held in abeyance the grievance of a bargaining unit employee pending the outcome of a Federal court lawsuit brought under the Equal Employment Opportunity Act of 1972 2/ (EEO Act), a case based on essentially the same facts as the grievance. In reaching this conclusion, he found, among other things, that the Respondent acted based on a good faith belief that it was proceeding in accordance with past policy and practice, and its action was in no way intended to obstruct the negotiated grievance procedure. The ALJ noted that the Respondent repeatedly indicated its willingness to proceed with the grievance once the EEO matter was resolved.

Contrary to the Administrative Law Judge, however, the Authority concludes that the Respondent's conduct was violative of the Order. 3/ Under the EEO Act, a Federal employee may concurrently pursue an EEO complaint both through agency procedures and in United States District Court 4/ and the court acts independently of the administrative process. 5/ The previous practice of the parties herein was to hold contractual grievances in abeyance while related matters were being processed through the agency's internal EEO procedures. This case involves the Respondent's extension of such practice to include the holding of a contractual grievance in abeyance while related EEO matters were being processed in a United States District Court. The Authority views this extension of the existing practice as a unilateral change in personnel policies and practices

---

1/ In his Recommended Decision and Order, the Administrative Law Judge inadvertently referred to Charles R. Speer, a representative of the Respondent, as "Mr. Greer." This inadvertence is hereby corrected.

2/ Pub. L. 92-261, 86 Stat. 103 et seq. (codified at 42 U.S.C. section 2000(e) et seq.).

3/ Section 19(d) of the Executive Order provides, in pertinent part, "(i)ssues which can properly be raised under an appeals procedure may not be raised under this section." In view of the fact that the amended EEO lawsuit deals with alleged violations of the EEO Act and in no way deals with the unfair labor practice issues raised by the instant complaint, the Authority concludes that section 19(d) does not serve to bar consideration of the complaint under the unfair labor practice procedures of the Order.

4/ "The existence of concurrent jurisdiction is apparently implicit in section 2000(e)-5(f)(1)." Grubbs v. Butz, 514 F. 2d 1323, 1329 (D.C. Cir. 1975).

5/ See Chandler v. Roudebush, 425 U.S. 840 (1976), in which the Supreme Court held that the EEO Act affords Federal employees the right to a trial de novo on employment discrimination claims.

and matters affecting working conditions that had no basis in past practice and, thus, a violation of section 19(a)(1) and (6) of the Order. 6/ Accordingly, consistent with this decision, the Authority hereby issues the following order: 7/

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Internal Revenue Service, Austin District, Austin, Texas shall:

1. Cease and desist from:

(a) Refusing to proceed to Step 4, and additional steps, if necessary, of the grievance procedure set forth in the parties' negotiated agreement effective May 3, 1974, on the grievance of May 20, 1976, which sought to prevent the use of an unfavorable appraisal rating in an employee promotion action.

(b) Unilaterally changing established practices regarding the processing of contractual grievances during the pendency of related internal agency EEO procedures to include matters before United States District Courts without first notifying the National Treasury Employees Union, Chapter 52, or any other exclusive representative of its employees, and affording such representative the opportunity to negotiate, to the extent consonant with law and regulations, on such changes in practice.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

6/ It is noted that the time delays involved in holding contractual grievances in abeyance beyond the period of an agency's internal processing of EEO complaints could serve to deter employees from exercising their fundamental Executive Order right to file grievances under negotiated procedures irrespective of any apparent willingness on the part of an agency to process the grievance after the resolution of the EEO matter by the Federal courts. Compare Department of Health, Education and Welfare, Social Security Administration, Disability Insurance Program Staff, Chicago, Illinois, 8 A/SLMR 1096, A/SLMR No. 1128 (1978), in which the Assistant Secretary concluded that there was no violation of the Order where the Respondent's willingness to process a grievance after the internal processing of a related EEO complaint mitigated any frustration of the grievance/arbitration machinery.

7/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

2. Take the following affirmative action in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request by the National Treasury Employees Union, Chapter 52, or any other exclusive representative of its employees, negotiate, to the extent consonant with law and regulations, concerning any changes in established practices regarding the processing of contractual grievances during the pendency of related internal agency EEO procedures.

(b) Upon request, proceed to Step 4, and succeeding steps, if necessary, of the grievance procedure set forth in the parties' negotiated agreement effective May 3, 1974, on the grievance of May 20, 1976, which sought to prevent the use of an unfavorable appraisal rating in an employee promotion action.

(c) Post at its facility at the Austin District, Austin, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the District Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to ensure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., January 25, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to proceed to Step 4, and additional steps, if necessary, of the grievance procedure set forth in the parties' negotiated agreement effective May 3, 1974, on the grievance of May 20, 1976, which sought to prevent the use of an unfavorable appraisal rating in an employee promotion action.

WE WILL NOT change established practices with regard to the processing of contractual grievances during the pendency of related internal agency EEO procedures without first notifying the National Treasury Employees Union, Chapter 52, or any other exclusive representative of our employees, and affording such representative the opportunity to negotiate, to the extent consonant with law and regulations, on such changes in practice.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request by the National Treasury Employees Union, Chapter 52, or any other exclusive representative of our employees, negotiate, to the extent consonant with law and regulations, concerning any changes in established practices regarding the processing of contractual grievances during the pendency of related internal agency EEO procedures.

WE WILL, upon request, proceed to Step 4, and succeeding steps, if necessary, of the grievance procedure set forth in our negotiated agreement, effective May 3, 1974, on the grievance of May 20, 1976, which sought to prevent the use of an unfavorable appraisal rating in an employee promotion action.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address is: Downtown Post Office Station, Bryan and Ervay Streets, P. O. Box 2640, Dallas, Texas 75221, and whose telephone number is: (214) 767-4996.

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
SUITE 700 - 1111 20th Street
WASHINGTON, D. C. 20036

In the Matter of	)	
	)	
INTERNAL REVENUE SERVICE,	)	
AUSTIN DISTRICT,	)	
AUSTIN, TEXAS	)	
Respondent	)	
	)	
and	)	CASE NO. 63-8838(CA)
	)	
NATIONAL TREASURY EMPLOYEES	)	
UNION, AND NTEU CHAPTER 52	)	
Complainant	)	

Thomas L. Self, Attorney at Law
General Legal Services
Office of Regional Counsel
Internal Revenue Service
Room 12-D, 27 1100 Commerce Street
Dallas, Texas 78242

Barbara Kelly, Technical Representative
Labor Relations Specialist
Austin District
Internal Revenue Service
Austin, Texas
For the Respondent

B. Craig Deats, Assistant Counsel
National Treasury Employees Union
Suite 104, 300 E. Huntland Drive
Austin, Texas 78752

Henry H. Robinson, Associate General Counsel
National Treasury Employees Union
Suite 104, 300 E. Huntland Drive
Austin, Texas 78752
For the Complainant

Before: JOSEPH A. MATERA
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

Pursuant to a notice of hearing on a complaint issued on December 13, 1978, by the Regional Administrator, Labor-Management Services Administration of the U.S. Department of Labor, Kansas City Region, a hearing in this matter was conducted on January 25, 1979, in Austin, Texas. This proceeding was initiated under Executive Order 11491, as amended (hereinafter called Order), by the filing of a complaint on October 2, 1978, by Vincent L. Connery, National President, National Treasury Employees Union and NTEU, Chapter 52 (hereinafter called Union), against the Internal Revenue Service, Austin District (hereinafter called Agency), pursuant to 29 C.F.R. § 203.4.

This decision is issued pursuant to transition rules and regulations, Federal Register, Vol. 44, No. 1, January 2, 1979, pages 7-8, in the name of the Federal Labor Relations Authority. In accordance with section 2400.2 (5 C.F.R. § 2400.2) of the transition rules and regulations, it shall be processed by the Authority in accordance with the Rules and Regulations of the Assistant Secretary for Labor-Management Relations, Title 29, Code of Federal Regulations, Part 201, et seq., except that the word "Authority" shall be substituted wherever the words "Assistant Secretary" appear in the Rules and Regulations of the Office of the Assistant Secretary.

The aforesaid complaint charged a violation of sections 19(a)(1) and (6) of the Order as a result of the alleged refusal of the Agency to comply with the grievance procedure of a multi-district agreement between the parties and also an alleged change in terms and conditions of employment by the Agency without prior consultation with the Union.

The parties were fully represented at the hearing by highly competent counsel who were afforded full opportunity to be heard, to adduce evidence and to examine and cross-examine witnesses. Thereafter, both parties filed briefs which have been duly considered.

A motion to correct the transcript was filed by counsel for the Agency with its post-hearing brief, in accordance with 29 C.F.R. § 203.19(a)(1), et seq. The motion is granted as to the proposed corrections on pages 2, 4, 21, 23, 63, 196 and 261. These proposed corrections are generally self-evident and do not change the context of any part of the transcript in which they appear. The motion is denied as to the proposed corrections on pages

60, 62 and 171. The transcript appears to reflect accurately the actual terms used in the active questioning of the witnesses, and an answer given on p. 171, although precise expression may not have been intended. To change the text of these questions in any way would require that the witnesses have an opportunity to also rephrase their answers. In the total context of the transcript I do not find this to be necessary.

Upon the entire record in this case, and from observations of the witnesses and their demeanor, and from all of the testimony and documentary evidence adduced at the hearing I make the following findings of fact and conclusions of law.

Findings of Fact

The Union herein was at all times material hereto the exclusive collective bargaining representative of certain employees of the Agency. At all such times and particularly during May 1976, the parties processed all grievances including the grievance relevant herein under an agreement entitled Multi-District Agreement II (Joint Exhibit 1, hereinafter referred to as MDA II). On May 20, 1976, bargaining unit employee Harvey Malyn (hereinafter referred to as grievant), employed as an estate tax attorney for the Agency, filed a contract grievance under this agreement. This grievance related to an April 23, 1976, promotion appraisal and its subsequent use in a promotion action involving a higher grade estate tax attorney position for which the claimant was applying. On June 1, 1976, a Step 1 meeting was held in respect to this contract grievance under Article 35, Section 7 of MDA II and on June 4, 1976, a decision denying the grievance was issued by the Agency. On June 9, 1976, after learning he had not been selected for promotion to the higher grade position, and that a woman had been chosen, grievant, through other than union representation, instituted an Equal Employment Opportunity (EEO) charge and complaint against his supervisor and Agency management. He thereafter made contact with an EEO counselor (Jt. Exh. 22, p. 3).

On June 10, 1976, the Union steward processing grievant's contract grievance appealed to Step 2 under the negotiated grievance procedure after receiving notice of the Step 1 denial by the agency. In his appeal letter the union steward also made the following request:

> Since the first step hearing, Mr. Malyn has filed a grievance with the Regional Equal

Employment Opportunity officer with reference to the subject matter of the grievance. Therefore, it is requested that any meetings to hear this appeal be postponed until the EEO grievance is disposed of. (Jt. Exh. 4, emphasis supplied.)

This Union request on behalf of grievant was acknowledged and acceded to by the Agency, its representative indicating that a second step meeting of grievant's contract grievance would be set up "after you notify me the EEO grievance has been disposed of." (Jt. Exh. 5.)

Grievant thereafter pursued his EEO remedies, filing a formal complaint of discrimination and reprisal based in part upon the alleged unfair evaluation referred to in his contract grievance as well as on a charge of sex bias (Jt. Exh. 6A, 6B). Grievant's EEO complaint was administratively processed in accordance with the federal statute, 42 U.S.C.A. § 2000e-16(a), et seq., and the implementing regulations, 5 C.F.R. § 713, et seq., including an investigation and proposed disposition by an Agency EEO officer and a hearing before a Civil Service complaint examiner. Both of these officials found no discrimination and recommended dismissal of the complaint. On January 27, 1978, the acting director, EEO Programs, Department of the Treasury, in his statutory role issued the final decision of the Department of the Treasury pursuant to 5 C.F.R. § 713.221, adopting the recommended decision of the Civil Service Commission finding no discrimination. Thereafter, on February 7, 1978, grievant notified the Agency that he wished to reopen his May 20, 1976, contract grievance at the Step 2 meeting level. Such a meeting was scheduled and held on March 7, 1978, pursuant to Article 35, Section 7 of MDA II and on March 13, 1978, a Step 2 decision was issued denying the contract grievance. A timely appeal by grievant to Step 3 was promptly heard by the Agency on March 30, 1978. A Step 3 decision was issued by the agency, again denying the contract grievance. The Union on April 10, 1978, then appealed the grievance to Step 4 as provided in the contract.

On April 18, 1978, grievant, through private counsel, then pursued his EEO remedies to the next statutory level by filing suit in the United States District Court for the Southern District of Texas, against the Commissioner of IRS. This suit alleges discrimination based on sex resulting in non-selection for the promotion in question. The action was also based in part upon allegations of down grading of grievant on performance evaluations, in retaliation for his assertion of rights under the EEO Act (Jt. Exh. 13).

Shortly after this suit was filed Mr. Greer, the Agency representative assigned to conduct the Step 4 level contract grievance meeting, learned of this law suit through another Agency manager. He then sought the advice of the Agency's Labor Relations Specialist as to further processing of the contract grievance and was advised that "if it involved the same subject matter it would be proper to withhold processing of the grievance." (Tr. 119.) This action, he testified, was based upon past practice of the Austin District of the Internal Revenue Service, that EEO complaints and investigations took precedence over contract grievances. As a result any contract grievance, he testified, would be held in abeyance until the EEO investigations and resolution of the EEO matter was settled (Tr. 121, 125). A second reason given by Mr. Greer for his action, in addition to that of past practice and policy, was that from his previous understanding it was not appropriate to deal with contract issues which were also under the jurisdiction of a court absent the personal involvement of the United States Attorney (Tr. 121).

After speaking with his Labor Relations Specialist Mr. Greer had the court suit read to him. He thereafter concluded that it did involve the same subject matter as the contract grievance. He informed the Union president, Mr. Sam, by phone of his conclusion and intent to hold the contract grievance in abeyance. He confirmed this by letter of April 26, 1978. He also supplied Mr. Sam with a copy of the court suit around the same time. He testified that Mr. Sam did not disagree with or object to his proposed action of holding the contract grievance in abeyance (Tr. 121). Mr. Sam did not recall the telephone conversation or whether or not he specifically disagreed with Mr. Greer at that time regarding the holding of the matter in abeyance, after receiving the letter confirming the alleged telephone conversation.

Following the holding of the contract grievance in abeyance, the grievant on May 8, 1978, filed a new EEO reprisal charge with the Regional Internal Revenue Service EEO Officer for refusal to process his May 20, 1976, contract grievance at Step 4. This new EEO charge was ultimately rejected as not within the purview of the EEO regulations.

The grievant, following the holding of his contract grievance in abeyance, also instituted through the Union on July 26, 1978, a pre-complaint of an unfair labor practice charge with the agency, contending that Respondent had violated sections 19(a)(1) and 19(a)(6) of the Order. Following a denial of the charge by the Agency the

formal unfair labor practice complaint, herein being considered, was filed on October 2, 1978.

The EEO suit filed by grievant in the meantime has been answered by the Internal Revenue Service and grievant through his private counsel has filed a second amended complaint. The suit remains pending.

Conclusions of Law

Those portions of section 19(a) of the Order which are pertinent to the issues raised herein provide that agency management shall not (1) interfere with, restrain or coerce an employee in the exercise of the rights as assured by the Order, or (6) refuse to consult, confer or negotiate with a labor organization as required by the Order. In this respect it is established that inteference with the filing or processing of grievances may be violative of the above-cited sections of the Order. Department of Transportation, Federal Aviation Administration, New York Air Route Traffic Control Center, A/SLMR No. 1178. Where such a course of action is initiated by a party which clearly contravenes the agreed upon terms of a negotiated agreement, without prior consultation, the bargaining requirements of the Order have not been met. Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87.

The Union charges just such a violation of the Order by the Agency in its holding in abeyance, and refusal to hear, grievant's contract grievance on the Step 4 level. The Union also charges a violation of the Order by the Agency in its failure to provide advance notification to the Union of an alleged changed personnel policy in respect to the holding of contract grievances in abeyance.

Addressing himself to this past Agency policy concerning the holding of grievances in abeyance, the president of Chapter 52 of the Union, who had been employed by the Agency for some 22 and a half years, testified in respect to the agency practice in question:

> JUDGE MATERA: Under those circumstances, as you say, [during the administrative processing of an EEO complaint], under those circumstances the ordinary practice then was to hold the grievance in abeyance pending the outcome of the EEO administrative complaint?
>
> THE WITNESS: Absolutely. I have an agency grievance now that's been held in abeyance in excess of two years now. (Tr. p. 109.)

Thus, there is no question that the Agency policy of holding contract grievances in abeyance pending the outcome of an "administrative complaint" was well established as to all parties. (See also Tr. pp. 49, 76, 105, 169, 170, 198 and 252.) This delay apparently involved on occasion substantial periods of time. However, it is the position of the complainant that this policy had no relevancy to an EEO complaint sharing the same subject matter as a contract grievance, which had proceeded beyond an administrative stage to the level of a court action as in the instant case.

Agency management personnel and the Labor Relations Specialist for the respondent maintained at the hearing that Agency policy and practice have been consistent in placing contract grievances in abeyance during the pendency of an EEO complaint involving the same subject matter. While it apparently was a matter of first precedent in the Austin District to have an EEO complaint at the level of a court proceeding while a contract grievance was pending, it nonetheless appeared consistent to Agency management to apply the same past policy and practice to this situation. Mr. Greer testified that his personal examination of the court documents convinced him that it arose out of the same subject matter as the contract grievance. He therefore felt he was acting in a manner consistent with past policy and practice in placing the fourth level contract grievance in abeyance.

I conclude from the evidence before me that Mr. Greer, on behalf of the Agency, was motivated by a good faith belief that he was acting in accordance with past practice and procedure of the Agency in placing the contract grievance in abeyance. The conclusions reached by Mr. Greer that the EEO court suit and the contract grievance were substantially the same, requiring him to place the contract grievance in abeyance, are both reasonable and supported by the evidence of record. Further credence is given to this Agency action by the fact that Mr. Sam, the Union president, voiced no objection when informed by Mr. Greer, both by a phone call and a confirming letter, of his intentions. 1/

1/ The Agency herein could further have been convinced of the "good faith" nature of its action by the failure of the Union to exercise a further procedure available to it under the contract, that is, of invoking arbitration under Article 56, Section 11, a procedure permitted under MDA II when there is an alleged failure by the employer to "meet any of the requirements of the procedure."

A review of the record in this case, carefully documented by both parties herein, convinces me that there was no deliberate intent by the Agency to evade or ignore the clear grievance procedures established in the negotiated agreement. The expressed willingness of the Agency to promptly conduct the various level grievance meetings under the contract, upon conclusion of the EEO matter, was clear. There was prompt reinstitution of the grievance machinery at the Step 2 level at grievant's request after the EEO proceeding had reached what was thought to be a conclusive stage (Jt. Exh. 22, stipulations 11, 12, 13, 14). At the trial of this matter there was a further declaration by Mr. Greer of the Agency's willingness and intention to conduct the Step 4 level meeting under the contract upon conclusion of the processing of the EEO complaint (Tr. 124).

The findings reached herein are in accord with the conclusions reached by the Assistant Secretary in at least two separate matters. In Department of HEW, Social Security Administration, Disability Insurance Program Staff, A/SLMR No. 1128, the agency refused to process a contract grievance beyond a certain level, pending resolution of a related EEO proceeding. Reliance was placed by the agency in that case on section 13(a) of the Order. As in this case, it was noted that the agency had indicated its willingness to proceed once the EEO matter had been resolved. The Assistant Secretary agreed with the findings of the Administrative Law Judge that there was no showing of bad faith by the agency, or that there had been any attempt to frustrate the grievance/arbitration machinery.

Similarly, in Department of the Treasury, Internal Revenue Service, Milwaukee District Office, Case No. 51-3911(CA), the agency held in abeyance further processing of certain grievances pending a decision on EEO complaints. The grievance involved in part the same subject matter as the EEO complaints. The agency based its action in that case on certain procedures contained in the Treasury Personnel Manual. The union alleged, as it does in this case, a violation of sections 19(a)(1) and (6) of the Order. The Acting Regional Administrator, in dismissing for failure to find any reasonable basis for the complaint, stated that even if the agency erred in its interpretation of the relevant personnel regulations, its conduct would constitute only a simple breach of the parties' negotiated agreement and would not rise to "the level of a flagrant and deliberate breach constituting a unilateral modification of the negotiated agreement." This dispute, he held, was properly a matter for the grievance machinery of the

parties' negotiated agreement rather than an unfair labor practice procedure. This dismissal of the complaint by the Regional Administrator was appealed to the Federal Labor Relations Council where the petition for review was denied. The Council failed to find that the dismissal of the complaint was arbitrary or capricious, or presented a major policy issue. FLRC No. 77A-135.

I find therefore that the complainant Union has failed to meet its burden of establishing a reasonable basis for the complaint. I conclude that the action by the Agency's representative, Mr. Greer, of placing a contract grievance in abeyance was based upon his good faith belief that he was acting in accord with past policy and practice accepted by both the Agency and the Union. There is no evidence in the record to suggest that this action was motivated either by grievant's Union membership or from past grievances and complaints filed by him against the Agency. 2/

I do not doubt the good faith belief of the parties concerning their own respective interpretations of past policy and practice in respect to holding matters in abeyance when an EEO complaint is pending. Whether the policy to hold in abeyance includes the pending of an EEO matter which has reached the level of a federal court action remains subject to clarification. However, such a clarification of differing and arguable interpretations respecting the implementation of a negotitated agreement is appropriately resolved within the grievance machinery of this negotiated agreement. It does not properly fall within the scope of the unfair labor practice procedure of the Order. Cf., Department of the Army, A/SLMR No. 624.

2/ Counsel for the Agency, in oral argument and in his brief, also relies upon section 19(d) of the Order in his argument for dismissal of the unfair labor practice charge. He argues that the statutory appeals procedure available to grievant as a result of his EEO cause of action in Federal District Court precludes the processing of the unfair labor practice complaint in accordance with section 19(d) of the Order.

The Agency's primary defense, as was clear from the evidence and testimony at trial, was the good faith belief that it was applying past policy and practice in placing the contract grievance in question in abeyance. There was no specific reliance, as in the Department of HEW, Social Security Administration case, supra, on any particular section of the Order at the time the Agency action was taken, but rather

It is concluded therefore under the total circumstances of this case that the Agency's action in holding the grievant's contract grievance in abeyance pending resolution of his EEO complaint did not constitute a clear and unilateral breach of the negotiated agreement between the parties and it is therefore found not to be violative of section 19(a)(1) and (6) of the Order.

ORDER

The complaint herein is hereby dismissed in its entirety.

JOSEPH A. MATERA
Administrative Law Judge

Dated: March 23, 1979
San Francisco, California

JAM:vg

2/ (cont.) on past policy and practice of the Agency. In light of my finding that no unfair labor practice in violation of sections 19(a)(1) and (6) occurred in this matter as a result of the incident in question, I find it unnecessary to rule upon this asserted defense by the Agency.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Department of the Army,
Headquarters, Military Traffic
Management Command

Respondent

and

Assistant Secretary
Case No. 22-09049(CA)

American Federation of Government
Employees, Local 909, AFL-CIO

Complainant

DECISION AND ORDER

On June 6, 1979, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of

the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendations as modified herein. 1/

The complaint herein alleged, among other things, that the oral reprimand given Thomas O. Barnes on October 26, 1977, was based on his union activities in violation of section 19(a)(1) and (2) of the Order. The oral reprimand given Barnes was based on his conduct at a merit promotion rating and ranking panel. The record reflects that Barnes served on the rating and ranking panel pursuant to the Complainant's negotiated right to select one member for such a panel. The other two members of the panel, Ms. Fleming and Ms. Killen, were selected by management. After each of the three panel members completed their rating and ranking independently, Ms. Holliman, a personnel specialist, convened the panel to collate the results and to discuss individual differences in ranking. The credited testimony reveals that Barnes became upset during this discussion and, among other things, made various comments to Killen regarding her rating and ranking. The credited testimony of Killen reflects that Barnes told her that she was "indoctrinated by management," that she "rated unfairly," and that she "had been told how to rate." Killen testified further that Barnes "was very loud." Based on these statements, which Killen described as embarrassing and constituting an attempt to intimidate her, and an incident involving her supervisor and Barnes the next day, Killen wrote a letter complaining about Barnes to Colonel Crum, head of the Directorate where she and Barnes are employed. Colonel Crum, after investigation, gave Barnes an oral reprimand, based solely on his conduct at the rating and ranking panel, which Crum considered to be "detrimental to the morale and discipline within the organization." 2/

The Administrative Law Judge concluded that the credible evidence overwhelmingly showed the oral reprimand to have been based solely on Barnes' personal conduct towards another employee during the panel meeting, which constituted official agency business. While the Administrative Law Judge acknowledged that Barnes was a union representative on the panel, he found no violation because union animus played no part in the reprimand. The Authority concludes that Barnes was engaged in protected union activity while serving on the panel, because he was the union-selected member pursuant to the parties' negotiated agreement. We do not view his activity to have lost its protection by virtue of its alleged impropriety. In this regard, in a recent decision the Authority noted that not

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1/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

2/ In agreement with the Administrative Law Judge, the Authority adopts Crum's credited version of the circumstances surrounding Barnes' reprimand and therefore finds it unnecessary to pass on the comment at p. 13 of the Recommended Decision and Order that even if Barnes' version were accepted, there would be no basis for a violation.

every alleged impropriety committed by an employee while otherwise engaged in protected activity is beyond the ambit of the protected activity. To remove the conduct from the ambit of the protection, the employee must be found to have engaged in flagrant misconduct. 3/ In the circumstances of the instant case, although the Authority does not endorse the tone of the statements made by Barnes to Killen during the panel discussion, the statements represented the legitimate concern of a union representative regarding rankings by panel members selected by management and do not represent the kind of flagrant misconduct which is beyond the ambit of protected activity. Accordingly, the Authority concludes that the oral reprimand given Barnes was violative of section 19(a)(1) and (2) of the Order as it was based on Barnes' conduct while he was engaged in protected activity.

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of the Army, Headquarters, Military Traffic Management Command, shall:

1. Cease and desist from:

(a) Reprimanding or otherwise discriminating against Thomas O. Barnes, or any other employee, with respect to conditions of employment because such employee engaged in protected activity while serving on behalf of the American Federation of Government Employees, Local 909, AFL-CIO, on a rating and ranking panel.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Executive Order.

2. Take the following affirmative action to effectuate the purposes of Executive Order 11491, as amended:

(a) Remove or expunge from its files any reference to the oral reprimand given Thomas O. Barnes on October 26, 1977, and submit to Thomas O. Barnes a written acknowledgment of that action.

(b) Post at the facilities of the Department of the Army, Headquarters, Military Traffic Management Command, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer of the Department of the Army, Headquarters, Military Traffic Command, and they shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

3/ Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, 2 FLRA No. 7 (1979). See also U.S. Small Business Administration, Central Office, Washington, D.C., 6 A/SLMR 157, A/SLMR No. 631 (1976).

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS HEREBY FURTHER ORDERED that the portion of the complaint in Assistant Secretary Case No. 22-09049(CA) found not to be violative of the Executive Order be, and it hereby is, dismissed.

Issued, Washington, D.C., January 25, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We Hereby Notify Our Employees That:

WE WILL NOT reprimand or otherwise discriminate against Thomas O. Barnes, or any other employee, with respect to conditions of employment because such employee engaged in protected activity while serving on behalf of the American Federation of Government Employees, Local 909, AFL-CIO, on a rating and ranking panel.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL remove or expunge from our files any reference to the oral reprimand given Thomas O. Barnes on October 26, 1977, and submit to Thomas O. Barnes a written acknowledgement of that action.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority whose address is 1730 K Street, NW., Room 401, Washington, D.C., and whose telephone number is: (202) 653-7213.

FEDERAL LABOR RELATIONS AUTHORITY

OFFICE OF ADMINISTRATIVE LAW JUDGES
1111-20th Street, N.W., Suite 700
Washington, D.C. 20036

In the Matter of	
DEPARTMENT OF THE ARMY HEADQUARTERS MILITARY TRAFFIC MANAGEMENT COMMAND Respondent	
and	Case No. 22-09049(CA)
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, Local 909, AFL-CIO Complainant	

Mr. Harry F. Rager
National Representative
American Federation of
Government Employees, AFL-CIO
14th District
8020 New Hampshire Avenue
Hyattsville, Maryland 20783
For the Complainant

William J. Merrigan, Esquire
Military Traffic Management Command
Department of the Army
Washington, D.C. 20315
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is a proceeding under Executive Order 11491, as amended (hereinafter also referred to as the "Order"). Although the Notice of Hearing was issued by a Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, and proceedings were, in part, conducted before the Assistant Secretary of Labor for Labor-Management Relations, all proceedings after January 1, 1979, were conducted before the Authority and this decision is issued in the name of the Authority, pursuant to transition rules and regulations, Federal Register, Vol. 44, No. 1, January 2, 1979 (5 C.F.R. Section 2400.2).

This matter was initiated by Complainant's charge, dated February 27, 1978 (ALJ Exh. 3) and complaint, dated May 26, 1978, filed May 30, 1978 (ALJ Exh. 1), to which Respondent replied by letter dated June 9, 1978 (ALJ Exh. 1). The charge and the complaint had alleged violations of Sections 19(a)(1), (2), (3); Section 10(e) and Section 19(d) of the Order. On October 5, 1978, the Regional Administrator advised Complainant that he was prepared to issue a Notice of Hearing on the following issues:

> "(1) Was Thomas O. Barnes issued on oral reprimand on October 26, 1977 because of his Union activities in violation of Sections 19(a)(1) and (2) of the Order.
>
> "(2) Was Thomas O. Barnes 'threatened' by Activity representatives on October 12, 19, 21 and 26, 1977, in violation of Sections 19(a)(1) of the Order for exercising his rights guaranteed by the Executive Order 11491, as amended.
>
> "(3) Did the Activity's September 1, 1977 letter to the Union prohibiting Thomas Barnes from serving on rating and ranking panels constitute a violation of Sections 19(a)(1) and (3) of the Order." 1/

Except as to the three issues stated by the Regional Administrator, which purportedly were based an allegations 1, 2 and 7 of the Complainant's charge, the Regional Administrator dismissed all other portions of the Complaint, including allegations 3, 4, 5, 6 and 8 as set forth in Complainant's charge, and advised Complainant of its right, pursuant to Section 203.8 of the Regultions, to appeal the portions of his decision dismissing allegations of the Complaint. No appeal was filed and on November 14, 1978, the Regional Administrator issued a Notice of Hearing on the alleged violation of Sections 19(a)(1) and (2) and (3) of the Order, as more specifically stated in its Regional Administrator's letter of October 5, 1978. The Notice of Hearing set the hearing for January 29, 1979, however, on January 3, 1979, at Complainant's request and for good cause shown, the hearing was rescheduled for February 1, 1979 (ALJ Exh. 2), pursuant to which a hearing was duly held before the undersigned on February 1, 1979, in Washington, D.C.

All parties were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved herein, and to present oral argument. At the close of the hearing, March 1, 1979, was fixed as the date for

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1/ The Regional Director's letter of October 5, 1978, was inadvertently omitted as a formal document. Accordingly, I have marked it as ALJ Exh. 5 and ALJ Exh. 5 is hereby incorporated as part of the record.

for mailing briefs and briefs, timely filed, have been received from both parties and have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings, conclusions and order.

Preliminary Matter

In its response to the complaint, dated June 9, 1978, Respondent had moved to dismiss the complaint, inter alia, for failure of Complainant to comply with Section 203.3(a) of the Regulations. At the hearing, Respondent filed a Motion to Dismiss Issue No. 2 for failure to comply with Section 203.3 (a)(3) of the Regulations and to dismiss Issue No. 3, as set forth in the Regional Administrator's letters of October 25, 1978, and November 19, 1978, for the reason that the issue stated by the Regional Administrator concerning Respondent's September 1, 1977, letter by Complainant prohibiting Thomas Barnes from serving on rating and ranking panels had not been contained in the complaint. Respondent's motion to Dismiss was denied at the hearing but is reasserted by Respondent in its Brief.

There is considerable merit to Respondent's contentions and especially so as to Issue No. 3. With respect to the September 1, 1977, letter, which is the basis of Issue No. 3, Respondent is correct that no allegation concerning this matter appears in Complainant's six page charge of February 27, 1978 (ALJ Exh. 3), although, the allegation does appear in a chronology of events attached to the charge (ALJ Exh. 4)(a document consisting of another 7 pages). Nor, indeed, is there any allegation in the Complaint concerning the September 1, 1977, letter. The only conceivable "reference" to any such allegation is the statement in the Complaint that, "A chronology of events is at Enclosure 1 to the Unfair Labor Practice charge." The complaint states that Complainant "alleges eight (8) specific instances where respondent violated E. O. 11491, and the specifics of these eight violations are contained in the ULP itself." Clearly, Complainant's use of the term "ULP" refers to its charge of February 27, 1978, and none of the eight "specific instances" alleged in the charge refers to the letter of September 1, 1977, or makes any assertion that Mr. Barnes was prohibited from serving on future rating and ranking panels. The Assistant Secretary has held that the Regulations may not be so liberally applied,

> "as to read into a complaint allegations contained in a pre-complaint charge but not contained in the subsequently filed complaint." United States Air Force, 380th Combat Support Group, Plattsburgh Air Force Base, New York, A/SLMR No. 557, 5 A/SLMR 592, 593 (1975)

a fortari, an allegation not contained in a pre-complaint charge, but merely contained in an enclosure filed with the charge entitled "Chronology of Events", may not be read into the instant complaint. The "Basis of the Complaint" does not set forth any facts that would give any basis, much less "a reasonable basis" to believe that any violation had occurred with respect to any letter in September 1, 1977, which was not alleged, with respect to any prohibition on Thomas Barnes serving on rating and ranking panels, which was not alleged, or that there was any violation of Sections 9(a)(1) and (3) of the Order in such respect, which was also not alleged. Because there was no "clear and concise statement of the facts constituting the alleged unfair labor practice . . . and the time and place of occurence of the particular acts", as required by Section 203.3(3) of the Regulations, 29 C.F.R. Section 203.3(3), to support Issue No. 3, the Regional Administrator erred in his letter of October 5, 1978 (ALJ Exh. 5) in his delineation of issue No. 3 2/ and I erred in not granting Respondent's Motion to Dismiss Issue No. 3 at the hearing. Respondent has fully preserved its position, has properly renewed its request in its Brief and, Issue No. 3, specifically,

> "(3) Did the Activity's September 1, 1977, letter to the Union prohibiting Thomas Barnes from serving on rating and ranking panels constitute a violation of Section 19(a)(1) and (3) of the Order"

is hereby dismissed 3/ for the reasons that: (a) the complaint contains no such allegation and the complaint contains neither a clear and concise statement of any facts constituting the alleged unfair labor practice nor the time and place of occurence of the particular act; (b) the charge contained no such allegation, but, even if it had, such allegation may not be read into the complaint; and (c) no matter what the Regional Administrator may have "adduced", the Regional Administrator has no authority under the Regulations to order a hearing on an issue that cannot reasonably be found in the complaint simply because his investigation may have revealed that such a violation might have occurred. As well stated by Judge Kramer in the Plattsburgh case, supra, "The Notice

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2/ The Regional Administrator in his letter of October 5, 1978, specifically referred to allegations 1, 2 and 7 (of the charge and not the complaint) and presumably inferred that allegation 7 supported his Issue No. 3; but no such allegation, or basis, is to be found in allegation No. 7 of the charge. Neither is such allegation, or basis, in allegations 1 or 2 of the charge nor in the complaint.

3/ While not depositive of a proper unfair labor practice allegation, the record shows:

a) Complainant's President testified that he "disregarded completely" the letter of September 1, 1977; and

b) Respondent has withdrawn its objection to Mr. Barnes sitting on future panels (Resp. Exh. 15 and 15-A).

of Hearing is denominated a 'Notice of Hearing on Complaint'. Section 203.8 of the Regulations authorizes the Assistant Regional Director to issue a Notice of Hearing if he finds 'there is a reasonable basis for the complaint'. It does not authorize him to issue a Notice of Hearing on a complaint that has not been filed." (5A/SLMR at 595). The Assistant Secretary affirmed, stating, in part, as follows:

> "In agreement with the Administrative Law Judge, I find that the Assistant Regional Director improperly issued a Notice of Hearing in this matter on an allegation which was not alleged in the complaint."

Cf., United States Department of the Army, Fort Polk, Louisiana, A/SLMR No. 1100 (1978); Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, A/SLMR No. 878, 7 A/SLMR 640 (1977).

As to Issue No. 2,

> "(2) Was Thomas O. Barnes 'threatened' by Activity representatives on October 12, 19, 21, and 26, 1977 in violation of Section 19(a)(1) of the Order for exercising his rights guaranteed by the Executive Order 11491, as amended." (ALJ Exh. 5)

Respondent is correct that the complaint is sorely deficient insofar as stating a "clear and concise statement of the facts" constituting a threat on any occasion. Indeed, the only basis for any such allegation is allegation No. 2 of the charge. Accepting incorporation of allegation No. 2 of the charge, the allegation would be:

> "The threatening remarks and statements Col. Crum and Engle made to Mr. Barnes on October 12, Oct. 19, Oct. 21, and Oct. 26, 1977, violated Barnes' rights assured by the Order, . . ." (ALJ Exh. 3).

While allegation No. 2 of the charge is, itself, devoid of a clear and concise statement of the facts, inasmuch as specific dates and persons are identified, allegation No. 2 of the charge, as one of the eight specific instances set forth in the charge (ULP) which Complainant has incorporated by reference, will be deemed sufficient to warrant denial of Respondent's Motion to Dismiss. Nevertheless, the practice of incorporating any allegation of a charge as part of the complaint, without setting forth in the complaint a clear and concise statement of the facts constituting the alleged unfair labor practice, the time and place of occurrence of the particular acts, etc., as required by Section 203.(3) of the Regulations, is not approved and, ordinarily, will not satisfy

the requirement of the Regulations. In the instant proceeding, Complainant did refer in the complaint to the eight "specific instances" contained in its charge, of which allegation No. 2 was one of the eight "specific instances"; and Respondent was fully apprised that Complainant sought to incorporate allegation No. 2 in its complaint. 4/ Accordingly, the denial of Respondent's Motion to Dismiss Issue No. 2 made at the hearing is affirmed.

Findings and Conclusions

A. The Oral Reprimand

On October 26, 1977, Mr. Thomas Barnes was given an oral reprimand by Colonel Luther Crum, Director of Management Information Systems in which Mr. Barnes is employed.

The events which led to the oral reprimand began with the convening of an ad hoc committee for evaluation and ranking, pursuant to Section VII, Merit Promotion and Internal Placement Plan, Headquarters, Military Traffic Management Command staff regulations (Resp. Exh. 4). Pursuant to Section VII of the staff regulations and Article XVIII, Section 3, of the parties' then effective agreement, 5/ (Resp. Exh. 5) such committees will include one Union representative. Thus, Article XVIII, Section 3, provided, for example, that, "the Union will have one participating member on ad hoc committees formed to perform the evaluating and ranking process". Mr. Barnes was the Union representative on the ad hoc committee which was convened on September 1, 1977. The other members of the committee were: Joanne Killen and Jackie Fleming. Sherrie Holliman, Personnel Management Specialist, was present to instruct the members of the Committee in their duties, to coordinate and to assist the Committee. Ms. Holliman gave each member of the Committee (Panel Members) a copy of "Responsabilities of Rating and Ranking Panel Members" (Resp. Exh. 7), instructed the panel members as to the procedure and forms to be used and gave them the personnel files of the candidates to be evaluated and ranked and left until the Panel had completed their individual ranking and rating of each candidate. When the panel members had completed their individual ranking and rating of each candidate, Ms. Holliman returned and collated the results and, where there were significant variations in the ratings by the members of the Panel, there was discussion in an effort to insure that each member had rated consistently, in accordance with the guidelines (Resp. Exh. 7), and, if possible,

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4/ By contrast, Issue No. 3, discussed above, was not included in the charge; was not, of course, included in any of the eight "specific instances" alleged in the charge; and not having been alleged, Respondent could scarecely respond to an allegation not made. (See, Respondent's letter dated June 9, 1978, in response to the complaint. ALJ Exh. 1).

5/ Article VII, Section 3, of the parties' current agreement, signed September 14, 1977 (Union Exh. 1), is substantially identical and the slight change is not material to this proceeding.

to arrive at a consensus. That acrimony displaced objective discussion is beyond doubt. Indeed, Ms. Killen was so disturbed by Mr. Barnes' conduct, which she found to have been so abusive that she had been embarrased and ridiculed and his languange degrading, that she went to Colonel Crum the following day, September 2, and asked what could be done. Colonel Crum told Ms. Killen that if she had any complaint she should put it in writing and he would have it investigated; but, recognizing that Ms. Killen was still very upset, urged her to think it over for a few days. Ms. Killen did so but on September 23, 1977, she wrote Colonel Crum and set forth her complaint in writing.

In the meantime, Mr. Barnes had written and Mr. Edgar Campbell, Jr., President of Local 909, had signed a letter dated September 2, 1977, addressed to Mr. Terry W. McCleary, Civilian Personnel Officer (Resp. Exh. 1) and about 10:30 a.m. on September 2, 1977, Mr. Barnes went, unannounced, to see Mrs. Knarr, Ms. Killen's immediate supervisor, to inform her, Mr. Barnes asserted, of the content of the letter "the Union had written to the Civilian Personnel Office (Resp. Exh. 1) concerning the -- Mrs. Killen's conduct on the panel and her refusal to follow the Merit Promotion Plan and how this had a disruptive effect on me." (Tr. 70).

On October 7, 1977, Colonel Crum directed Mr. Gilbert G. Engle, Chief, Systems Design and Maintenance Division, to investigate the matters set forth in Ms. Killen's letter of September 23, 1977. Mr. Engle proceeded to do so and first interviewed Mr. Barnes on October 11, 1977; Ms. Killen, Ms. Fleming and Ms. Holliman on October 13, 1977. Mr. Engle testified that he concluded, on the basis of his investigation, that Ms. Killen's description or the incident was correct; that Ms. Killen had felt intimidated and threatened by Mr. Barnes' words and behavior; that under personnel regulations he was shown said disruptive behavior would have warranted a suspension; but that he felt an oral reprimand was appropriate and on October 18, 1977, be recommended to Colonel Crum that Mr. Barnes be given an oral reprimand. As noted above, Colonel Crum gave Mr. Barnes an oral reprimand on October 26, 1977.

It is not the function of the unfair labor practice procedure to inquire into performance of the members of the rating and ranking panel, indeed, it is not even within the province of this proceeding to question whether the oral reprimand was proper or improper; but, rather, the scope of this proceeding is limited to determining: (a) whether Respondent by such oral reprimand, interfered with, restrained, or coerced Mr. Barnes in the exercise of the rights assured by the Order, and/or (b) whether Respondent by such oral reprimand encouraged or discouraged membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment (i.e. Section's 19(a)(1) and/or (2) of the Order). For reasons more fully set forth hereinafter, I find that Respondent did not violate either Section 19 (a)(1) or (2) by its oral reprimand of Mr. Barnes.

I did not find Mr. Barnes to be a convincing witness. Not only did his repeated interjection of irrelevant comments create the impression of evasion of the question asked; but, more important, in significant respects his testimony was wholly lacking in credibility. For example, Mr. Barnes stated that the purpose of the reprimand was never explained; that he was "provided nothing by anyone"; but later Mr. Barnes admitted that Mr. Engle had stated the purpose of his investigation, namely, to investigate Mr. Barnes' alleged conduct, or misconduct, based upon Mrs. Killen's letter to Colonel Crum dated September 23, 1977; that Mr. Engle summarized what she said; and Mr. Barnes admitted that he received a copy of Ms. Killen's letter, dated September 23, 1977, on October 19, 1977. Mr. Barnes testified that at the meeting in Colonel Crum's office on October 26, 1977, he feared for his life. This would have been a highly improbable assertion under any circumstances in view of Mr. Barnes' own physical stature (6' 4", 230-235 pounds); but under the actual circumstances was ludicrous in view of the fact that Mr. Barnes was accompanied by three representatives, Messrs. Campbell, Forbes and Brown, as well as Mr. Barnes' conduct and actions, including his announcing, when everyone was leaving, "Hold it, another Union meeting" and then proceeding to read a statement in which he said, inter alia, that he would get Colonel Crum and Mr. Engle fired or relieved.

By comparison, I found Colonel Crum and Mr. Engle to be very credible witnesses and, accordingly I fully credit their testimony. The record shows that Ms. Killen first went to Colonel Crum on September 2, 1977; that Colonel Crum told her that any complaint would have to be made in writing; that any complaint filed would be investigated; but he urged Ms. Killen to think the matter over before taking any action. Ms. Killen, on September 23, 1977, wrote Colonel Crum about Mr. Barnes' conduct; and on October 7, 1977, Colonel Crum instructed Mr. Engle to investigate the incident described in Ms. Killen's letter of September 23, 1977, which Mr. Engle proceed to do. Thus, on October 11, 1977, he interviewed Mr. Barnes at which time he explained the purpose of his investigation. On October 13, 1977, Mr. Engle interviewed Ms. Killen, Ms. Fleming and Ms. Holliman. Neither party called as a witness either Ms. Fleming or Ms. Holliman, although the statement of Ms. Holliman (Resp. Exh. 8) was introduced without objection by Complainant. While Mr. Barnes testified that he talked to Ms. Fleming on September 8, 1977, at which time he stated that Ms. Fleming told him she had not been approached by management; but the inference by Mr. Barnes that Mr. Engle did not, in fact, interview Ms. Fleming is without basis since Mr. Engle testified that he talked to Ms. Fleming on October 13, 1977, more than a month after Mr. Barnes stated his conversation had taken place. Ms. Killen testified and her testimony was wholly credible, is consistent with, and supported by, the statement of Ms. Holliman and Mr. Engle's testimony regarding his interview with Ms. Fleming.

On October 12, 1977, Mr. Barnes admitted that he went to Colonel Crum's office to confirm Mr. Engle's having been "tasked" by Colonel Crum to investigate. Mr. Barnes testified that he informed Colonel Crum of Respondent's October 7, 1977, unfair labor practice charge. I fully credit Colonel Crum's testimony that Mr. Barnes stated that he, Colonel Crum, had no authority in the case that this was harassment; that he (Colonel Crum) could not pursue this matter because he (Barnes) was a union officer at which point Colonel Crum responded, "Mr. Barnes, I do not agree with you. I do not agree that your being a union official excuses you for your personal conduct."

Mr. Engle submitted his report to Colonel Crum on October 18, 1977, and on October 19, 1977, Colonel Crum met with Mr. Barnes. I fully credit Colonel Crum's testimony that he told Mr. Barnes at that time that he (Colonel Crum) was accusing him (Mr. Barnes) of misconduct which Ms. Killen had described in her letter, a copy of which was given to Mr. Barnes on October 19, 1977; that Mr. Engle had investigated the matter and had found those occurrences had occured; and that Mr. Engle had recommended that Mr. Barnes be given an oral reprimand. Colonel Crum further advised Mr. Barnes on October 19, 1977, that if he had anything to say in his defense he would be glad to listen; that he could submit it in writing or that he could present it orally; that he was authorized to have anyone of his choosing to represent him; and that he would have two days to respond. Because of schedule conflicts, the next meeting on this matter was not held until October 26, 1977. On October 26, 1977, Mr. Barnes met with Colonel Crum and brought with him three representatives, Messrs. Campbell, Forbes and Brown. Mr. Engle was also present.

Mr. Engle testified that Colonel Crum was quite calm, his voice was well modulated, he was not angry, he used no strong language, and he made no threatening remarks, gestures or looks. Neither Mr. Campbell nor Mr. Forbes testified to the contrary (Mr. Brown was not called as a witness) and I can only conclude that Mr. Barnes' comment that Colonel Crum's eyes were "dripping with hate" and/or that his manner was "hostile and threatening" were but further figments of a fertile imagination.

The record contains no credible evidence that Respondent either investigated Ms. Killen's complaint about Mr. Barnes' conduct on the Panel on September 1, 1977, or that it gave Mr. Barnes an oral reprimand on October 26, 1977, for any reason other than his personal conduct toward another employee in the course of the performance of official agency business. I am fully aware that Mr. Barnes was 3rd Vice President of Local 909; but in serving as union representative on the Panel he was not fulfilling any duty as 3rd Vice President, rather, he was, simply, the union representative, or designee, on the Panel. In any event, however, a union official is not immune from discipline, Department of Transportation, Federal Aviation Administration, Las Vegas Control Tower,

Las Vegas, Nevada, A/SLMR No. 796, 7 A/SLMR 150 (1977), and Respondent's Regulations clearly provide for discipline for ". . . creating a disturbance among fellow employees, resulting in an adverse effect on morale, production, or maintenace of proper discipline." (Resp. Exh. 6).

The Regional Administrator by his letter of October 5, 1978, dismissed the allegation of dual processing and, accordingly, this issue is not before me. Nevertheless, it must be noted that on September 2, 1977, in his meeting with Ms. Knarr, Mr. Barnes asserted that he was acting in his capacity as a union officer and, of course, the letters of September 2 and 15, 1977, were signed by Mr. Campbell as President of Local 909. Respondent's Unfair Labor Practice Charge (Union Exh. 2) concerned asserted violations of the Order by Local 909 principally as the result of Mr. Barnes' statements to Ms. Knarr on September 2, 1977, and by the letters dated September 2 and 15, 1977, signed by Mr. Campbell as President of Local 909, although reference was made to certain asserted statements made by Mr. Barnes to Ms. Killen during the panel proceedings on September 1, 1977. 6/ I draw no inference whatever from Respondent's charge and/or any settlement thereof. As any allegation of "dual processing" has been dismissed by the Regional Adminstrator, such issue is not before me and has not been considered. The parties must recognize that unilateral actions taken to enforce beliefs may, nevertheless, violate rights assured by the Order. I do not condone in any manner Respondent's action, since rescinded, to bar Mr. Barnes from serving on rating and ranking panels; but, solely because said allegation was not included in the complaint, this issue may not be considered.

The record simply does not support the allegation that Respondent investigated and, on the basis of its investigation, issued an oral reprimand to Mr. Barnes because he was a union officer, because he was a union member, because he engaged in any right assured by the Order, or that Respondent by such oral reprimand encouraged or discouraged membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment.

To the contrary, as noted above, the record shows only that the reason for the oral reprimand was Mr. Barnes' personal conduct toward another employee in the course of the performance of official agency business on September 1, 1977. Although Ms. Killen had made an oral statement to Colonel Crum on September 2, 1977, Colonel Crum advised Ms. Killen to think the matter over carefully before making a complaint. When Ms. Killen, on Septmeber 23, 1977, made a complaint, Colonel Crum had her allegations investigated. Mr. Engle conducted as thorough an investigation as possible by interviewing each person present. Mr. Barnes

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6/ Union Exhibit 3 was received without objection, however, this document was not furnished to the Reporter and, accordingly, is not in the Exhibit file. This document, dated August 30, 1978, was entitled "Withdrawal of Notice of Hearing, Approval Request for Withdrawal of the Charge."

stated that he declined to comment. Both Ms. Fleming and Ms. Holliman fully supported Ms. Killen's assertions concerning Mr. Barnes' conduct on September 1, 1977, and Mr. Barnes' attitute and his proclivity for demeaning comments, as reflected by his testimony, not only did nothing to refute the allegations that his personal conduct on September 1, 1977, had gone far beyond the acceptable realm of vigorous discussion, but, indeed, show that the assertions made were fully consistent with Mr. Barnes' conduct in general.

Although the record shows no similar disciplinary action by Respondent against any other employee, neither does the record show that any other employee had ever engaged in the personal abuse of a Panel member. It is also recognized that Mr. Barnes was an officer of Complainant, but to the extent that his status as a union officer may give rise to a suspicion, or presumption, that disciplinary action may have been taken against him because of his union activity, the credible evidence and testimony overwhelmingly demonstrates that the oral reprimand of Mr. Barnes was given solely because of his personal conduct on September 1, 1977, toward a fellow member of a rating and ranking panel. Having found that the allegations that the oral reprimand of Mr. Barnes violated Sections 19(a)(1) and (2) of the Order have not been proved by a preponderance of the evidence, I shall dismiss this portion of the complaint.

B. The Alleged Threats on October 12, 19, 21 and 26, 1977

The record is as barren of evidence to support the allegation of Issue No. 2 as the complaint was deficient in stating a "clear and concise statement of the facts" constituting a threat on any occasion. As to October 12, 1977, the record shows that Mr. Barnes went to Colonel Crum's office to get confirmation that Colonel Crum had "tasked" Mr. Engle to make an investigation. As previously noted, Mr. Barnes testified that he informed Colonel Crum of Respondent's October 7, 1977, unfair labor practice charge; and as previously stated, I fully credit Colonel Crum's testimony that Mr. Barnes stated that he, Colonel Crum, had no authority in the case, that this was harassment, that he (Colonel Crum) could not pursue the matter because he (Barnes) was a union officer, at which point Colonel Crum responded, "Mr. Barnes I do not agree with you. I do not agree that your being a union official excuses you for your personal conduct." However, even accepting Mr. Barnes' version that Colonel Crum said, "You caunot hide behind union activities for your personal conduct", I find no threat in violation of Section 19(a)(1) of the Order for Mr. Barnes having exercised rights guaranteed by the Order.

As to October 19, 1977, the record shows that Colonel Crum met with Mr. Barnes at which time Colonel Crum informed Mr. Barnes that he was accusing him of misconduct which Ms. Killen had described in her letter

of September 23, 1977; that Colonel Crum had a copy of the September 23, 1977, letter made for Mr. Barnes, that Colonel Crum informed Mr. Barnes that Mr. Engle had investigated the allegations, had found that those occurrences had occured, and had recommended that Mr. Barnes be given an oral reprimand. Mr. Barnes left the meeting with Colonel Crum briefly and returned with Messrs. Campbell and Forbes. During this meeting, Colonel Crum advised Mr. Barnes that if he had anything to say in his defense he would be glad to listen; that he could submit it in writing or that he could present it orally; that he could have anyone of his choosing to represent him; and that he would have two days to respond. Again, I find no threat in violation of Section 19(a)(1) of the Order for Mr. Barnes having exercised rights guaranteed by the Order.

There was a meeting on October 21, 1977, at which Mr. Barnes, Mr. Campbell, Mr. Rager and possibly Mr. Forbes were present for Complainant and Mr. Wolf, Mr. Kingsley and Mr. McClearly were present for Respondent. Presumably this meeting concerned Respondent's unfair labor practice charge, but, in any event, the record contains nothing that could possibly constitute a threat in violation of Section 19(a)(1) of the Order for Mr. Barnes having exercised rights guaranteed by the Order.

Apparently, Complainant asserts that the fact that Respondent proceeded with an investigation of his personal conduct constituted a "threat". For reasons fully set forth hereinabove with respect to the oral reprimand, the record does not support the allegation that the investigation, and subsequent oral reprimand, was motivated by Mr. Barnes' activity as a union officer or because he exercised rights guaranteed by the Order. To the contrary, the investigation, and subsequent oral reprimand, stemmed from a complaint by an employee asserting that Mr. Barnes had, as a fellow member of a rating and ranking panel and in the course of performance of official agency business, engaged in improper conduct toward her. Confronted with a complaint of misconduct, Respondent, absent proof of improper motivation which was not shown in this case, had an obligation to investigate the complaint. Mr. Barnes, although the union's designee on the panel, was not acting in his capacity as 3rd Vice President of Local 909 in serving on the panel, but, even if he had been acting as a union officer, he was not immune from agency discipline, Department of Transportation, Federal Aviation Administration, Las Vegas Control Tower, Las Vegas, Nevada A/SLMR No. 796, 7 A/SLMR 150 (1977), and Section 12(b) of the Order specifically provides, in part, that,

> "(b) Management officials of the agency retain the right, in accordance with applicable laws and regulations

* * * * *

> "(2). . . to suspend, demote, discharge or take other disciplinary action against employees;"

That Complainant, albeit it part through the action of Mr. Barnes, engaged in further and additional conduct asserted to have constituted an unfair labor practice does not, standing alone, render Respondent's disciplinary action against Mr. Barnes improper. Indeed, the allegation of "dual processing" was dismissed by the Regional Adminstrator and is not before me. There is no credible evidence or testimony of any improper motivation by Respondent. The record shows that the complaint by Ms. Killen concerned Mr. Barnes' personal conduct toward her as a fellow member of the panel; that Respondent responsibly investigated the allegations asserted; that its investigation showed that the allegations were true; and Mr. Barnes was informed of the allegations and the results of the investigation and was given full opportunity to respond. There is no credible evidence that Respondent issued its oral reprimand of Mr. Barnes because of his exercise of any right assured by the Order or to encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment. To the contrary, the record shows that the sole reasons for the action taken was Mr. Barnes' personal conduct toward a fellow member of a rating and ranking panel in the course of performance of an official agency duty.

Finally, as of October 26, 1977, the threat alleged concerned the place Mr. Barnes was to sit. Although I found Colonel Crum's testimony credible are far more persuasive as to what occurred (See, Tr. 212), even if Mr. Barnes' testimony that,

> "A. We all came in and started for the table and he says, No, I want you to sit over here. And I said I'm here with the people, representatives where I can consult with them, and I want to take notes here at the table. He says, 'No, you sit over here.'" (Tr. 103)

is accepted, there is no basis to support the allegation that Respondent thereby threatened Mr. Barnes for exercising any right guaranteed by the Order.

As I have found the allegation as to Issue No. 2 to be without support in the record, I shall dismiss this portion of the complaint.

RECOMMENDATION

Having found that Respondent has not engaged in certain conduct prohibited by Sections 19(a)(1) and (2) of Executive Order 11491, as amended, and having found that no allegation concerning Respondent's letter of September 1, 1977, in violation of Sections 19(a)(1) and (3) was included in the complaint, I recommend that the complaint herein be dismissed in its entirety.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: June 6, 1979
Washington, D.C.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Department of Health, Education
and Welfare, Social Security Administration,
Great Lakes Program Service Center,
Chicago, Illinois

Respondent

and

Assistant Secretary
Case No. 50-17087(CA)

American Federation of Government
Employees, AFL-CIO
Social Security Local 1395

Complainant

DECISION AND ORDER

On June 21, 1979, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding finding that the Respondent violated section 19(a)(6) and (1) of Executive Order 11491, as amended, and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Recommended Decision and Order, and the Complainant filed an answering brief.

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of

the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the Respondent's exceptions and the Complainant's answering brief, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation. */

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of Health, Education and Welfare, Social Security Administration, Great Lakes Program Service Center, Chicago, Illinois, shall:

1. Cease and desist from:

(a) Refusing to negotiate with Local 1395, American Federation of Government Employees, AFL-CIO, concerning the Individual Performance Assessment System for Trainees.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes of Executive Order 11491, as amended:

(a) Withdraw, if already implemented, any Individual Performance Assessment System for Trainees.

(b) Notify Local 1395, American Federation of Government Employees, AFL-CIO, as the authorized representative of the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), the exclusive bargaining representative of Respondent's employees, of any proposed Individual Performance Assessment System for Trainees, and, upon request, negotiate in good faith, to the extent consonant with law and regulations, on any such proposal.

(c) Post at its facilities at the Great Lakes Program Service Center copies of the attached notice marked "Appendix" on forms to be furnished by the

*/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Director of the Great Lakes Program Service Center and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places were notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., January 25, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We Hereby Notify Our Employees That:

WE WILL NOT refuse to bargain with Local 1395, American Federation of Government Employees, AFL-CIO, with respect to any Individual Performance Assessment System for Trainees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL withdraw any Individual Performance Assessment System for Trainees we have implemented and notify Local 1395, American Federation of Government Employees, AFL-CIO, the authorized representative of the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals) of any proposed Individual Performance Assessment System for Trainees, and, upon request, negotiate to the extent consonant with law and regulations, on any such proposal.

_____
(Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of the posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, whose address is: Room 1638, Dirksen Federal Building, 219 South Dearborn Street, Chicago, Illinois 60604; and whose telephone number is: (312) 353-6746.

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
1111-20th Street, NW., Suite 700
Washington, D.C. 20036

In the Matter of	:	
	:	
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SOCIAL SECURITY ADMINISTRATION, GREAT LAKES PROGRAM SERVICE CENTER, CHICAGO, ILLINOIS	:	
Respondent	:	Case No. 50-17087(CA)
and	:	
LOCAL 1395, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO	:	
Complainant	:	

Mr. Lee Langster
Executive Vice President
Local 1395
American Federation of Government Employees
600 West Madison Street
Chicago, Illinois 60606

For the Complainant

Mr. Francis X. Dippel
Management Representative
Great Lakes Program Service Center
Bureau of Retirement and Survivors Insurance
Social Security Administration
1200 West High Rise Building
6401 Security Boulevard
Baltimore, Maryland 21235

For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

This is a proceeding under Executive Order 11491, as amended (hereinafter also referred to as the "Order"). Although the Notice of Hearing was issued by a Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, all proceedings after January 1, 1979, have been conducted before the Federal Labor Relations Authority and this decision is issued in the name of the Authority pursuant to transition rules and regulations, Federal Register, Vol. 44, No. 1, January 2, 1979 (5 C.F.R. Section 2400.2).

On, or about, September 26, 1978, Complainant filed a charge and on November 20, 1978, filed a complaint alleging violations of Sections 19(a)(1) and (6) of the Order as the result of Respondent's refusal to negotiate a proposal made by Respondent on September 7, 1978 (ALJ Exh. 1). Notice of Hearing issued on December 28, 1978 (ALJ Exh. 2) pursuant to which a hearing was duly held before the undersigned on March 6, 1979, in Chicago, Illinois. Respondent's motion to Reopen Hearing or in the Alternative to include certain Proffered Documentary Evidence was denied by Order dated April 9, 1979. At the close of the hearing, April 6, 1979, was fixed as the date for the mailing of briefs and each party has timely filed 1/ a brief which have been carefully considered. Upon the basis of the entire record, including any observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendations:

Findings and Conclusions

There are three issues. First, whether Respondent had a duty to negotiate or merely to consult; Second, whether this proceeding is barred by the provisions of 19(d) of the Order; and Third, whether, if there were an obligation to negotiate, Respondent's refusal to bargain on September 11, 1978, was a violation of Sections 19(a)(1) and (6), inasmuch as Respondent had previously, on July 21, 1977, refused to bargain on a proposal, which Respondent asserts is the same proposal it made on September 7, 1978, and Complainant did not file a charge within six months of the occurrence of its initial refusal to bargain, as required by Section 203.2(2) of the Regulations.

1/ Complainant's brief was a three page mailgram. Complainant is to be commended for its succinct but complete brief, which consists of a statement of the issues, a statement of the facts, and argument, with citation of authorities relied upon, in this format.

1. The duty to negotiate.

Local 1395, which represents employees of the Great Lakes Program Service Center, is one of the six local unions constituting the National Council of Social Security Payment Center Locals, American Federation of Goverment Employees, AFL-CIO. Since 1971, the Bureau of Retirement and Survivors Insurance of the Social Security Administration and the National Office of the American Federation of Goverment Employees, AFL-CIO (National Council of Social Security Payment Center Locals) have been parties to a series of Master Agreements, the most recent agreement being effective March 15, 1974 (Res. Exh. 3). This Master Agreement (Res. Exh. 3) is the same Master Agreement as was involved in Department of Health, Education and Welfare, Social Security Administration, BRS1, Northeastern Program Center, A/SLMR No. 1101 (1978), and in Social Security Administration, Bureau of Retirement and Survivors Insurance, A/SLMR No. 1177 (1978); Respondent's contentions, inter alia, that its responsibility is limited under the Agreement (Article 2, Section (e)) to consultation rather than negotiation, are the same contentions as urged by Respondent in the Northeastern Program Service Center case, supra, considered at length by Judge Naimark in his decision, Case No. 30-7725(CA) (1978), and affirmed by the Assistant Secretary as A/SLMR No. 1101. The contract provisions are fully set forth in the decision of Judge Naimark and need not be repeated. In like manner, the discussion and conclusions of Judge Naimark, affirmed by the Assistant Secretary, not only are fully dispositive of the same issues here, but I completely agree with his conclusions that "management may not properly confine its obligations to consultation with Complainant concerning matters affecting the Program Center ...." Accordingly, for the reasons fully set forth by Judge Naimark in the Northeastern Program Service Center case, supra, adopted by the Assistant Secretary, A/SLMR No. 1101, I conclude that Respondent was required to bargain with Complainant, not merely consult as contended by Respondent. 2/ See, also, Social Security Administration,

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2/ Because the decision in A/SLMR No. 1101 is both controlling and dispositive of this issue it is unnecessary to consider further Respondent's arguments, all of which were urged and rejected in the Northeastern Program Service Center case. Nevertheless, it is appropriate to note that Mr. Donald Jones, President of Local 1395 and, also, President of the National Council of Social Security Payment Center Locals and a signatory to Respondent Exhibit 3, testified without contradiction, that:

> "When we negotiated the agreement we understand consult to be interchangeable with negotiate, meet, and confer." (Tr. 57). (continued)

Bureau of Retirement and Survivors Insurance, A/SLMR No. 1177 (1978). Department of Health, Education and Welfare, Social Security Administration, Bureau of Retirement and Survivors Insurance, A/SLMR No. 1022 (1978); Department of Health, Education and Welfare, Social Security Administration, BRS 1, Northeastern Program Service Center, A/SLMR No. 984 (1978).

2. This proceeding is not barred by Section 19(d) of the Order

On August 21, 1978, Complainant's President, Mr. Donald Jones, filed a grievance which asserted, in part, that Respondent "has utilized an Individual Assessment System for Trainees to measure the performance of trainees since about July 1977. This procedure (IPAS for Trainees) was not discussed with Local 1395 in accordance with provisions of Articles 2, 6, 24 and other applicable articles of the Master Agreement or Executive Order 11491, as amended." (Exhibit 1 to Respondent's Motion to Dismiss). By letter dated September 20, 1978, Respondent stated, in part, "I must point out to you that there has been no implementation of the Individual Assessment System for Trainees." (Exhibit 2 to Respondent's Motion to Dismiss).

While it is obvious that the grievance raised an issue concerning non-compliance with the Executive Order, it is equally obvious that the grievance concerned asserted action by Respondent prior to September 7, 1978, on which date Respondent submitted another draft of an IPAS for Trainees proposal as to which Respondent refused to bargain on September 11, 1978, which is the subject of the present complaint. Because the grievance of August 21, 1978, did not, and could not, concern an event which had not occurred, Complainant did not raise the issue under its grievance procedure which it has raised under the complaint and this proceeding is not barred by Section 19(d) of the Order. The fact that Respondent, by its response of September 20, 1978, has referred to the events of September 7 and 11, 1978, does not alter the issue raised by the grievance so as to include as a part thereof the events of September 1978. Respondent's Motion to Dismiss, received at the hearing and carried with the case, is, therefore denied.

2/ (Continued) Mr. Jones further testified that Mr. John Griner, then National President of AFGE, in a letter to Mr. Hugh McKenna, then Bureau Director, had advised the Bureau that the Authority requested and granted to the National Ofice, rather than the Council, as the bargaining agent for the Council, had been redelegated to the Council. (Tr. 60). Although the letter referred to by Mr. Jones was not offered in evidence, Respondent has not disputed in any manner Mr. Jones' testimony.

3. Respondent violated Sections 19(a)(6) and, derivatively, 19(a)(1) by its refusal to bargain on September 11, 1978.

It is quite true that in July 1977, Respondent submitted a proposed IPAS for Trainees and that, on July 21, 1977, Respondent refused Complainant's request for negotiations. It is also quite correct that Complainant did not file a charge within six months of Respondent's refusal to bargain on July 21, 1977. Had Respondent implemented its proposal there could be no finding of an unfair labor practice as to Respondent's July 21, 1977, refusal to bargain; but Respondent did not implement its 1977 proposal.

To the contrary, on September 7, 1978, Respondent submitted a new version of its IPAS for Trainees proposal and on September 11, 1978, Respondent refused Complainant's request to bargain. Although the record shows that Respondent's 1978 IPAS for Trainees proposal was, in fact, different from its 1977 proposal, even if it had been the same proposal, as Respondent had not implemented its earlier proposal, when Respondent in 1978 again submitted a proposal which concerned personnel policies and practices and matters affecting working conditions, it was required by Section 11(a) of the Order to negotiate with Complainant and its refusal to do so, at Complainant's request, on September 11, 1978, was in violation of Section 19(a)(6) of the Order and, derivatively, of Section 19(a)(1) of the Order.

I am fully aware that Respondent offered to consult, i.e., to receive input from Complainant, and that Complainant refused to consult and insisted on its right to negotiate. It is true that good faith bargaining is not determined by formal trappings or even by how the parties may have characterized their conduct, United States Department of the Treasury, Internal Revenue Service, Chicago District, A/SLMR No. 711, 6 A/SLMR 492 (1976); Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia, A/SLMR No. 1065 (1978); but here, Respondent's conduct was intended to forestall bargaining and, in fact, did forestall all efforts of Complainant to secure bargaining. For reasons set forth hereinabove, Respondent misconceived its obligation under the Order, which is to negotiate not merely consult, and because its conduct forestalled negotiations required by the Order an appropriate remedial order will be recommended.

Recommendations

Having found that Respondent has engaged in conduct violative of Sections 19(a)(1) and (6) of the Order by its refusal to bargain with Complainant on September 11, 1978, with respect to a proposal for Individual Performance Assessment System for Trainees made by Respondent on September 7, 1978, I recommend that the Authority adopt the following order.

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Sections 203.26(b) of the Regulations, the Federal Labor Relations Authority hereby orders that Great Lakes Program Service Center, Social Security Administration, Department of Health, Education and Welfare, Chicago, Illinois, shall:

1. Cease and desist from:

(a) Refusing to negotiate with Local 1395, American Federation of Government Employees, AFL-CIO, concerning Individual Performance Assessment System for Trainees.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Withdraw, if it has implemented, any Individual Performance Assessment System for Trainees.

(b) Notify Local 1395, American Federation of Government Employees, AFL-CIO, as the authorized representative of the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), the exclusive bargaining representative of Respondent's employees, of any proposed Individual Performance Assessment System for Trainees, and, upon request, negotiate in good faith, to the extent consonant with law and regulations, on any such proposal.

(c) Post at its facilities at the Great Lakes Program Service Center copies of the attached notice, marked "Appendix", on forms to be furnished by the Authority. Upon receipt of such form they shall be signed by the Director of Respondent and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.26 of the Regulations, notify the Authority, in writing, within 20 days from the date of this order as to what steps have been taken to comply therewith.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: June 21, 1979
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to bargain with Local 1395, American Federation of Government Employees, AFL-CIO, with respect to any Individual Performance Assessment System for Trainees.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended, by refusing to negotiate with respect to personnel policies and practices and matters affecting working conditions so far as may be appropriate under applicable laws and regulations.

WE WILL NOT in any like or related manner refuse to consult, confer, or negotiate with Local 1395 as required by Executive Order 11491, or in like or related manner interfer with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL WITHDRAW any Individual Performance Assessment System for Trainees we have implemented and WE WILL NOTIFY Local 1395, American Federation of Government Employees, AFL-CIO, as the authorized representative of the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals) of any proposed Individual Performance Assessment System for Trainees, and, upon request, negotiate in good faith, to the extent consonant with law and regulations, on any such proposal.

_____
Activity

Dated:_____ by:_____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, whose address is Suite 1201A, Insurance Exchange Building, 175 W. Jackson Boulevard, Chicago, Illinois 60604.

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 30 REPORT OF CASE DECISIONS February 29, 1980

UNFAIR LABOR PRACTICE CASES

2 FLRA No. 74 (January 25, 1980)

Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Midwest Region, Chicago, Illinois, Assistant Secretary Case No. 50-17024(CA). Upon a complaint filed by the union (NTEU and NTEU Chapter 94) under E.O. 11491 (alleging that the activity violated section 19(a)(1) and (6) of the Order when it declared three union proposals nonnegotiable, which proposals the union asserted had been found to be negotiable by the Federal Labor Relations Council in a previous negotiability decision), the Authority found that there was no meaningful difference between two of the proposals and the proposals that the Council had found negotiable. The Authority therefore concluded that the activity's declaration of nonnegotiability as to those two proposals was violative of section 19(a)(1) and (6) of the Order; and issued a remedial order as to that portion of the union's complaint. However, the Authority also found that there were significant differences between the language and intent of the third proposal in this case, and the language and intent of the allegedly identical proposal that the Council had found negotiable. The Authority concluded, therefore, that the activity's declaration of nonnegotiability as to that third proposal was not violative of the Order; and dismissed that portion of the union's complaint. (Decision and Order attached.)

2 FLRA No. 76 (January 25, 1980)

Internal Revenue Service (IRS) and Brooklyn District Office, IRS, Assistant Secretary Case No. 30-08634(CA). Upon a complaint filed by the union (NTEU and NTEU Chapter 53) under E.O. 11491, concerning the transfer of certain job functions from the activity to another facility, the ALJ found that the union was first notified of the transfer of one of the functions after that function had already been transferred, and that the notification as to the second function was insufficient to enable the union to negotiate on the impact and implementation of the decision, in a meaningful manner, prior to the actual change. The ALJ, therefore, concluded that the agency and the

activity had violated section 19(a)(1) and (6) of the Order by unilaterally implementing the transfers. In agreement with the findings, conclusions, and recommendation of the ALJ as to the first job function, the Authority found that the agency and activity had violated the Order by effecting that transfer without notifying the union and affording an opportunity to negotiate on implementing procedures and impact on adversely affected unit employees. The Authority thereupon issued a remedial order as to that portion of the complaint. As to the second job function, the Authority found, contrary to the ALJ, that responsible union officials had actual knowledge of the impending transfer in sufficient time to demand bargaining on impact and implementation. Accordingly, the Authority dismissed that aspect of union's complaint. (Decision and Order attached.)

NEGOTIABILITY CASE

2 FLRA No. 75 (January 25, 1980)

Association of Civilian Technicians and State of Georgia National Guard, Case No. 0-NG-35. The dispute concerned a two paragraph union proposal which would (1) prohibit management from assigning grounds maintenance or other non-job related duties to technicians without their consent and, apparently, whether or not such duties were reflected in the employees' position descriptions; and (2) provide that general cleanup duties would be assigned on a fair and equitable basis. The union appealed the activity's allegation that both paragraphs of the proposal were outside the duty to bargain and therefore nonnegotiable. The Authority found that the first paragraph of the union's proposal violated section 7106(a)(2)(B) of the Statute, while the second paragraph did not. Accordingly, the Authority sustained the agency's allegation as to the first paragraph and set aside the allegation relating to the second paragraph. (Decision attached.)

Attachments (3)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Department of the Treasury,
Bureau of Alcohol, Tobacco and
Firearms, Midwest Region,
Chicago, Illinois

Respondent

and

Assistant Secretary
Case No. 50-17024(CA)

National Treasury Employees Union
and NTEU Chapter 94

Complainant

DECISON AND ORDER

This matter is before the Authority pursuant to Administrative Law Judge Garvin Lee Oliver's March 22, 1979, Order forwarding the record in this matter to the Federal Labor Relations Authority for decision.

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, were transferred to the Authority under section 304 of the Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Upon consideration of the entire record in this case, including the parties' stipulation of facts, accompanying exhibits and briefs, the Authority finds:

The complaint herein alleges that Respondent, Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Midwest Region, Chicago, Illinois, violated section 19(a)(1) and (6) of the Order when it declared non-negotiable several proposals made by Complainant, National Treasury Employees Union and NTEU Chapter 94, during negotiations over the impact and implementing procedures of the Respondent's decision to realign work and centralize clerical functions

in its Firearms/Explosives Licensing Section (F/ELS). The Complainant asserts that this declaration of non-negotiability of its proposals by the Respondent violated the duty to negotiate under the Order because the proposals were clearly negotiable as determined previously by the Federal Labor Relations Council (FLRC). National Treasury Employees Union and Department of Treasury, U.S. Customs Service Region VII, 5 FLRC 249, FLRC No. 76A-28 (1977), Immigration and Naturalization Service and American Federation of Government Employees, 3 FLRC 380, FLRC No. 74A-13 (1975). The Respondent argues that the cited cases are not determinative herein because they involve different circumstances and different parties, and further because they contain proposals which differ from those herein.

The undisputed facts, as stipulated by the parties, are as follows:

The Respondent conducted a pilot program concerning the realignment of work and the centralization of clerical functions in the F/ELS for 180 days. During this time, it had consulted with the Complainant. On September 27, 1977, the Respondent notified the Complainant that it proposed to institute permanent changes related to the pilot program, effective October 11, 1977. The parties met on October 3, 1977, pursuant to a request by the Complainant to negotiate regarding the impact and implementing procedures of the intended changes. The Respondent extended the pilot program twice, ultimately through October 31, 1977, to give the Complainant an opportunity to solicit the views of the bargaining unit on the intended changes and to submit proposals. On October 19, 1977, the Complainant submitted its proposals to the Respondent for consideration. The Respondent declared non-negotiable all of the Complainant's proposals on October 2, 1977, and the intended organizational changes were implemented on November 1, 1977, according to schedule.

The proposals made by the Complainant which are in dispute herein are set out below, along with the proposals found to be negotiable by the Council and alleged to be comparable by the Complainant: 1/

SECTION 1, Proposed By The Complainant

> The parties recognize that the Bureau attempted to equalize the distribution of work between the various individual employees in the Firearms Section. However, the parties realize that the realignment of job functions could result in an imbalance in the work load and, therefore, could cause one or more employee(s) to be overburdened in relation to his/her (their) fellow workers. Consequently, the employer agrees to insure, to the extent practicable, an equitable distribution of the work load among similarly situated employees. To this end, the Employer will adhere to the following procedures:

1/ The Regional Administrator, Labor-Management Services Administration, dismissed the instant unfair labor practice complaint in its entirety on April 21, 1978. However, pursuant to a request for review by the Complainant, the Assistant Secretary reinstated that portion of the unfair labor practice complaint with respect to the Complainant's proposals 1, 2(D) and 4, as, in his view, they contained language similar to that found in proposals found negotiable by the Federal Labor Relations Council in Customs Service and Immigration and Naturalization Service, cited above, such that a reasonable basis for the Complainant's allegation was established with respect to those proposals.

(1) The Employer will use whatever means necessary to monitor the work load of the various individual unit employees;

(2) On or about the sixth month anniversary date of the realignment of work, the Employer will cause to be made a review of the comparative work loads of each employee;

(3) Should this review reveal an imbalance in the distribution of work, the Employer will, to the extent practicable, take whatever steps are necessary to insure a fair and equitable work load distribution.

Similar language found negotiable in Immigration and Naturalization Service:

Article 18, Section A(1):

Immigration Officers shall rotate to vehicular inspection on a fair and equitable basis.

SECTION 2(D), Proposed By The Complainant

D. An employee will, upon request, be allowed to swap work assignments if a qualified replacement, approved by the supervisor, is available and willing to work, and if the work flow will not be significantly impaired.

Similar proposals found negotiable in Customs Service:

Article 29, Section 3

An employee will, upon request, be allowed to swap placement assignments, if a qualified replacement, approved by the supervisor, is available and willing to work and if the work flow is not impaired.

Article 22, Section 4

An employee, upon request, will be allowed to swap shift assignments and/or days off if a qualified replacement, approved by the supervisor, is available and willing to work and if the work flow is not impaired.

SECTION 4, Proposed By The Compainant

To provide for employee development, the Employer agrees to rotate employees through the various phases of work that are available within their job title.

Similar proposal found negotiable in Immigration and Naturalization Service:

Article 25, Section A:

To provide for employee development the Service agrees to rotate employees through the various phases of work within their job title that is available.

FINDINGS AND CONCLUSIONS

It was the clear intent of the Executive Order that once a determination of negotiability is made through the processes of the Order, 2/ a subsequent declaration of non-negotiability of the matter would be an unfair labor practice. 3/ Upon comparison of the language and circumstances of the Complainant's proposals number 2(D) and 4 with clauses previously declared negotiable by the FLRC and set out above after each of the Complainant's proposals, the Authority finds no meaningful differences and thus concludes that the Respondent's declaration of non-negotiability of proposals number 2(D) and 4 was in violation of the Order. The Complainant's proposal number 2(D) is for all practical purposes identical with the proposals deemed negotiable in Customs Service, and there is nothing persuasive in the stipulation of facts or briefs to distinguish the two. Similarly, the Complainant's proposal number 4 so closely tracks the proposal found negotiable in Immigration and Naturalization Service as to make any distinction between them arbitrary or in error on its face. It is concluded therefore that the matters involved in these proposals have already been declared negotiable through the processes of the Order, and the Respondent's declaration of non-negotiability as to them was in violation of section 19(a)(1) and (6) of the Order.

Significant differences are to be noted, however, in language and intent between the Complainant's proposal number 1 and the cited clause in Immigration and Naturalization Service, previously determined to be negotiable and alleged to be similar by the Complainant. 4/ Thus, the language of the cited clause refers only to the rotation of Immigration Officers while the language in the proposal refers to the distribution of work. The Authority concludes therefore, that it has not been established that the Respondent's declaration of non-negotiability with respect to that proposal was violative of the Order. Accordingly, the Authority shall dismiss that portion of the complaint.

2/ The Study Committee Report and Recommendations which led to the issuance of Executive Order 11491, provides:

> A labor organization should be permitted to file an unfair labor practice complaint when it believes that a management official has been arbitrary or in error in excluding a matter from negotiation which has already been determined to be negotiable. . . .
>
> Labor-Management Relations in the Federal Service, 1975, p. 1.

3/ Veterans Administration, 1 FLRA No. 101 (August 21, 1979).

4/ In this regard, the clause in Immigration and Naturalization Service contains the language "fair and equitable basis" which is similar to language in the proposal in paragraph (3) ("fair and equitable work load distribution.") However, the language clearly is used in a different context.

ORDER 5/

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Midwest Region, Chicago, Illinois, shall:

1. Cease and desist from:

(a) Declaring non-negotiable proposals made in the course of negotiations by the National Treasury Employees Union and NTEU Chapter 94, which involve matters previously determined to be negotiable by the Federal Labor Relations Council.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action:

(a) Upon request of the National Treasury Employees Union and NTEU Chapter 94, meet and confer to the extent consonant with law and regulations regarding their proposals number 2(D) and 4 pertaining to the impact and implementing procedures of the organizational changes made in the Firearms/ Explosive Licensing Section of the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Midwest Region, Chicago, Illinois.

(b) Post at the facilities of the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Midwest Region, Chicago, Illinois, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Regional Regulatory Adminstrator of the Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Midwest Region, Chicago, Illinois, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and all other places where notices to employees are customarily posted. The Administrator shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

5/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

IT IS FURTHER ORDERED that the portion of the complaint in Assistant Secretary Case No. 50-17024(CA) found not to be violative of the Executive Order be, and it hereby is, dismissed.

Issued, Washington, D.C., January 25, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY EMPLOYEES OF THE DEPARTMENT OF THE

TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

MIDWEST REGION, CHICAGO, ILLINOIS, THAT:

WE WILL NOT declare non-negotiable proposals made in the course of negotiations by the National Treasury Employees Union and NTEU Chapter 94, which involve matters previously determined to be negotiable by the Federal Labor Relations Council.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request of the National Treasury Employees Union and NTEU Chapter 94, meet and confer to the extent consonant with law and regulations regarding their proposals number 2(D) and 4 pertaining to the impact and implementing procedures of the organizational changes made in the Firearms/ Explosive Licensing Section of the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Midwest Region, Chicago, Illinois.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address and telephone number are: Room 1638, Dirksen Federal Building, 219 South Dearborn Street, Chicago, Illinois, 60604, (312) 353-6746.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Internal Revenue Service (IRS)
and Brooklyn District Office, IRS

Respondents

and

Assistant Secretary
Case No. 30-08634(CA)

National Treasury Employees Union (NTEU)
and NTEU, Chapter 53

Complainants

DECISION AND ORDER

On May 10, 1979, Administrative Law Judge Garvin Lee Oliver issued his Recommended Decision and Order in the above-entitled proceeding finding that the Respondent, Brooklyn District Office, IRS, had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. 1/ Thereafter, the Respondents filed exceptions and a supporting brief to the Administrative Law Judge's Recommended Decision and Order and the Complainants (Union) filed a response thereto.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondents' exceptions and supporting brief and the Union's response thereto, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendations, except as modified herein.

1/ The Administrative Law Judge found there was no basis on which to find Respondent Internal Revenue Service (as opposed to Respondent Brooklyn District Office, IRS) had failed to meet its obligations under the Executive Order. No exceptions were taken to that finding.

The complaint herein alleged, in essence, that the Respondents violated section 19(a)(1) and (6) of the Order by transferring the maintenance of manual part payment job function and the routine microfilm searches job function from the Brooklyn District Office to the Brookhaven Service Center, without prior notification to the union and affording it an opportunity to request negotiation over the impact and implementation of those management decisions. 2/

The Administrative Law Judge found that the Respondent did in fact transfer the job functions in issue, and that the transfers did effect a change in working conditions of unit employees and thus had an impact on their terms and conditions of employment. He further found that the Union was first notified of the job function transfers after the microfilm searches function had in fact been transferred, and, with respect to the maintenance of manual part payment function, that the manner of notice given to the Union did not constitute the type of precise notification envisaged by the Order. The Administrative Law Judge found that such notification was insufficient to enable the Union to negotiate in a meaningful manner, prior to the changes, concerning the impact and implementation of management's decisions. Finally, he concluded that where it had not been afforded reasonable notice, the Union did not have to request bargaining in order to establish a violation of the Order by the Respondent. Accordingly the Administrative Law Judge concluded that the Respondent by unilaterally implementing the transfer of the microfilm searches function and the maintenance of manual part function from the Brooklyn District Office to the Brookhaven Service Center violated section 19(a)(1) and (6) of the Order.

With respect to notification to the Union of the job function transfers, the facts, as found by the Administrative Law Judge, are clear. Having made its decision to transfer a number of job functions from the Brooklyn District Office to the Brookhaven Service Center, the Respondent transfered the microfilm searches function during the first week in January 1978, and the maintenance of manual part payment function on either February 12 or 13, 1978. Between those dates, on January 17, 1978, Gargano, one of Respondent's Branch chiefs, told Union Vice-President Modin of Respondent's plans involving the two transfers in issue, although he did not know at that time whether the transfers had taken place. As credited by the Administrative Law Judge shortly thereafter, Modin relayed that information to Union President Braverman. The record reveals no earlier notification to the Union. Thus, the Union had no knowledge of the Respondent's plan to transfer the microfilm searches function until after that transfer was a fait accompli. In these circumstances, in agreement with the findings, conclusions

2/ During the course of the hearing, the Union attempted to expand the scope of the complaint to include the transfer of other job functions which were referred to in neither the complaint, as amended, nor the Respondents' answer thereto. The Administrative Law Judge found that the Union was aware of these matters at the time the charge was filed and concluded that since they were not raised in either the pre-complaint charge or the complaint, he would refuse to consider them, relying on Department of the Navy, Norfolk Naval Shipyard, A/SLMR No. 967 (1978). Noting that no exceptions were filed concerning the findings and conclusions of the Administrative Law Judge in this respect they are hereby affirmed by the Authority.

and recommendations of the Administrative Law Judge, the Authority finds that the Respondent violated section 19(a)(1) and (6) of the Order by transfering the microfilm searches function without notifying the union and affording it the opportunity to meet and confer on the procedures which management would observe in implementing such transfer and on the impact of such transfer on adversely affected unit employees.

However, with respect to the maintenance of manual part payment function, the Authority finds that the Union had adequate knowledge of the Respondent's decision almost a month prior to the action taken. Thus, as noted above, both the Union President and Vice-President were made aware of Respondent's plans in mid-January, prior to the actual transfer which took place on February 12 or 13. Contrary to Complainant's arguments, in the Authority's view it is not significant, in the circumstances of this case, that the usual management officials did not effectuate the notification and that Gargano did not know the status of the impending transfers when he informed Modin of their existance. What is significant, in the view of the Authority, is that responsible Union officials had actual knowledge of the impending transfer in sufficient time to demand bargaining concerning its impact and implementation. In such circumstances, the Union was obliged to request negotiations in order to give rise to the Respondent's obligation to bargain. 3/ The record shows no such request or demand by the Union prior to the filing of its charge in the instant case. Accordingly, the Authority will order that this allegation of the complaint be dismissed. 4/

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that Brooklyn District Office, IRS, Brooklyn, New York, shall:

1. Cease and desist from:

(a) Instituting a transfer of the microfilm searches function from the Brooklyn District Office, IRS, to the Brookhaven Service Center, IRS, involving employees represented exclusively by the National Treasury Employees Union and

3/ Cf. Southeast Exchange Region of Army Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, 6 A/SLMR 237, A/SLMR No. 656 (1976); U.S. Department of Air Force, Norton Air Force Base, 3 A/SLMR 175, A/SLMR No. 261 (1973).

4/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

NTEU, Chapter 53, or any other exclusive representative of its employees, without first notifying the exclusive representative and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such a transfer and on the impact such transfer will have on adversely affected unit employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request, meet and confer with the National Treasury Employees Union and NTEU Chapter 53, to the extent consonant with law and regulations, concerning the procedures which management observed in transferring the microfilm searches function and the impact such transfer had on adversely affected employees in the exclusively recognized unit.

(b) Post at all Internal Revenue Service, Brooklyn District Office facilities and installations copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Director of the Brooklyn District Office and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the portion of the complaint found not to be violative of the Executive Order in Assistant Secretary Case No. 30-08634(CA) be, and it hereby is, dismissed.

Issued, Washington, D.C., January 25, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute a transfer of the microfilm searches function from the Brooklyn District Office, IRS, to the Brookhaven Service Center, IRS, involving employees represented exclusively by the National Treasury Employees Union and NTEU, Chapter 53, or any other exclusive representative of our employees, without first notifying the exclusive representative and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such a transfer and on the impact such transfer will have on adversely affected unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL upon request, meet and confer with the National Treasury Employees Union and NTEU Chapter 53, to the extent consonant with law and regulations, concerning the procedures which management observed in transferring the microfilm searches function from the Brooklyn District Office, IRS, to the Brookhaven Service Center, IRS, and the impact such transfer had on adversely affected employees in the exclusively recognized unit.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, whose address is: Room 241, 26 Federal Plaza, New York, New York 10007, and whose telephone number is: (212) 264-4934.

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
1111-20th Street, N.W., Suite 700
Washington, D.C. 20036

In the Matter of

INTERNAL REVENUE SERVICES (IRS) AND
BROOKLYN DISTRICT OFFICE, IRS
Respondents,

and

NATIONAL TREASURY EMPLOYEES UNION
(NTEU) AND NTEU, CHAPTER 53
Complainants

Case No. 30-08634(CA)

Allan B. Horn, Esquire
Robert F. Hermann, Assistant
Regional Counsel
Office of the Regional Counsel
Internal Revenue Service
North-Atlantic Region
26 Federal Plaza, 12th Floor
New York, New York 10007
For the Respondents

Frank D. Ferris
Director of Training
National Treasury Employees Union
1730 K Street, N.W., Suite 1101
Washington, D.C. 20006
For the Complainant

Before: GARVIN LEE OLIVER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arose pursuant to Executive Order 11491, as amended, as a result of an unfair labor practice complaint filed on August 17, 1978 and an amended complaint filed on September 11, 1978 by the National Treasury Employees Union (NTEU), Chapter 53 (hereinafter called the Complainant or Union), against the Internal Revenue Service (IRS) and Brooklyn District Office, IRS (hereinafter called the Respondents or Activity).

The amended complaint alleged that the Respondents violated Sections 19(a)(1) and (6) of the Executive Order by the transfer of functions, specifically, maintenance of manual part payment and routine microfilm searches from the Brooklyn District to the Brookhaven Service Center, sometime after February 15, 1978, without prior negotiation over impact and implementation with the Union.

A hearing was held in this matter before the undersigned in New York, New York. Both parties were represented and afforded full opportunity to be heard, to adduce relevant evidence, and to examine and cross-examine witnesses. Post-hearing briefs have been received from both parties and duly considered.

Based on the entire record herein, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, and the briefs, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

Complainant is the exclusive bargaining representative for a unit comprised of federal employees of the Brooklyn District Office, IRS.

On December 5, 1977, a meeting attended by all Internal Revenue Service, North-Atlantic Regional District Directors and Collection/Collection and Taxpayer Service (CATS) Division Chiefs was conducted by the Office of the Regional Commissioner, Internal Revenue Service, North-Atlantic Region to discuss collection resources. Among the topics discussed was the feasibility of centralization of various District functions in the Brookhaven and Andover Service Centers to conserve resources. Thereafter, studies were undertaken by District and Regional personnel in connection with suggestions and discussions at the December 5 meeting. As a result of these studies, the Regional Commissioner decided to transfer the microfilm research and manually monitored installment agreements functions, among others, from the Districts, including Brooklyn, to the Service Centers. (R.A. Exh. ID: Tr. 128). These functions were performed in the Brooklyn Office by the Office Management Branch. (Tr. 76).

The routine microfilm research function was transferred to the Brookhaven Service Center during the first week of January 1979. (Tr. 94-95, 109, 128). There were three individuals performing the microfilm research task prior to the transfer. One of these individuals performed microfilm research on a full-time basis, and two clerical employees did the research approximately twenty percent of their time. After the transfer, the individual devoting full-time to microfilm research duties continued to perform special microfilm research full-time, but, with the loss of the routine research, the clerical employees then devoted full-time to their clerical duties. (Tr. 94-98; 111-112; 139-141). Prior to the transfer it took Revenue Officers 4-7 days to obtain a reply to a routine microfilm research request. After the transfer, 10-12 days was required for a reply. (Tr. 99).

On January 11, 1978, Cubie Dawson, Chief, Collections Division, Brooklyn District Office, met with his Branch chiefs. He advised them of the Regional Commissioner's plans to transfer certain functions to the Brookhaven Service Center. (Tr. 127). He took no steps at this time to notify the Union. (Tr. 130). The practice at this time of notifying the Union of changes in personnel policies, practices and working conditions was for Mr. Dawson or his assistant, Mr. Zaruches, to notify George Braverman, president of the Union, or, if Mr. Braverman was not available, to notify Herman Modin, Vice president for Collection, and ask that Mr. Modin notify Mr. Braverman. In addition, the Branch chiefs normally notified the Union stewards in their respective branches. (Tr. 87-91; 116; 190-191).

Joe A. Gargano, Field Branch Chief, Collection Division, attended the Branch chiefs meeting on January 11, 1978. Mr. Gargano had no management responsibility for the Office Branch, which was primarily affected by the transfer of functions, but decided to inform Herman Modin, Union Vice President for Collections and steward for the Revenue officers in his branch, on January 17, 1978, because Mr. Modin had been complaining about the detailing of Revenue Officers to the Office Branch, and Mr. Gargano believed that the transfer of functions would reduce the number of hours Revenue Officers were so detailed. (Tr. 155-156; 161-162, 171; Reg. Adm. Exh. 1D-1).

Mr. Gargano advised Mr. Modin, among other things, that, "All microfilm research was being scheduled to be handled exclusively by the Brookhaven Service Center," and "Manual part-payment agreements will also be transferred to the Service Center." (Reg. Adm. Exh. ID-1). Mr. Gargano was not aware of which changes had or had not been implemented at this time. (Tr. 164, 170).

Herman Modin testified that shortly after his January 17, 1978 conversation with Mr. Gargano, he telephoned George Braverman, President of the Union, to inform him of the transfer of the two functions. (Tr. 183). Mr. Braverman testified that he received no such call. (Tr. 200-201). I credit Mr. Modin's testimony in this regard. Mr. Modin is a key office holder in the Union, and his testimony was, arguably, contrary to the interest of the Union, while Mr. Braverman's testimony in this regard is substantially self-serving.

The maintenance of non-IDES monitored installment agreements, or manual part payment function, was transferred from the Brooklyn District to the Brookhaven Service Center on February 12 or 13, 1978 (Tr. 133).

The manual part payment function in the Brooklyn District was performed by Research Adjustment Examiners as a small portion of their duties prior to the transfer. Prior to the transfer, this function entailed Examiners reviewing part payment files approximately four hours a month to assure that

installment or part payment agreements with taxpayers were current and were not in default. After the primary responsibility for the function was transferred to the Service Center, these same Examiners in the Brooklyn District continued to quality review the files to make sure that payment plans were equitable and in keeping with Internal Revenue manual provisions. However, instead of four hours, they spent approximately an hour on the review function. The only portion of the function which was not performed in Brooklyn after the transfer was the posting of payments in files and a monthly review to insure that payments were up to date. (Tr. 113-114, 147-148).

Mr. Nathan Zaruches, Assistant Chief, Collection Division, testified that after the microfilm research and manual part payment function had been transferred to the Brookhaven Service Center, he had an informal meeting with George Braverman, President of the Union, sometime between the first and third weeks in February 1978. (Tr. 69-70, 75, 77). Mr. Braverman told Mr. Zaruches that it was his understanding that some functions had been transferred. Mr. Zaraches acknowledged that four functions, including microfilm research and manual part payment, had been transferred and that eight others were still under consideration. Mr. Zarachues gave Mr. Braverman a copy of a memorandum dated February 2, 1978 which had been received from the Assistant Regional Commissioner and which listed the various functions which were being considered for change, or on which some action had been taken (Tr. 69; Reg. Adm. Exh. ID-3).

Mr. Braverman testified that he recalled no such meeting with Mr. Zaraches in February 1978, and that his review of his daily locator records and appointment book reflected no such meeting. (Tr. 22-23). However, I credit Mr. Zaruches' testimony concerning the meeting, primarily on the basis of his firm recollection concerning the circumstances under which he gave the February 2, 1978 memorandum to Mr. Braverman.

Mr. Braverman received inquiries about the transfers from employees in the Mineola office. They were concerned about their job or position descriptions being changed as a result of the transfer. (Tr. 32-33, 36).

On March 7, 1978 Mr. Braverman and Mr. Modin met with Cubie Dawson, Chief, Collections Division and Frank Ramagito, Chief of Personnel, concerning another matter. At the conclusion of the meeting, Mr. Braverman inquired about the transfer of functions to the Brookhaven Service Center. Mr. Dawson replied that microfilm research had been transferred, but he was not sure as to the exact dates of the transfer of other items, or whether, in fact, they would be transferred. Mr. Dawson was not aware at the time that the manual part payments function had already been transferred. Mr. Braverman stated that this matter should have been discussed with the Union beforehand as he might want to negotiate the implementation and impact. Mr. Dawson replied that the decision was made by the Regional office and, as far as he was concerned, it would not have any significant impact on the operation. Accordingly, he did not agree that this was a matter they needed to negotiate. No further details concerning the transfers were provided. (Tr. 32-35; 134-137; 143-144).

The unfair labor practice charge was filed April 19, 1978. The Respondent's reply of June 20, 1978 notes that during the pertinent period the Union "did not present any information to show that there was some negotiable impact or to provide impact areas for us to discuss." The reply also stated, "Should NTEU submit negotiable items, we will, of course, discuss them with you." (Reg. Adm. Exh. 1B-2).

The routine microfilm research and manual part payment functions were returned from the Brookhaven Service Center to the Brooklyn District office in October or November, 1978.

Discussion, Conclusions, and Recommendations

A. Procedural Matters

At the hearing in this matter, Complainant attempted, for the first time, to expand the scope of their complaint to include the transfer of the TDI initial processing function to the Brookhaven Service Center. Both the charge and complaint refer "specifically" to the transfer of the microfilm research and manual part payment function. The Agency response also addresses only the legal ramifications of the transfer of the two functions. As found above, Complainant was aware at the time the charge was filed that other functions were being transferred. The Agency was not on proper notice of, or prepared, to litigate other matters at the hearing. Since other matters were not properly raised in either the pre-complaint charge or the complaint, they will not be considered. Department of the Navy, Norfolk Naval Shipyard, A/SLMR No. 967 (1978).

B. Transfer of Microfilm Research and Manual Part Payment Functions

Notwithstanding the fact that a particular management decision is non-negotiable because it falls within the ambit of Section 11(b) or 12(b) of the Order, the Agency or Activity must, nevertheless, afford an exclusive representative reasonable notice and an opportunity to bargain with respect to the impact and implementation of such action, prior to its implementation, when such action effects a change in existing personnel policies and practices or working conditions of unit employees, provided it does not interfere with the exercise of the reserved rights themselves. Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 984 (1978); U. S. Customs Service, Region VII, Los Angeles, California, A/SLMR No. 1066 (1978); Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, 7 A/SLMR 255, A/SLMR No. 814 (1977).

Respondents contend that the transfers had no "significant" impact; thus, they were under no obligation to notify Complainant prior to implementation, relying on Department of the Navy, Norfolk Naval Shipyard, 7 A/SLMR 199,

A/SLMR No. 805 (1977); Department of Defense, Air National Guard, Texas Air National Guard, Camp Mabry, Austin, Texas, 6 A/SLMR 591, A/SLMR No. 738 (1976); Naval Communications Area, Master Station Eastpac, Honolulu, A/SLMR No. 1035 (1978); and Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, supra. These cases are inapposite. As the Assistant Secretary pointed out in Department of Defense, Department of the Navy, Naval Training Center, Great Lakes, Illinois, A/SLMR No. 1175, fn. 3 (Dec. 29, 1978), the Texas Air National Guard case involved prohibiting the consumption of alcoholic beverages, and the Naval Communications Area case involved the use of volunteer bartenders, both areas not traditionally associated with personnel policies, practices, and general working conditions. Further, in the Norfolk Naval Shipyard case, involving a change in the manner of enforcement of traffic regulations, it was found that no change had occurred in the personnel policies, practices, or general working conditions of Federal employees. Likewise, in Brookhaven Service Center it was found that absent any evidence of change in the actual duties performed by control clerks, the agency was under no obligation to inform the union prior to issuing a new standard position description.

Respondent's decision to transfer the microfilm research and manual part payment functions from the Brooklyn District Office to the Brookhaven Service Center did effect a change in the working conditions of unit employees. The evidence shows that two clerical employees who previously worked on routine microfilm research about twenty percent of their time no longer performed such work after the transfer. The evidence also shows that after the transfer it took Revenue Officers five or six days longer to obtain replies to routine microfilm research requests and, consequently, it took them longer to complete their case assignments. Similarly, after the transfer of the manual part payment function, examiners spent four hours less per month on the review of part payment files and the posting of such payments was no longer performed at the Brooklyn District office. One manager believed that the transfer of these functions, together with others, would reduce the number of hours Revenue Officers were detailed from the Field Branch to the Office Branch, and some employees were concerned about their jobs or position descriptions being changed as a result of the transfers.

The change directly affected employees during duty hours, was directly job-related, and employees had reasonable job-related concerns about possible tangential consequences. Thus, it is concluded that Respondent Brooklyn District Office, IRS, was required to afford the Complaint reasonable notice and an opportunity to bargain with respect to the impact and implementation of such action prior to its implementation. Cf. Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 984 (Feb. 6, 1978) and A/SLMR No. 1150 (Nov. 17, 1978) (decision to transfer claims cases effected a change in employee terms and conditions of employment). Absent some form of national recognition or national consultation rights, Respondent IRS, as

opposed to Respondent Brooklyn District Office, IRS, had no obligation to bargain or consult with NTEU with respect to matters concerning local management decisions. Internal Revenue Service and Internal Revenue Service, South Carolina District Office, A/SLMR No. 1027 (1978).

It is clear that no prior notice was afforded Complainant with respect to the transfer of the microfilm research function. Respondents contend however, that prior notice was afforded to Complainant with respect to the proposed transfer of the manual part payment function through Field Branch Chief Gargano's conversation with Chapter Vice President and field branch steward Modin on January 17, 1978 and Assistant Collection Division Chief Zaruches conversation with Chapter president Braverman sometime after February 2, 1978. The manual part payment function was transferred on February 12 or 13, 1978.

Mr. Zaruches testified that both functions had been transferred before his conversation with Mr. Braverman sometime after February 2, 1978. I credit his testimony. Thus, this conversation with Mr. Braverman did not constitute prior notice.

With respect to Mr. Gargano's conversation with Mr. Modin, it was established that a past practice existed whereby either Mr. Dawson or Mr. Zaruches would sometimes notify Mr. Modin and ask him to relay the information to Mr. Braverman. There was, however, no evidence that Mr. Gargano, who had no management responsibility for the Office Branch, was used by Mr. Dawson or Mr. Zaruches to notify the Union of Office Branch changes through Mr. Modin. Mr. Gargano merely discussed matters with Mr. Modin as the field branch steward, and his conversation on January 17, 1978 was regarded by both Mr. Gargano and Mr. Dawson simply as a conversation between the field branch chief and the field branch steward. There was no indication that he should notify Mr. Modin, or that management was receptive to consultation on the issue. Cf. General Services Administration, Region 3, Public Buildings Service, Central Support Field Office, A/SLMR 583 (1975). Mr. Gargano was not even aware on January 17, 1978 of which changes had or had not been implemented. Therefore, although Mr. Modin made Mr. Braverman aware of his conversation with Mr. Gargano, this notice to Mr. Modin did not constitute the type of precise notification by Respondent envisaged by the Order which would have enabled the Complainant to bargain in a meaningful manner, prior to the change, concerning the impact and implementation of the management decision. Cf. Jacksonville District, Internal Revenue Service, Jacksonville, Florida, 7 A/SLMR 758, A/SLMR No. 893 (1977); Department of the Treasury, Internal Revenue Service, Indianapolis, Indiana, 7 A/SLMR 844, A/SLMR No. 909 (1977).

There is no indication in the record that prior to, or even on, March 7, 1978, when the Union specifically inquired about the transfers, that management recognized the Union's right to bargain on the impact and implementation of the change. Respondents point out that Complainant at

no time submitted proposals for negotiation over impact and implementation. However, there is no requirement that an exclusive representative's, request for impact bargaining must set forth or include its proposals therein, Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 1176 (1978) or, where it has not been afforded reasonable notice, even that a request be made after the fact to establish a violation. Department of the Treasury, Internal Revenue Service, Austin Service Center, Austin, Texas, A/SLMR No. 1142 (1978).

The record reflects that since the charge was filed, Respondent has indicated its willingness to discuss any impact items Complainant may raise. However, Respondent did not concede that it had any obligation to Complainant in this respect or that there was any impact. Under the particular circumstances of this case, I do not find that Respondent's subsequent conduct cured the original violation. Compare Vandenberg AFB, 4392d Aerospace Support Group, Vandenberg AFB, California, 3 FLRC 491, FLRC No. 74A-77 (1975).

Accordingly, I conclude that Respondent, Brooklyn District Office, IRS, by unilaterally implementing the transfer of the microfilm research function and the maintenance of manual part payment function from the Brooklyn District Office to the Brookhaven Service Center violated Section 19(a)(6) of the Order by failing to afford the Complainant specific notice of its intentions and to provide the Complainant with a reasonable opportunity to bargain over the procedures to be observed in implementing the transfers and on the impact of the transfers on adversely affected employees. Such failure necessarily tends to interfere with, restrain, or coerce employees in the exercise of rights assured by the Order, in violation of Section 19(a)(1) of the Order.

Recommendations

Upon the basis of the foregoing findings of fact, conclusions, and the entire record, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, 29 C.F.R. Section 203.26(b), and Section 2400.2 of the transition rules and regulations, 5 C.F.R. Section 2400.2 (1979), the Authority hereby orders that the Internal Revenue Service, Brooklyn District Office, shall:

1. Cease and desist from:

(a) Instituting a transfer of the routine microfilm research function and/or the manual part payment function from the Brooklyn District Office, IRS, to the Brookhaven Service Center, IRS, involving employees represented

exclusively by the National treasury Employees Union and NTEU, Chapter 53, or any other exclusive representative of its employees, without first notifying the exclusive representative and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementating such a transfer and on the impact such transfer will have on adversely affected unit employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request, meet and confer with the National Treasury Employees Union and NTEU Chapter 53, to the extent consonant with law and regulations, concerning the procedures which management observed in transferring the routine microfilm research funciton and/or the manual past payment function and the impact such transfers had on adversely affected employees in the exclusively recognized unit.

(b) Post at all Internal Revenue Service, Brooklyn District office facilities and installations copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Director of the Brooklyn District Office and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: May 10, 1979
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

EXEUCTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a transfer of the routine microfilm research function and/or the manual part payment function from the Brooklyn District Office, IRS, to the Brookhaven Service Center, IRS, involving employees represented exclusively by the National Treasury Employees Union and NTEU, Chapter 53, or any other exclusive representative of our employees, without first notifying the exclusive representative and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such a transfer and on the impact such transfer will have on adversely affected unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, meet and confer with the National Treasury Employees Union and NTEU Chapter 53, to the extent consonant with law and regulations, concerning the procedures which management observed in transferring the routine microfilm research function and/or the manual part payment function from the Brooklyn District Office, IRS, to the Brookhaven Service Center, IRS, and the impact such transfers had on adversely affected employees in the exclusively recognized unit.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

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UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Association of Civilian Technicians

(Union)

and

Case No. O-NG-35

State of Georgia National Guard

(Activity)

DECISION ON NEGOTIABILITY ISSUE

Union Proposal

Technicians may be responsible for maintaining his/her immediate work area, however will not be utilized for grounds maintenance, or activities which are not job related. An exception to this is recognized when a general cleanup is required. Technicians will not be directed to assignments outside his/her position duties without his/her consent. See FLRC 76A-139; Jun. 77, FLRC 73A-21; Jan. 74, FLRC 76A-44; Jul. 77.

When a general cleanup is required, assignment will be made on an equitable basis without regard to rank or grade or sex. Exception will be recognized for physical infirmities which may preclude participation or endanger the health of the Technician.

Question Here Before the Authority

The question is whether the union's proposal is within the agency's duty to bargain under the Federal Service Labor-Management Relations (FSLMR) Statute or, as alleged by the agency, violates section 7106(a) of the Statute.1/

1/ Section 7106(a) of the FSLMR Statute (92 Stat. 1198) provides in pertinent part:

§ 7106. Management Rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(Continued)

Opinion

Conclusion: (1) The first paragraph of the proposal conflicts with section 7106(a)(2)(B) of the Statute. (2) The second paragraph of the proposal does not violate section 7106(a)(2)(B) of the Statute. Accordingly, pursuant to section 2424.8 of the Authority's Rules and Regulations (44 Fed. Reg. 44740 et seq. (1979)), the agency's allegation that the disputed proposal is not within the duty to bargain is sustained in part and set aside in part.2/

Reasons: (1) Under the language of section 7106(a)(2)(B) of the Statute (and in the absence of any contrary indication in the legislative history of such language) it is clear that management has the right "to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted . . . ." [Emphasis added.] The foregoing provision as enacted is identical to section 7106(a)(2)(B) of the bill (H.R. 11280) reported out of the House Committee3/ and the final version of the bill passed by the House (the "Udall substitute").4/ Neither the Report which accompanied the House Committee bill5/ nor any subsequent discussion leading to the enactment of this provision6/ defines or explains the extent of management's reserved right "to assign work." At the least, however, it clearly encompasses the circumstances of the present case insofar as the first paragraph of the proposal provides that "[t]echnicians . . . will not be utilized for grounds maintenance, or activities which are not job related," and "will not be directed to assignments outside [their] position duties without [their] consent." That is, this express language would constitute an absolute

(Continued)

> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
>
> (2) in accordance with applicable laws--
>
> (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted. . . .

2/ In so deciding that the second paragraph of the subject proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

3/ See H.R. REP. No. 95-1403, 95th Cong., 2d Sess. 274 (1978).

4/ See 124 CONG. REC. H 9627 (daily ed. Sept. 13, 1978).

5/ Supra n. 3, at 43.

6/ See, e.g., 124 CONG. REC. H 9634 (daily ed. Sept. 13, 1978).

prohibition against management's assigning grounds maintenance or other non-job related duties to technician positions and, as well, would prevent management from assigning such work to technicians without their consent, apparently whether or not the duties were reflected in their position descriptions. The instant case is therefore distinguishable from American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey, Case No. O-NG-20, 2 FLRA No. 16 (Nov. 29, 1979), Report No. ____, in which the Authority found (at 7-9 of decision) that management's right "to assign work" under section 7106(a)(2)(B) of the Statute was not violated by a union proposal which would require agency management to amend an employee's position description if it decided to require the performance, on a regular basis, of additional duties not reasonably related to the duties set forth in the position description, and would therefore prevent management from relying on the general phrase "other related duties as assigned" for such purpose. By contrast, the union proposal herein would appear to prevent the activity from assigning certain duties to technicians even if their position descriptions were amended to include such duties.

Accordingly, the first paragraph of the union's proposal conflicts with section 7106(a)(2)(B) of the Statute, and the agency's allegation that the proposal is not within the duty to bargain must be sustained.

(2) The second paragraph of the union's proposal essentially provides that, with certain limited exceptions, "[w]hen a general cleanup is required, assignment will be made on an equitable basis . . . ." The union asserts that its proposal is not intended to limit or restrict management's right to assign work, but merely seeks "an equitable solution to cleanup and grounds keeping . . . ."

Section 7106(b)(2) of the Statute[7/] provides that management's exercise of any rights contained in section 7106(a) of the Statute does not preclude negotiations on the procedures which management officials will observe in exercising those rights. In this connection, the legislative history of the Statute reflects the intent to authorize unions to negotiate fully on such procedures, unless the negotiations would prevent management from acting at all.[8/] Based upon the record in the instant case, the essence of this portion

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7/ Section 7106(b)(2) of the Statute provides:

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating--
>
> . . . . . .
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section[.]

8/ As the Authority has previously noted, see National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District Office,

(Continued)

of the union's proposal is to ensure fairness and equity in the assignment of general cleanup and grounds maintenance duties -- not to obligate management to bargain about whether technicians, individually or collectively, will or will not perform such general cleanup and grounds maintenance.9/ That is, the second paragraph of the proposal merely provides that, once management has decided to require a general cleanup and has determined which employees will perform such duties, management will distribute specific assignments to such duties on a fair and equitable basis. Since there is no showing that a procedure to distribute cleanup assignments equitably will prevent management from acting at all in assigning general cleanup duties to technicians, the

(Continued)

Case No. O-NG-9, 1 FLRA No. 102 (Aug. 23, 1979), Report No. 15, at n. 9, and Case No. O-NG-20, supra note 7, at n. 5 of decision, the Joint Explanatory Statement of the Committee on Conference stated in the Conference Report which accompanied the bill which was enacted and signed into law, as follows:

> 3. Senate section 7218(b) provides that negotiations on procedures governing the exercise of authority reserved to management shall not unreasonably delay the exercise by management of its authority to act on such matters. Any negotiations on procedures governing matters otherwise reserved to agency discretion by subsection (a) may not have the effect of actually negating the authority as reserved to the agency by subsection (a). There are no comparable House provisions.
>
> The conference report deletes these provisions. However, the conferees wish to emphasize that negotiations on such procedures should not be conducted in a way that prevents the exclusive representative from negotiating fully on procedures. . . .

S. REP. No. 95-1272, 95th Cong., 2d Sess. 158 (1978).

9/ In this connection, the Authority notes that, while the first paragraph of the union's proposal restricted management's right to assign grounds maintenance work to technicians and was therefore found to be inconsistent with section 7106(a)(2)(B) of the Statute and hence nonnegotiable, there was a specific "exception to this [restriction] . . . when a general cleanup is required."

procedure in question is within the duty to bargain under section 7106(b)(2) of the Statute and the agency's allegation to the contrary must be set aside.

Issued, Washington, D.C., January 25, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Léon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

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FLRA Report of Case Decisions and FSIP Releases

Contents of Package

This package should include the following items:

Report of Case Decision Number 31

Report of Case Decision Number 32

If any of the above items are not included, please contact the Administrative Office, Federal Labor Relations Authority, 1900 E Street, NW., Room 7469, Washington, D. C. 20424 - telephone 202- 653-8040.

H.N.

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 31 REPORT OF CASE DECISIONS March 4, 1980

REPRESENTATION CASE

2 FLRA No. 81 (February 12, 1980)

Department of Energy, Bonneville Power Administration, Portland, Oregon, Assistant Secretary Case No. 71-4770(AC). Upon a petition filed by the union (Columbia Power Trades Council) under E.O. 11491, the Authority found that the case involved a nominal change which resulted from the transfer of the activity from the Department of the Interior to the Department of Energy and ordered the union's exclusive recognition be amended to conform to the existing circumstances. (Decision and Order Amending Recognition attached.)

NEGOTIABILITY CASES

2 FLRA No. 77 (January 31, 1980)

American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, Case No. 0-NG-40. The dispute involved 16 union proposals which, for various reasons, the agency alleged were nonnegotiable. Proposal I concerned the use of agency space and facilities for day care centers to be operated by the union. The Authority held that the proposal concerned a condition of employment and did not violate the agency's right to determine its budget under section 7106(a) of the Statute. Proposal II concerned union use of the agency's internal phone system for contract administration and other appropriate official business purposes. The Authority found this proposal concerned matters directly related to conditions of employment of unit employees and did not violate management's right to determine the technology of performing its work under section 7106(b)(1) of the Statute. Proposal III concerned the details of employees to higher grade or same grade positions based on seniority considerations, where the agency chose not to use competitive procedures. The Authority held that this proposal was within the scope of bargaining and did not violate either the agency's right to assign employees under section 7106(a)(2)(A) of the

Statute or its right to make selections for appointments under 7106(a)(2)(C). Proposals IV through VI concerned employee assignments on details to lower grade positions, loans, and temporary assignments, respectively, each based on seniority considerations. The Authority held that these proposals violated the agency's right to assign employees under section 7106(a)(2)(A) of the Statute. Proposal VII concerned the agency's employment mobility program and would require the agency, in the absence of volunteers, to select employees for reassignment based on inverse seniority. The Authority held that the proposal violated the agency's right to assign employees under section 7106(a)(2)(A) of the Statute. Proposals VIII and IX concerned equal employment opportunity. The Authority found that the proposals related to the conditions of employment of unit employees and did not violate section 7106(b)(1) or 7106(a)(1) of the Statute. Proposal X also involved EEO and the utilization of work force skills. More particularly, Subsection A related to the redesign of jobs where feasible, while Subsection C provided for an adequate number of overhires to substitute for indisposed employees. The Authority held that Subsection A of the proposal did not violate the agency's right to assign work under section 7106(a)(2)(B), but that Subsection C did violate the agency's right under section 7106(b)(1) to determine the numbers, types, and grades of employees assigned to a tour of duty. Proposal XI required, in part, that half of the EEO counselors at each installation would be selected from a list provided by the union. The Authority held that the disputed portion of the proposal violated the agency's right to assign work under section 7106(a)(2)(B) of the Statute. Proposal XII involved proposed procedures from mid-term negotiations. The Authority held that the proposal established a negotiable procedure under section 7106(b)(2) of the Statute. Proposal XIII required the agency, where employees subject to a RIF are entitled to an offer of reassignment to another position, to adhere to employee preferences in assigning them to the positions. The Authority held that the proposal violated the agency's right to assign employees under section 7106(a)(2)(A) of the Statute. Proposals XIV and XV required, respectively, that unit employees temporarily assigned to an encumbered but temporarily vacant higher graded bargaining unit position, and employees temporarily assigned to perform the duties of a higher graded position, be compensated at the rate of pay appropriated to the higher position after specified time periods. The Authority held that Proposal XV was within the scope of bargaining under section 7117 of the Statute and that neither Proposal XIV nor XV violated the law governing Federal employee compensation. Proposal XVI concerned the assignment of certain supervisory duties to employees on the basis of seniority. The Authority held that two subsections of this proposal violated the agency's right to assign work under

section 7106(a)(2)(B) of the Statute and another subsection violated the law governing employee compensation. Accordingly, the Authority set aside the agency's allegations that the union's proposals numbered I, II, III, VIII, IX, Subsection A of X, XII, XIV, and XV were nonnegotiable and sustained its allegations of nonnegotiability as to proposals IV, V, VI, VII, subsection C of X, XI, XIII, and XVI. (Decision attached.)

2 FLRA No. 78 (February 4, 1980)

American Federation of Goverment Employees, Local 3669, AFL-CIO and Veterans Administration Medical Center, Minneapolis, Minnesota, Case No. 0-NG-47. The dispute involved a union proposal that nurses be guaranteed every other weekend off. The Authority held that the proposal concerned a matter that was negotiable only at the agency's election under section 7106(b)(1) of the Statute. Accordingly, the Authority sustained the agency's allegation that the proposal was not within the duty to bargain. (Decision attached.)

2 FLRA No. 79 (February 4, 1980)

American Federation of Government Employees, AFL and Department of Health, Education, and Welfare, Social Security Administration, El Paso District, Texas, Case No. 0-NG-191. During the term of the parties' agreement, the union requested negotiations on certain statistical forms to be implemented for accountability of various groups of employees. The agency sought and apparently did not receive a specific proposal from the union. The union subsequently filed the instant appeal with the Authority but did not provide the Authority with any specific proposal on the matter on which it sought to negotiate. The Authority found that this case was identical, in all material respects, to the Alabama, ACT case, Case No. 0-NG-27 (Report No. 25), in which the Authority held that a petition that did not present a sufficiently specific and delimited proposal on which the Authority could render a negotiability decision did not meet the conditions for review under section 7117 of the Statute and section 2424.1 of the Authority's rules and regulations. Accordingly, the Authority dismissed the union's appeal in this case. (Decision attached.)

Appeal withdrawn:	Case No.	Date
	0-NG-212	January 29, 1980

STATEMENTS OF POLICY AND GUIDANCE

2 FLRA No. 80 (February 4, 1980)

Case No. 0-PS-8. The National Treasury Employees Union requested a major policy determination concerning the effect of certain provisions of the Civil Service Reform Act of 1978 on allegedly inconsistent provisions of collective bargaining agreements. The Authority determined that the request did not satisfy the standards governing the issuance of general statements of policy and guidance set forth in section 2427.5 of the Authority's rules and, therefore, the request could not be granted. (Decision attached.)

Attachments (5)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Department of Energy,
Bonneville Power Administration,
Portland, Oregon

Activity-Petitioner

and

Assistant Secretary
Case No. 71-4770(AC)

Columbia Power Trades
Council, AFL-CIO

Labor Organization

DECISION AND ORDER AMENDING RECOGNITION

Upon a petition for amendment of recognition duly filed under section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Daniel P. Kraus on December 1, 1978. Thereafter, on July 19, 1979, the hearing was reconvened before Hearing Officer Robert G. Mayberry.

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, in a matter such as here involved, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Hearing Officers made at the hearings and finds that no prejudicial error was committed. The rulings are hereby affirmed.

Upon the entire record in this case, including a brief filed by the Department of Energy, Bonneville Power Administration (Activity), the Authority finds: 1/

The Activity filed an Amendment of Certification (AC) petition seeking to amend the recognition granted the Columbia Power Trades Council (Council) by changing the name of the Activity from Bonneville Power Administration, Department of Interior, to Bonneville Power Administration, Department of Energy. The current collective bargaining agreement between the Activity and the Council dates from 1945 and contains the Activity's recognition of the Council as the exclusive representative of the Activity's hourly employees. The Council's unit of exclusive recognition has not been certified under the procedures of Executive order 11491, as amended. The Council asserts that the AC petition and the hearings in this matter are in violation of the savings clauses contained in Executive Order 10988, 2/ Executive Order 11491, as amended, 3/ and the Statute 4/ which preserve the continuity of the parties' negotiated agreement and the recognition contained therein. The Council argues that no harm would

1/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

2/ Section 15 of Executive Order 10988 provided:

> Nothing in this order shall be construed to annul or modify, or to preclude the renewal or continuation of, any lawful agreement heretofore entered into between any agency and any representative of its employees. Nor shall this order preclude any agency from continuing to consult or deal with any representative of its employees or other organization prior to the time that the status and representative rights of such representative or organization are determined in conformity with this order.

3/ Section 24 of Executive Order 11491, as amended, provides, in pertinent part:

> This Order does not preclude -- (1) the renewal or continuation of a lawful agreement between an agency and a representative of its employees entered into before the effective date of Executive Order No. 10988. . . .

4/ Section 7135 of the Statute provides, in pertinent part:

> (a) Nothing contained in this chapter shall preclude -- (1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter. . . .

ensue if the petition were denied, because the parties already have agreed to alter their negotiated agreement wherein the recognition is contained by including the name change, and because denial of the petition would maintain the existing collective bargaining relationship which is the purpose of the savings clauses.

The Activity was established by the Bonneville Project Act of 1937, as amended, 16 U.S.C. secs. 832, 832a, 832b-832i. Under that Act, the office of Administrator of the Activity was constituted an office in the Department of the Interior and was under the jurisdiction and control of the Secretary of the Interior. In accordance with the Act, the Administrator of the Activity was appointed by the Secretary of the Interior, and his functions under the Act could be exercised by the Secretary of the Interior.

When the Department of Energy was created in 1977, the Department of Energy Organization Act, 42 U.S.C. secs. 7101-7352, 7152, transferred to the Secretary of Energy all the functions of the Secretary of the Interior and officers and components of the Department of the Interior with respect to the Bonneville Power Administration. The Activity herein was preserved as a separate entity within the Department of Energy, headed by an Administrator appointed by the Secretary of Energy. This transfer has not effected any change in the function, purpose, or mission of the Activity. During the 1979 contract negotiations between the Activity and the Council, tentative agreement was reached to change references to "Department of the Interior" in the parties' collective bargaining agreement to "Department of Energy," where applicable.

At the hearing in this matter, the parties stipulated that the Council's unit continues to be appropriate, and that there is no question concerning representation currently pending. Further, the parties agree that granting the petition for amendment of recognition would not change the size or composition of the bargaining unit.

Under all of the foregoing circumstances, the Authority concludes that it is not precluded by the saving clauses of Executive Orders 10988 and 11491, as amended, or the Statute, from amending the recognition, as requested. Those provisions were intended to maintain the viability of provisions in an agreement entered into before January 17, 1962, which would otherwise be limited or proscribed by constraints subsequently imposed. 5/ An AC petition cannot alter the bargaining relationship between parties or the viability of provisions in their collective bargaining agreement. Rather, it is an appropriate vehicle to conform a recognition to existing circumstances resulting from such nominal or technical changes as a change in the name of the exclusive representative or a change in the name or location of the agency or activity.

Nor does the fact that the parties have agreed to alter their negotiated agreement by including the Activity's name change warrant dismissal of the AC petition. Amendment of recognition by mutual agreement of the parties is without legal significance if done apart from the policies, regulations, and procedures established by the Authority. Thus, the only means by which the subject recognition could be amended is by an AC petition.

5/ Cf. Interpretation of the Order, FLRC No. 78P-2 (August 9, 1978).

Accordingly, because the case involves only a nominal or technical change which resulted from the transfer of the Activity from the Department of the Interior to the Department of Energy, the Authority shall order that the Council's exclusive recognition be amended to conform to the existing circumstances resulting from the change in the designation of the Activity.

ORDER

IT IS HEREBY ORDERED that the exclusive recognition granted by the Activity to the Columbia Power Trades Council, AFL-CIO, and contained in the parties' current collective bargaining agreement, first negotiated May 2, 1945, be, and it hereby is, amended by substituting therein as the designation of the Activity: "Bonneville Power Administration, Department of Energy."

Issued, Washington, D.C., February 12, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

American Federation of
Government Employees, AFL-CIO

(Union)

and

Case No. O-NG-40

Air Force Logistics Command,
Wright-Patterson Air
Force Base, Ohio

(Activity)

DECISION ON NEGOTIABILITY ISSUES

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 et seq.).

Union Proposal I[1/]

ARTICLE 36 DAY CARE FACILITIES

The employer will provide adequate space and facilities for a day care center at each ALC. The union agrees to operate the day care center in a fair and equitable manner. The use of the facilities to be available to all base employees under the terms and conditions of the constitution and by-laws of such facility. The day care center will be self supporting, exclusive of the services and facilities provided by the employer.

Question Here Before the Authority

The question is whether, contrary to the agency's allegation, Union Proposal I concerns "conditions of employment" and, therefore, is within the general scope of the duty to bargain under section 7117 of the Federal Service Labor-Management

1/ The bargaining unit in this case is a command-wide unit.

Relations Statute.[2/] If so, the further question is whether the proposal is inconsistent with the right of the agency to determine its budget under section 7106(a) of the Statute, as alleged by the agency.[3/]

Opinion

Conclusion: Union Proposal I concerns a condition of employment and does not violate the agency's right to determine its budget under section 7106(a) of the Statute. Therefore, it is within the agency's duty to bargain under section 7117 of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the

2/ Section 7117(a)(1) of the Statute provides as follows:

> § 7117. Duty to bargain in good faith; compelling need; duty to consult
>
> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

The term "matters" as used in section 7117(a)(1) is explained by reference to the definition of "collective bargaining" in section 7103(a)(12) and "conditions of employment" in section 7103(a)(14) of the Statute:

> § 7103. Definitions; application
>
> . . . . . .
>
> (12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees . . . .
>
> . . . . . .
>
> (14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . .

3/ Section 7106(a)(1) of the Statute provides, in relevant part, as follows:

> § 7106. Management rights
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--
> (1) to determine the . . . budget . . . of the agency . . . .

agency's allegation that the disputed proposal is not within the duty to bargain is set aside.4/

Reasons: The agency takes the position that the requirement of the proposal that the agency provide space and facilities for a day care center to be run by the union is not a condition of employment affecting unit employees within the meaning of the Statute because the use of agency space for day care facilities has no connection with the employment relationship.

On the contrary, the availability of day care facilities affects the work situation and employment relationship in a variety of significant ways. For example, the existence and availability of such facilities can be determinative of whether an individual will be able to accept a job with an employer and of whether an employee will be able to continue employment with an employer. Thus, in addition to being an asset to management in recruiting and keeping a stable workforce,5/ such facilities can be a decisive factor in the maintenance by unit employees of an employment relationship. Furthermore, problems with child care arrangements can result in employee tardiness and absenteeism.6/ Thus, they have a detrimental effect on employee use of leave and on employee productivity, resulting in lowered morale and lessened ability to perform satisfactorily in relation to established expectations. It is also noted that, because of the increased number of families in which both parents work, as well as the necessity for single parents to work, the significance of day care facilities to the employment relationship has increased over recent years.7/

For the foregoing reasons, it is concluded that use of agency space for day care facilities is a condition of employment. It is directly related to the personnel policies, practices and matters affecting working conditions of unit employees and is within the scope of bargaining under section 7117 of the Statute.

4/ In so deciding that the proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

5/ Personnel Policies Forum: Turnover and Job Satisfaction, Survey No. 91, Bureau of National Affairs, Inc., Washington, D.C., 1970.

6/ Personnel Policies Forum: Absenteeism and Its Control, Survey No. 90, Bureau of National Affairs, Inc., Washington, D.C., 1970.

7/ See, for example, Hayghe, "Marital and family characteristics of workers, March 1977," 101 Monthly Labor Review 51 (Feb. 1978); Bednarzik and Klein, "Labor Force Trends: a synthesis and analysis," 100 Monthly Labor Review 3 (Oct. 1977); Johnson and Hayghe, "Labor force participation of married women, March 1976," 100 Monthly Labor Review 32 (June 1977); Grossman, ". . . Mothers in the labor force," 100 Monthly Labor Review 41 (June 1977); Hayghe, "Families and the rise of working wives--an overview," 99 Monthly Labor Review 12 (May 1976); Hayghe, "Marital and family characteristics of workers," 98 Monthly Labor Review 60 (Jan. 1975).

The agency next alleges that Union Proposal I violates its right to determine its budget under section 7106(a)(1) of the Statute because it would require the agency to bear the cost of the space and facilities provided for the day care center. The underlying assumption of this position appears to be that a proposal is inconsistent with the authority of the agency to determine its budget within the meaning of section 7106(a)(1) if it imposes a cost upon the agency which requires the expenditure of appropriated agency funds. Such a construction of the Statute, however, could preclude negotiation on virtually all otherwise negotiable proposals, since, to one extent or another, most proposals would have the effect of imposing costs upon the agency which would require the expenditure of appropriated agency funds. Nothing in the relevant legislative history indicates that Congress intended the right of management to determine its budget to be so inclusive as to negate in this manner the obligation to bargain.

There is no question but that Congress intended that any proposal which would directly infringe on the exercise of management rights under section 7106 of the Statute would be barred from negotiation.8/ Whether a proposal directly affects the agency's determination of its budget depends upon the definition of "budget" as used in the Statute. The Statute and legislative history do not contain such a definition. In the absence of a clearly stated legislative intent, it is appropriate to give the term its common or dictionary

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8/ See, for example, the statement of Congressman Clay, one of the proponents of the "Udall substitute," during the House debate on Title VII of the Civil Service Reform Act of 1978:

> Congressman CLAY:
>
> . . . . . .
>
> The Udall substitute contains a management rights clause substantially enlarged beyond that in the committee print. An important element in our agreeing to entrust such an expanded management rights clause to the hands of the new Authority is the example of the protection afforded the collective bargaining process by conscientious scrutiny of management claims of infringements on management rights, especially as found in the two 1978 decisions above. If the new Authority is faithful to these interpretative guidelines, the ultimate exercise of the specified managerial responsibility, the only subject exempted from the bargaining obligation, will be protected and the general obligation to bargain over conditions of employment will be unimpaired. However, it is essential that only those proposals that directly and integrally go to the specified management rights be barred from the negotiations. [Emphasis supplied.]

124 CONG. REC. H9638 (daily ed. Sept. 13, 1978).

See also the statement of Congressman Ford of Michigan, 124 CONG. REC. H9649 (daily ed. Sept. 13, 1978).

definition.9/ As defined by the dictionary, "budget" means a statement of the financial position of a body for a definite period of time based on detailed estimates of planned or expected expenditures during the period and proposals for financing them.10/ In this sense, the agency's authority to determine its budget extends to the determination of the programs and operations which will be included in the estimate of proposed expenditures and the determination of the amounts required to fund them. Under the Statute, therefore, an agency cannot be required to negotiate those particular budgetary determinations. That is, a union proposal attempting to prescribe the particular programs or operations the agency would include in its budget or to prescribe the amount to be allocated in the budget for them would infringe upon the agency's right to determine its budget under section 7106(a)(1) of the Statute.

Moreover, where a proposal which does not by its terms prescribe the particular programs or amounts to be included in an agency's budget, nevertheless is alleged to violate the agency's right to determine its budget because of increased cost, consideration must be given to all the factors involved. That is, rather than basing a determination as to the negotiability of the proposal on increased cost alone, that one factor must be weighed against such factors as the potential for improved employee performance, increased productivity, reduced turnover, fewer grievances, and the like. Only where an agency makes a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits can an otherwise negotiable proposal be found to violate the agency's right to determine its budget under section 7106(a) of the Statute.

Union Proposal I does not on its face prescribe that the agency's budget will include a specific provision for space and facilities for a day care center or a specific monetary amount to fund them. Furthermore, the agency has not demonstrated that Union Proposal I will in fact result in increased costs. On the contrary, the record is that the matter of the cost to the union for space and facilities is subject to further negotiation. It is not necessary, therefore, to reach the issue of whether the alleged costs are outweighed by compensating benefits. Consequently, Union Proposal I does not violate the right of the agency to determine its budget under section 7106(a) of the Statute.

Finally, it is noted that the agency has not adverted to problems which might arise in connection with implementation and administration of an agreement, should it include Union Proposal I, *vis a vis* provisions of applicable law and Government-wide rule or regulation11/ governing, *e.g.*, the use or allocation of space. Therefore, the Authority makes no ruling as to whether Union Proposal I is consistent with such law or regulation.

9/ *See* National Treasury Employees Union and U.S. Customs Service, Region VIII, San Francisco, California, Case No. O-NG-3, 2 FLRA No. 30, (Dec. 13, 1979), Report No. ____ at 4 of the decision.

10/ Webster's Third New International Dictionary (Unabridged), (1966).

11/ *Cf.* Federal Property Management Regulations, 41 C.F.R. § 101-17.2.

Union Proposal II

ARTICLE 28 USE OF OFFICIAL FACILITIES

Section 2. AF Telephone System

For purposes of administering this nationwide agreement and other appropriate official business, the local president, chief steward or their designees will have the use of nationwide Air Force telephone systems at the union office. It is understood that this telephone will be used for conducting proper labor-management relations activities. It will not be used for solicitation of membership or dues or other internal business of AFGE.

Question Here Before the Authority

The question is whether Union Proposal II is outside the agency's duty to bargain under section 7117 of the Statute[12/] because it does not relate to the conditions of employment of unit employees and, if not, whether it concerns a matter related to the technology of performing the work of the agency, which under section 7106(b)(1), is negotiable solely at the election of the agency.[13/]

Opinion

Conclusion: Union Proposal II is within the agency's duty to bargain under section 7117 of the Statute and does not violate the agency's right to determine the technology of performing its work under section 7106(b)(1) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that the proposal is not within the duty to bargain is set aside.[14/]

Reasons: The agency contends, first of all, that union use of the agency's internal phone system for contract administration purposes and other

12/ See note 2, supra.

13/ Section 7106(b)(1) of the Statute provides, in relevant part, as follows:

§ 7106. Management rights

. . . . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

(1) at the election of the agency, . . . on the technology . . . of performing work . . . .

14/ In so deciding that the proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

appropriate official business as provided in Union Proposal II is outside the duty to bargain under section 7117 of the Statute because it does not relate to the conditions of employment of unit employees. The contention is without merit.

It is clear from the language of the proposal that the basic purpose for which the phone system would be used by the union relates to the administration of the parties' collective bargaining agreement. As such, the phone system would be a tool to assist in the implementation of the conditions of employment established in that agreement. Thus, since the agency phone system is to be used for labor-management relations purposes, particularly, contract administration, which are matters directly related to the conditions of employment of unit employees, Union Proposal II is within the scope of the duty to bargain under section 7117 of the Statute.

The agency also contends that Union Proposal II interferes with its right under section 7106(b)(1) of the Statute to elect whether it will negotiate over the technology by which work is performed. This contention cannot be sustained. The proposal would not determine whether the agency will adopt a particular technology of performing work, e.g., utilize telephones as opposed to some other communications technology in the performance of its work. It merely provides that the union will have access to the system which the agency selected, and which is in existence, for use in connection with contract administration and other labor-management relations matters. Thus, Union Proposal II does not concern a matter which is negotiable only at the election of the agency under section 7106(b)(1). It is within the duty to bargain.

Union Proposals III - VI

ARTICLES 20 & 21 DETAILS & LOANS

Union Proposal III

Section 2. Details to Higher or Same Graded Positions

B. Unless the employer decides to use competitive procedures as outlined in Article ____ (Promotions), temporary assignment to higher or same grade/different duty positions shall be offered to qualified and available employees with requisite skills on the basis of seniority within the lowest organizational segment. If senior employees decline and it is necessary to detail an employee, the least senior employee shall be assigned.

Union Proposal IV

Section 3. Details to Lower Graded Positions

Details to lower grade positions will be rotated among qualified and available employees in inverse order of seniority.

Union Proposal V

Section 4. Loans

B. Selection of employees for loans will be equitably rotated among qualified and available employees with requisite skills in inverse order of seniority.

Union Proposal VI

Section 5. Temporary Assignments Outside the Bargaining Unit

B. Where conditions are less at the receiving location than is provided for by this contract, the employee's wishes to decline such assignment will be considered. Selection for such assignments will be equitably rotated in accordance with Section [3] of this Article.

Question Here Before the Authority

The question is whether the union's proposals violate the right of the agency to assign employees under section 7106(a)(2)(A) of the Statute and, with respect to filling positions, to make selections for appointments under section 7106(a)(2)(C) of the Statute.[15/] With respect to Union Proposal III, in particular, the question is also whether it is outside the scope of bargaining under section 7117 of the Statute[16/] to the extent that it applies to supervisory positions outside the unit.

15/ Section 7106(a)(2) of the Statute provides, in relevant part, as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws--

(A) to . . . assign . . . employees in the agency . . . ;

. . . . . .

(C) with respect to filling positions, to make selections for appointments from--

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source . . . .

16/ See note 2, supra.

Opinion

Conclusion: Union Proposal III is within the scope of bargaining under section 7117 and does not violate either the right of the agency to assign employees under section 7106(a)(2)(A) or its right to make selections for appointments under section 7106(a)(2)(C) of the Statute. Union Proposals IV - VI violate the right of the agency to assign employees under section 7106(a)(2)(A) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that Union Proposal III is not within the duty to bargain is set aside and its allegations that Union Proposals IV-VI are not within its duty to bargain are sustained.[17/]

Reasons: The agency alleges that Union Proposal III is outside the scope of bargaining under section 7117 of the Statute because the phrase "higher grade positions" as used in the proposal would include supervisory positions outside the bargaining unit. The agency has misunderstood the proposal. In the first place, Union Proposal III does not on its face apply to supervisory positions. Moreover, the record does not support the allegation that it does. Specifically, the unión states that its proposal is intended to apply only to higher graded positions within the bargaining unit. Thus, without deciding whether a proposal relating to details to supervisory positions would be outside the duty to bargain under the Statute, the agency in this case has not shown that Union Proposal III applies to such positions.

Next, the agency alleges with respect to each of the above-quoted proposals that it violates the right of the agency to assign employees under section 7106(a)(2)(A) of the Statute because each proposal compels the selection on the basis of seniority of an individual employee for the particular type of assignment specified in the proposal. This allegation has merit in connection with Union Proposals IV, V, and VI.

Union Proposals IV, V, and VI each establish a procedure for the selection of individual employees for assignment by the agency. In particular, under each of the proposals, once the agency has determined the particular qualifications[18/] and skills needed to perform the work of the position to which the employee will be assigned, and identified the employees in the unit who meet those requirements and would be available for assignment, selection from among the employees so identified of the particular employee who will be assigned must be on the basis of seniority. That is, depending on the circumstances, the most senior or the least senior employee from among the group of qualified, skilled, and available employees must be selected for the assignment. In thus

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17/ In so deciding that Union Proposal III is within the duty to bargain, the Authority makes no judgment as to the merits of that proposal.

18/ The union indicates that it does not intend the terms "qualified" and "with requisite skills" to mean that an employee must be fully qualified to fill the position on a permanent basis in order to be temporarily assigned under the proposals at issue herein. The proposals are interpreted as consistent with this intent.

compelling the selection of a particular individual for temporary assignment to another position, Union Proposals IV, V, and VI each directly interfere with the right of the agency to assign employees. The right to assign employees in the agency under section 7106(a)(2)(A) of the Statute is more than merely the right to decide to assign an employee to a position. An agency chooses to assign an employee to a position so that the work of that position will be done. Under section 7106(a)(2)(A) of the Statute, the agency retains discretion as to the personnel requirements of the work of the position, i.e., the qualifications and skills needed to do the work, as well as such job-related individual characteristics as judgment and reliability. Therefore, the right to assign an employee to a position includes the discretion to determine which employee will be assigned. (Clearly, the assignment of an employee to a position is distinguishable from the assignment of an employee to a shift.) A procedure for selecting an employee for assignment solely on the basis of seniority removes from the agency that discretion which, as indicated above, is an essential part of the decision to assign. Union Proposals IV, V, and VI compel the choice of the particular employee to receive an assignment solely on the basis of seniority and thereby directly interfere with the discretion to determine which employee to assign, in violation of section 7106(a)(2)(A) of the Statute.

Union Proposal III is distinguishable from Union Proposals IV, V, and VI. It specifically would allow the agency the option of utilizing competitive procedures to make the selection. Such competitive procedures reserve the agency's right to select the employee for promotion or assignment from among those available through any appropriate source.19/ Thus, under Union Proposal III, the agency retains the option of exercising its discretion to select a particular employee for assignment. Only if the agency chooses not to use competitive procedures must it select the individual on the basis of seniority. Because Union Proposal III preserves in this manner the agency's discretion to select, the proposal does not directly interfere with the agency's basic right to assign employees under section 7106(a)(2)(A) of the Statute.

Similarly, Union Proposal III would not be inconsistent with the right of the agency, in filling positions, to make selections for appointments under section 7106(a)(2)(C). That is, assuming, without deciding that the section applies to temporary assignments such as are involved in this proposal, Union Proposal III, as already stated, reserves to the agency the option of exercising its right to select an employee for assignment, from among those available, through any appropriate source.

19/ Federal Personnel Manual, chap. 335, subchap. 1-4, Requirement 4 provides as follows:

> Selection procedures will provide for management's right to select or not select from among a group of best qualified candidates. They will also provide for management's right to select from other appropriate sources, such as reemployment priority lists, reinstatement, transfer, handicapped, or Veterans Readjustment eligibles or those within reach on an appropriate OPM certificate. In deciding which source or sources to use, agencies have an obligation to determine which is most likely to best meet the agency mission objectives, contribute fresh ideas and new viewpoints, and meet the agency's affirmative action goals.

In summary, Union Proposal III does not conflict with the right of the agency to assign employees under section 7106(a)(2)(A) or with the agency's right to select under section 7106(a)(2)(C) of the Statute and, thus, is within the duty to bargain under the Statute. Union Proposals IV - VI conflict with the right of the agency to assign employees under section 7106(a)(2)(A) of the Statute and, thus, are excluded from the duty to bargain.

Union Proposal VII

ARTICLE 37 MISCELLANEOUS

Section Mobility

Prior to invoking the employment mobility requirement, the employer will seek volunteers from among employees of the same title, series and grade. If there are no volunteers, and the employer is required to unilaterally transfer employees within the unit, the employee with the least amount of seniority shall be selected first. The remaining employees shall be transferred in ascending seniority order.

Question Here Before the Authority

The question is whether Union Proposal VII violates the right of the agency to assign employees under section 7106(a)(2)(A) of the Statute.[20/]

Opinion

Conclusion: Union Proposal VII violates the agency's right to assign employees under section 7106(a)(2)(A) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that the proposal is not within the duty to bargain is sustained.

Reasons: The employment mobility requirement as stated in the proposal refers to the agency program under which employees may be permanently reassigned from one duty station to another. The proposal requires the agency, in the absence of a volunteer for such reassignment, to select the employee to be reassigned on the basis of inverse seniority. That is, the agency is required under the proposal, without the option to do otherwise, as in the case of Union Proposal III, to select for reassignment the least senior employee of the title, series, and grade of the position to be filled. For the reasons stated in the discussion of Union Proposals III - VI, by thus requiring the agency to select an employee for assignment on the basis of seniority the proposal obviates the discretion as to selection which is an essential part of the right to assign under section 7106(a)(2)(A) of the Statute. Accordingly, Union Proposal VII conflicts with the right of the agency to assign employees under section 7106(a)(2)(A) and, thus, is excluded from the duty to bargain.

20/ See, note 15, supra.

Union Proposals VIII and IX

ARTICLE 19 EQUAL EMPLOYMENT OPPORTUNITY

Union Proposal VIII

Section 2. Air Force Policy and Program Objectives

. . . [T]he employer will establish comprehensive plans and programs, both at command and installation levels, to attain the Air Force objectives.

Union Proposal IX

Section 3. EEO Plans of Action

Section 3 of Article 19 is a multipart proposal which establishes guidelines for the development of affirmative action plans at the command and installation levels. [The proposal is set forth in its entirety in Appendix A. The disputed portions are underscored.]

Questions Here Before the Authority

The questions are, first of all, whether matters relating to discrimination in employment, which are the subject of Union Proposals VIII and IX, are conditions of employment and, hence, are within the scope of the duty to bargain under section 7117 of the Statute;[21] if so, whether such matters pertain to the methods and means of performing the work of the agency, which, under section 7106(b)(1) of the Statute, are negotiable solely at the election of the agency; and, finally, whether particular portions of the proposals violate the right of the agency to determine its organization under section 7106(a)(1) of the Statute.[22]

21/ See note 2, supra.

22/ Section 7106 of the Statute provides, in relevant part, as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(1) to determine the . . . organization . . . of the agency . . . .

. . . . . .

(b) Nothing in this section shall preclude any agency and any labor oraganization from negotiating--

(1) at the election of the agency, . . . on the . . . methods, and means of performing work . . . .

Opinion

Conclusion: Union Proposals VIII and IX relate to the conditions of employment of unit employees and are within the scope of the agency's duty to bargain under section 7117 of the Statute. Moreover, the proposals do not concern matters related to the methods and means of performing the work of the agency and, therefore, do not violate section 7106(b)(1) of the Statute. Finally, the proposals do not violate the right of the agency to determine its organization under section 7106(a)(1). Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegations that the disputed proposals are not within the duty to bargain is set aside.23/

Reasons: The agency alleges, first of all, that the subject matter of Union Proposals VIII and IX, i.e., discrimination in employment, is not a condition of employment and therefore is outside the duty to bargain under section 7117 of the Statute. The agency's position is without support in the legislative history of the Statute.

Title VII of the bill reported out of the House Committee (H.R. 11280) contained a definition of the term "conditions of employment" which specifically excluded "policies, practices, and matters relating to discrimination in employment . . . ."24/ The bill passed by the House (the "Udall substitute") did not change this portion of Title VII of the Committee bill insofar as relevent to the issue herein.25/ Title VII of the bill introduced in and

23/ In so deciding that the union's proposals are within the duty to bargain, the Authority makes no judgment as to the merits of the proposals.

24/ Section 7103 of H.R. 11280 as reported by the House Committee on Post Office and Civil Service provided, in relevant part, as follows:

§ 7103. Definitions; application

. . . . . .

(14) 'conditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters--

(A) relating to discrimination in employment on the basis of race, color, religion, sex, age, national origin, or handicapping condition

. . . .

25/ Section 7103 of the bill (H.R. 11280) as passed by the House provided, in relevant part, as follows:

§ 7103. Definitions; application

. . . . . .

(Continued)

passed by the Senate (S. 2640) did not contain this provision or any provision having a similar effect.26/ The bill which was reported out of the House-Senate Conference Committee, and which was subsequently passed by Congress and signed into law by the President, deleted the portion of the House bill which excluded matters related to discrimination in employment from the definition of "conditions of employment."27/ The Conference Committee Report contains no explanation as to why this provision of the House bill was deleted. Nevertheless, it is reasonable to conclude that the deletion of this exclusion in the bill which was enacted into law indicates that Congress intended such matters to be within the scope of the duty to bargain. If Congress had intended to exclude matters related to discrimination in employment from the duty to bargain it simply could have enacted the House provision unchanged.

Thus, contrary to the agency's allegation, matters related to discrimination in employment, such as are involved in Union Proposals VIII and IX at issue herein, are within the scope of the duty to bargain under section 7117 of the Statute.

(Continued)

> 14) 'conditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters--
>
> (A) relating to discrimination in employment on the basis of race, color, religion, sex, age, national origin, or handicapping condition, within an agency subject to the jurisdiction of the Equal Employment Opportunity Commission . . . .

26/ Cf., in particular, section 7202, Definitions, of the bill (S. 2640) as passed by the Senate. See also section 7215, Representation rights and duties, of the Senate bill.

27/ Section 7103 of the Statute provides, in relevant part, as follows:

> § 7103. Definitions; application
>
> . . . . . .
>
> (14) 'conditions of employement' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters--
>
> (A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
>
> (B) relating to the classification of any position; or
>
> (C) to the extent such matters are specifically provided for by Federal statute.

The agency next alleges that Union Proposals VIII and IX, by requiring the agency to establish equal employment opportunity plans and specifying the contents of those plans, violate management's right, under section 7106(b)(1) to elect whether it will negotiate on the methods and means by which it performs its work. In particular, the agency argues that these proposals interfere with its right under section 7106(b)(1) to elect whether it will bargain over the ways in which it will fulfill its obligation under law[28/] and regulation[29/] to implement an equal employment opportunity program. However, assuming without deciding that an agency equal employment opportunity program constitutes a "method" or "means" within the meaning of the Statute, it is clear that an agency's development of such a program is not what is meant in section 7106(b)(1) by the phrase "performing work." The House-Senate Conference Committee Report discussed at length the language regarding methods and means of performing work in section 7106(b)(1) of the Statute. That discussion is of interest insofar as it illustrates some agency activities --e.g., auditing, awarding grants, and research and development-- which the conferees considered to constitute agency "work:"[30/]

> . . . By inclusion of this language, however, it is not intended that agencies will discuss general policy questions determining how an agency does its work. It must be construed in light of the paramount right of the public to as effective and efficient a Government as possible. For example, the phrase "methods and means" is not intended to authorize IRS to negotiate with a labor organization over how returns should be selected for audit, or how thorough the audit of the returns should be. It does not subject to the collective bargaining agreement the judgment of EPA about how to select recipients for the award of environmental grants. It does not authorize the Energy Department to negotiate with unions on which of the research and development projects being conducted by the Department should receive top priority as part of the Department's efforts to find new sources of energy.

The examples used have a common characteristic: they are each directly and integrally related to the accomplishment of the mission of the agency, i.e., those particular objectives which the agency was established to accomplish. In the instant case, the mission of the organizational segment of the agency involved is logistical support. The union proposals do not go to determining the way in which the agency will perform the particular activities by which it accomplishes that mission. That is, since the equal employment opportunity programs which are the subject matter of these proposals are not directly or integrally related to the provision of logistical support to the Air Force, there is no conflict between these proposals and the right of the agency under section 7106(b)(1) of the Statute to determine the methods and means of performing its work. Thus, the agency does not have the right to elect whether to bargain on the proposals.

28/ See 42 U.S.C. § 2000e - 16.

29/ See, e.g., 5 C.F.R. § 713.201 ff. and Federal Personnel Manual, chap. 713.

30/ S. Rep. No. 95-1272, 95th Cong., 2nd Sess. 154 (1978).

The remaining agency allegation is that these proposals conflict with its right to determine its "organization" under section 7106(a)(1) of the Statute. In particular, the agency contends that the proposals purport to assign specific responsibilities in the area of equal employment opportunity programs to specific agency organizational levels. As a consequence, the agency argues, the proposals are determinative of the functional structure of the agency.

On the contrary, as indicated above, matters related to discrimination in employment are within the agency's duty to bargain under the Statute. That is, an agency is obligated to negotiate with an exclusive representative on those matters, unless otherwise prohibited by law and regulation, at the level of the exclusive recognition.31/ Moreover, in circumstances which involve a comprehensive unit, such as the present case,32/ the agency is also under an obligation to negotiate at the level of the exclusive recognition with respect to the particular conditions of employment which will apply at subordinate activities within the unit. That is, the parties may provide in a master agreement at the level of recognition for the negotiation of supplemental agreements at the local level regarding matters pertaining to the conditions of employment of unit employees at the local level. For example, if the particular agency actions at issue in a proposal could be negotiated, as relevant herein, at the command level, to be performed by the agency at the command level, the Statute does not preclude the parties from providing in a master agreement at the command level for these actions to be performed at the level of subordinate activities within the unit.

Thus, the proposals at issue herein rather than determining the organizational structure of the agency merely require the agency to negotiate the particular activities it will perform at the command level, which is the level of exclusive recognition, in the area of equal employment opportunity and at subordinate levels of the command within the unit. Therefore, these proposals do not conflict with the right of the agency to determine its "organization" under section 7106(a)(1) of the Statute and are within the duty to bargain under the Statute.

31/ Section 7114 of the Statute provides, in relevant part, as follows:

§ 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering all employees in the unit. . . .

. . . . . .

(4) Any agency and any exclusive representative in any appropriate unit, through appropriate representatives, shall meet and negotiate in good faith for purposes of arriving at a collective bargaining agreement. . . .

32/ See note 1, supra.

Union Proposal X

ARTICLE 19 EQUAL EMPLOYMENT OPPORTUNITY

Section 5. Utilization of Workforce Skills
The employer will strive to utilize, under current regulations and circumstances, the present skill of each member of the workforce.

A. Procedures for skills utilization will include the redesigning of jobs where feasible.

. . . . . .

C. Where authorized, installation commanders will provide an adequate number of overhires, which will permit individuals with physical or mental handicaps, chronic ailments, illnesses or injuries, and single heads of families who have dependents, to utilize sick or annual leave, or LWOP, to handle their responsibilities to themselves and/or dependents without undue impact upon the organizational mission. Supervisors will grant leave in all cases where the need is clearly documented on the request for leave; and use of leave for these purposes will not constitute a basis for leave abuse charges. [Only the underlined portions of the proposal are in dispute.]

Questions Here Before the Authority

The questions are whether, as alleged by the agency, subsection A of Union Proposal X violates the right of the agency to assign work under section 7106(a)(2)(B) of the Statute and whether, as further alleged by the agency, subsection C of the proposal concerns a matter pertaining to the numbers, types, and grades of employees assigned to a tour of duty, which, under section 7106(b)(1) of the Statute, is negotiable solely at the election of the agency.33/

33/ Section 7106 of the Statute provides, in relevant part, as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws--

(B) to assign work . . . .

. . . . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

(Continued)

Opinion

Conclusion: Subsection A of Union Proposal X which relates to the redesign of jobs does not violate the agency's right to assign work under section 7106(a)(2)(B), and is within the duty to bargain;[34/] but subsection C of the proposal which relates to an adequate number of overhires violates the agency's right to determine the numbers, types, and grades of employees assigned to a tour of duty under section 7106(b)(1) of the Statute and, thus, is outside the duty to bargain. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that Union Proposal X is not within the duty to bargain is set aside in part and sustained in part.

Reasons: The assignment of work to employees or positions is a right reserved to management under section 7106(a) of the Statute. The redesign of a position or a job requires, among other things, a determination of the work which will be assigned to the position or employee involved. Thus, a proposal to redesign a position or job in a particular manner would conflict with management's right to assign work by prescribing the work to be assigned. Subsection A of Union Proposal X, however, does not require the agency to assign or refrain from assigning any particular work. Rather, subsection A merely provides that job redesign would be used as one of the procedures for best utilizing the present skills of unit employees, where this would be feasible. This general operating principle, identifying job redesign as one of the alternative procedures which may be followed where it is feasible to do so, clearly does not infringe on the right of the agency to assign work and, thus, is within the duty to bargain.[35/]

(Continued)

> (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty . . . .

34/ In so deciding that subsection A of the subject proposal is within the duty to bargain, the Authority makes no judgment as to the merits of that portion of the proposal.

35/ It is noted that this portion of the proposal is entirely consistent with Federal equal employment opportunity policy, as expressed in the Federal Personnnel Manual (FPM) concerning the maximum utilization of skills. In this regard, FPM, chap. 713, subchap. 2-4(c) provides in pertinent part:

> c. Maximum utilization of skills. The agency shall utilize to the fullest extent the present skills of its employees. Where feasible, the agency shall redesign jobs so that tasks not requiring the full utilization of the incumbents' skills be assigned to jobs with lower skill requirements. This will afford greater opportunity to employees to perfect their skills, while opening up job opportunities for persons with lower skills. . . .

Turning now to subsection C of Union Proposal X relating to an adequate number of overhires, the express language of this portion of the proposal would determine that each installation must have such overhires and, therefore, directly concerns the numbers of employees assigned to organizational subdivisions of the agency. In this regard, section 7106(b)(1) of the Statute provides that the number of employees may be negotiated only at the election of the agency. In this case, the agency has elected not to negotiate on such matters and, thus, the agency's allegation that this portion of the proposal is not within the duty to bargain is sustained.36/

Union Proposal XI

ARTICLE 19 EQUAL EMPLOYMENT OPPORTUNITY

Section 6. EEO Counselors

The employer agrees to provide at each installation trained EEO counselors, who will be available and accessible to all employees, wherever their work station. Half of the Counselors will be selected from a list provided by the union. [Only the underlined portion of the proposal is in dispute.]

Question Here Before the Authority

The question is whether the disputed portion of Union Proposal XI violates management rights under section 7106(a)(2)(B) of the Statute and is, therefore, as the agency alleges, not within the duty to bargain.

Opinion

Conclusion: Union Proposal XI violates the right of the agency to assign work under section 7106(a)(2)(B) of the Statute.37/ Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that the proposal is not within the duty to bargain is sustained.

Reasons: Agency employees selected as EEO Counselors perform the duties associated with EEO counseling either as their total work assignment or in addition to the other duties which are regularly assigned to them and which comprise their appointed positions. Thus, the determination to select a particular employee as an EEO counselor is in reality a decision to assign certain duties, in this situation EEO counselor duties, to that employee.

36/ Cf. National Treasury Employees Union, Chapter 66 and Internal Revenue Service, Kansas City Service Center, Case No. O-NG-19, 1 FLRA No. 106, (Sept. 13, 1979), Report No. 16.

37/ See note 33, supra.

In this regard, the agency retains the right under section 7106(a)(2)(B) of the Statute to assign work to positions or employees. The disputed portion of the proposal, however, mandates that the agency assign EEO counselor duties to a certain percentage of employees selected by the union, to the exclusion of other agency employees. Thus, since the disputed portion of the proposal directly prescribes the assignment of certain duties to particular employees, and, in effect, precludes the assignment of those duties to other employees, it conflicts with section 7106(a)(2)(B) of the Statute. Hence, the agency's allegation that the disputed portion of the proposal is not within the duty to bargain is sustained.

Union Proposal XII[38/]

ARTICLE 33 NEGOTIATIONS DURING THE TERM OF THIS ACREEMENT

Section 3. Mid-Term Negotiations

. . . . . .

A. Mid-Term Negotiations at Command AFLC Level

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7. Should the union choose to submit the issue to the FSIP the employer will not, except for overriding exigencies or unreasonable delay of implementation of management rights, implement the change before the Panel has completed its work.

8. Should the employer unilaterally implement the change in accordance with Section 7 above before the Panel has completed its work the decision of the Panel will be applied retroactively to the date of implementation.

. . . . . .

B. Mid-Term Negotiations at Local Level

. . . . . .

6. Should the parties fail to reach agreement after mediation, the employer may unilaterally implement change, provided a minimum of 15 days advance notice has been given to the union. If the union chooses to submit the issue to the Federal Service Impasses Panel during this period, except for overriding exigencies or unreasonable delay of implementation of management rights, the employer will not implement the change and will maintain the status quo until the Panel has completed its dispute resolution process.

38/ The portions of the proposal set forth herein are those which are in dispute. The whole proposal is set forth in Appendix B.

7. Should the employer unilaterally implement the change in accordance with Section 6 above, the decision of the Panel will be applied retroactively to the date of implementation.

Question Here Before the Authority

The question is whether the portions of the proposed procedures for mid-term negotiations set forth above would violate management rights under section 7106 of the Statute, as alleged by the agency.

Opinion

Conclusion: The disputed portions of Union Proposal XII herein establish a negotiable procedure under section 7106(b)(2) of the Statute.[39/] Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that those portions of Union Proposal XII are not within the duty to bargain is set aside.[40/]

Reasons: The agency objects, first of all, to that aspect of Union Proposal XII which would require, in effect, that the agency hold in abeyance implementation of any proposed change in conditions of employment during the term of the agreement pending the decision of the Federal Service Impasses Panel on matters referred to it by the parties, except in circumstances involving an "overriding exigency" or "unreasonable delay" of implementation of management rights. The agency argues that this requirement would result in unreasonable delays in the exercise of any management right which might be involved and that, for this reason, these provisions of the proposed procedures are contrary to the Statute. The agency position is without merit.

First, the plain language of the proposal would permit the agency to implement any change in conditions of employment in circumstances where holding the

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39/ Section 7106(b)(2) of the Statute provides as follows:

§ 7106. Management rights

. . . . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

. . . . . .

(2) procedures which management officials will observe in exercising any authority under this section . . . .

. . . . . .

40/ In so deciding that the proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

action in abeyance as required by the proposal would result in unreasonable delays in the exercise of management rights. Moreover, contrary to the agency's argument that the Statute imposes a more stringent standard of delay than that in the proposals, the Authority, in the Dix-McGuire Exchange case,41/ rejected the contention that the statutory standard for determining whether a proposed procedure is within the duty to bargain is whether it would result in an unreasonable delay in the implementation of management rights. In its decision, the Authority stated as follows:42/

> . . . The legislative history of the Statute, as it pertains to subsection (b)(2), reveals, first of all, that the Committee on Conference, in adopting the bill which subsequently was enacted by Congress and signed into law by the President, specifically rejected a provision of the Senate bill (S. 2640) which provided that negotiation on procedures should not "unreasonably delay" so as to "negate" the exercise of management's reserved rights. The conclusion is justified, therefore, that Congress did not intend subsection (b)(2) to preclude negotiation on a proposal merely because it may impose on management a requirement which would delay implementation of a particular action involving the exercise of a specified management right. Rather, as the Conference Report indicates, subsection (b)(2) is intended to authorize an exclusive representative to negotiate fully on procedures, except to the extent that such negotiations would prevent agency management from acting at all. That is, insofar as it is consistent with the right of management ultimately to act, Congress intended the parties to work out their differences with regard to procedures in negotiations. [Footnotes omitted.]

Thus, the statutory standard is whether adoption of the proposed procedure, through negotiations, will prevent the agency from acting at all. The proposal in the Dix-McGuire Exchange case required the agency to stay the suspension or removal of an employee pending completion of the contractual grievance procedure, including arbitration. The Authority determined that while the proposal would delay agency action, it would not prevent the agency from acting at all and found this proposal to be within the duty to bargain. The proposal in this case, like that in Dix-McGuire Exchange, would require the agency to hold in abeyance its proposed action--in this instance, pending completion of the procedures of the Panel. However, the proposal herein, as distinguished from Dix-McGuire Exchange, would permit the agency to implement that proposed action before the completion of the Panel procedures in circumstances which involve an "overriding exigency" or an "unreasonable delay" in the exercise of management rights. As such, the proposal at issue herein is less restrictive of management rights than that in Dix-McGuire Exchange and, a fortiori, would not prevent the agency from acting at all pursuant to those rights.43/ In this

41/ American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey, Case No. O-NG-20, 2 FLRA No. 16, (Nov. 29, 1979), Report No. ____.

42/ Ibid at 2-4 of the decision.

43/ Cf. National Treasury Employees Union, Chapters 103 and 111 and U.S. Customs Service, Region VII, Case No. O-NG-16, 2 FLRA No. 15, (Nov. 29, 1979), Report No. ____.

respect, then, it is a negotiable procedure under section 7106(b)(2) of the Statute.

The agency objects, further, to that portion of the union's proposal which (in those situations where the agency, consistent with the "overriding exigency" and "unreasonable delay" provisions, implements its proposed action prior to the completion of the Panel procedures) requires that the decision of the Panel be applied retroactively to the date of the agency action. Specifically, the agency argues that the retroactivity requirement would cancel the actions taken in the exercise of any management right involved. To the extent that this is an argument that the retroactivity requirement would have the effect, contrary to the Statute, of preventing the agency from acting at all, it misconstrues the effect of the proposal. The plain language of this part of the proposal and the record herein indicate that the proposal is not intended to nullify the action itself, i.e., the exercise of the management right, but to retroactively apply the Panel decision as to the procedures to be followed in the implementation of the action and the appropriate arrangements to be made for employees adversely affected by the action. In this respect, the effect of the retroactivity requirement would be analogous to the effect of a judgment that an agency must re-run, e.g., a reduction in force or a promotion action in order to comply with legal or regulatory requirements. That is, the right of the agency to take the action is not in question, only the manner in which the action was implemented. Thus, the requirement that the decision of the Panel be applied retroactively as of the date of the agency action would not in and of itself prevent the agency from acting at all in the circumstances described in the proposals.

Moreover, neither the language of the proposal nor the record in the case indicates an intent for the proposal to require that retroactive application of the decision of the Panel must occur if such application would be inconsistent with applicable law and regulation.

Thus, for the foregoing reasons, Union Proposal XII establishes a negotiable procedure under section 7106(b)(2) of the Statute which management officials will observe in the exercise of management rights during the term of the agreement.

Union Proposal XIII

ARTICLE 16 REDUCTION IN FORCE

Section 6.

B. Prior to any placement actions, the employer will establish lists of positions by grade, title, series, career potential and location into which personnel may be entitled to bump or retreat. Lists will contain all vacant positions and will be updated weekly. These lists will be made available to all individuals determined to be affected by the RIF. All affected employees will be offered an opportunity to list the preferred positions desired in each grade, in order of preference. The employer will assign employees, in retention order, to positions of preference for which qualified, in the order of preference, unless there are persuasive

mission related reasons for not doing so, in which case the employer will provide the reasons in writing to the union and to the employee.

Question Here Before the Authority

The question is whether Union Proposal XIII violates the right of the agency to assign employees in the agency under section 7106(a)(2)(A) of the Statute.[44/]

Opinion

Conclusion: Union Proposal XIII violates the agency's right to assign employees under section 7106(a)(2)(A) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that the proposal is not within the agency's duty to bargain is sustained.

Reasons: Union Proposal XIII requires the agency, where there are employees subject to a reduction in force (RIF) who are entitled under applicable regulations[45/] to an offer of assignment to another position, to assign those employees to the positions to which they are entitled on the basis of employee preference. As a practical matter, the proposal would apply primarily in circumstances where there are vacant positions for which an employee is qualified[46/] and where there is more than one position to which the employee has assignment rights,[47/] since these are the circumstances under applicable regulations in which the agency has discretion as to the reassignment of employees in a reduction in force.[48/] However, in these circumstances, the proposal would compel the agency to assign an employee to a position on the basis of that employee's preference. That is, the agency would be required to forego its discretion as to the selection of the employee to be assigned to that position. The Authority held, in connection with its consideration of Union Proposals III - VII above, that the right of the agency to assign employees includes discretion as to the selection of the particular employee to be assigned. Thus, as discussed more fully in connection with Union Proposals III-VII, herein, since Union Proposal XIII, in the circumstances described, would compel the selection of a particular employee for assignment, it interferes with the discretion which is an essential part of the right to assign under section 7106(a)(2)(A) of the Statute. Therefore, it is outside the duty to bargain.

44/ See note 15, supra.

45/ See 5 C.F.R. §§ 351.701 - 351.705. See also Federal Personnel Manual, chap. 351, subchap. 7.

46/ 5 C.F.R. § 351.201(b). See also Federal Personnel Manual, chap. 351, subchap. 7-1.b.

47/ See Federal Personnel Manual, chap. 351, subchap. 7-3.c.(3).

48/ See Federal Personnel Manual, chap. 351, subchap. 7-3.c.(1) - (2).

Union Proposals XIV and XV

ARTICLE 13 TEMPORARY PROMOTIONS

Union Proposal XIV

Section 2. Temporary Promotion to Encumbered Positions

When an employee is temporarily assigned to an encumbered, but temporarily vacant bargaining unit position of a higher grade for 30 days, the employee will receive the rate of pay for the higher position to which assigned, commencing on the 31st day.

Union Proposal XV

Section 3. Assignment of Duties of a Higher Graded Position

When an employee is temporarily assigned the duties of a higher graded position for 30 consecutive days, the employee will receive the rate of pay for the higher position to which assigned, commencing on the 31st day.

Questions Here Before the Authority

The questions are whether Union Proposal XV is outside the scope of bargaining under section 7117 of the Statute[49/] to the extent that it applies to supervisory positions and whether Union Proposals XIV and XV, as they apply to unit positions, are contrary to the law governing compensation of Federal employees.[50/]

Opinion

Conclusion: Union Proposal XV is within the scope of bargaining under section 7117 of the Statute and Union Proposal XIV and Union Proposal XV do not conflict with the law governing compensation of Federal employees. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that the disputed proposals are not within the duty to bargain is set aside.[51/]

Reasons: These two proposals require, respectively, that unit employees temporarily assigned to an encumbered but temporarily vacant higher graded position and temporarily assigned to perform the duties of a higher graded

49/ See note 2, supra.

50/ The agency cites United States v. Testan, et al., 424 U.S. 392, 406 (1976) and Dianish, et al. v. United States, 183 Ct. Cl. 702 (1968).

51/ In so deciding that the proposals are within the duty to bargain, the Authority makes no judgment as to the merits of the proposals.

position be compensated at the rate appropriate to such higher graded positions after certain specified time periods. The agency alleges with respect to Union Proposal XV that it is outside the duty to bargain to the extent that the higher graded positions referred to therein are intended to include supervisory positions outside the bargaining unit. The allegation cannot be sustained.

First of all, the proposal does not on its face apply to supervisory positions. However, even assuming that it did, the proposal would be within the duty to bargain under the Authority's decision in the Naval Air Rework Facility case[52/] regarding a substantially identical proposal:[53/]

> In this regard, the act called for by the proposal, of providing compensation to the employee at the level commensurate with the job he or she is performing (i.e., temporarily promoting the employee), simply is a ministerial act implementing management's decision to select and assign the employee involved to the higher graded position. As previously indicated, nothing in the proposal would interfere with management's right to make such decision to select and assign. Thus, nothing in the proposal would impair management's right to determine whether and whom temporarily to promote.

Similarly, the agency argument that these proposals, contrary to law, would require the agency to compensate employees, in the circumstances specified in the proposals, at the rate of pay of the higher graded positions without having temporarily promoted them to these positions, is without merit.

The agency is correct in its statement of the law as requiring promotion as a prerequisite to the higher compensation.[54/] However, the agency has failed to show that the proposals would require it to pay employees the higher rate without having temporarily promoted those employees or that temporary promotions under the circumstances specified in the proposals would be contrary to law or regulation. On the contrary, absent an indication in the proposal itself or in the record in the case that the union intended otherwise, given the law as stated above, the requirement that the employee receive the higher rate of pay is tantamount to a requirement that the employee who has been selected by management be temporarily promoted to the higher graded position.

52/ Methods and Standards Association and Naval Air Rework Facility, Naval Air Station, Pensacola, Florida, Case No. O-NG-41, 2 FLRA No. 34, (Dec. 21, 1979), Report No. ____.

53/ The proposal at issue in the Naval Air Rework Facility case provided as follows:

> Unit employees who are non-competitively, temporarily assigned the duties of a higher grade position over a period of five days or more will receive the pay authorized for the higher grade position.

54/ See, e.g., Coleman v. United States, 100 Ct. Cl. 41 (1943); Desmond v. United States, 201 Ct. Cl. 507 (1973); 54 Comp. Gen. 263 (1974); 57 Comp. Gen. 336 (1978).

In this regard, as is implicit in the Naval Air Rework Facility case, cited above, unless the proposal specifically provides or the record indicates otherwise, the requirement that an employee temporarily serving in or performing the duties of a higher graded position be paid the rate of pay of the higher graded position must be interpreted as consistent with applicable law, that is, as requiring that the employee be temporarily promoted to that position.

Moreover, the agency has not shown that a temporary promotion in the circumstances described in the proposals in any other manner would be contrary to law and regulation. In particular, the agency has provided no evidence to support its claim that Union Proposal XIV could be interpreted to require the establishment of another position. Certainly, the proposal itself does not require such action for implementation and the agency produces no evidence to support a conclusion that it would be precluded by law or regulation from temporarily promoting an employee to an encumbered but temporarily vacant position. In short, the agency has not demonstrated that the proposals, by requiring the agency to compensate employees at the rate of a higher graded position under the circumstances specified, are contrary to law and regulation. Therefore, the proposals are within the agency's duty to bargain under the Statute.

Union Proposal XVI

ARTICLE 13 TEMPORARY PROMOTIONS

Section 5. Alternate Foreman Selection

An alternate foreman/supervisor is a production employee of journeyman grade level selected by the foreman/supervisor to ensure continuity of functions while the foreman/supervisor is absent.

(a) Selection of alternate foreman/supervisors shall be rotated among journeymen and workleader employees volunteering to act in this capacity. Designations will be equitably rotated on a seniority basis (service computation date). The initial selection will be the employee with the most seniority, unless the employee declines. The remaining employees will be utilized in descending order according to their seniority.

(b) Each employee so designated will serve until they have accumulated 30 days of experience of acting foreman/supervisor. Employees who are designated as an alternate foreman/supervisor will have this assignment recorded by the employer on the employee's AF 971 file. Every accumulative 30 workdays in which the employee has served as acting foreman/supervisor will be certified on an SF 52 form and recorded on the employee's official personnel file.

(c) Temporary promotions will be made when employees perform the duties of these positions for 30 days or more.

Questions Here Before the Authority

The questions are, first of all, whether subsections (a) and (b) of Union Proposal XVI violate management rights under section 7106(a)(2) of the Statute, and, secondly, whether subsection (c) violates the law governing compensation of Federal employees, as alleged by the agency.

Opinion

Conclusion: Subsections (a) and (b) of Union Proposal XVI violate the right of the agency to assign work under section 7106(a)(2)(B) of the Statute,[55/] and subsection (c) of the proposal violates the law governing compensation of Federal employees.[56/] Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegations that Union Proposal XVI is not within the duty to bargain is sustained.

Reasons: According to the record in this case, there is no established position of "alternate foreman/supervisor." Rather, it appears that the term refers to circumstances in which certain of the duties incident to an established supervisory position are assigned to unit employees on an ad hoc basis during the temporary absence of the supervisor. Subsections (a) and (b) of Union Proposal XVI concern the selection of unit employees to perform the subject supervisory duties. In particular, they would compel the assignment of certain supervisory duties to employees on the basis of seniority or, once such duties were assigned, prevent the assignment of those duties to other employees before a specified time period had elapsed. In other words they would eliminate the discretion inherent in the right to assign work under section 7106(a)(2)(B) of the Statute. The right to assign work includes discretion as to the particular employee to whom it will be assigned. Thus, since subsections (a) and (b) of the proposal would directly interfere with the agency's right to assign work to particular employees, the agency's allegation that these sections are not within the duty to bargain is sustained.

Moreover, as previously indicated, the term "alternate foreman/supervisor" does not refer to an established position but to the performance of some of the duties incident to a supervisory position by unit employees on an ad hoc basis. It is well settled that a Federal employee is entitled to receive only the salary of the position to which he or she was appointed even though he or she may have performed duties of another position.[57/] In the instant case, however, unit employees are merely performing some of the duties incident to a supervisory position on an ad hoc basis rather than being assigned to an

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55/ See note 33, supra.

56/ United States v. Testan, et al., 424 U.S. 392, 406 (1976); Dianish, et al. v. United States, 183 Ct. Cl. 702 (1968).

57/ See Federal Personnel Manual, chap. 511, subchap. 1-6; 55 Comp. Gen. 1062 (1976); United States v. Testan, et al., 424 U.S. 392, 406 (1976).

established supervisory position. No basis exists under Federal personnel law to support a temporary promotion in these circumstances. Therefore, subsection (c) of Union Proposal XVI, by requiring such temporary promotion is inconsistent with applicable law. Consequently, the agency's allegation that subsection (c) of the proposal is not within the duty to bargain is sustained.

Issued, Washington, D.C., January, 31, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

Attachments:

Appendices

APPENDIX A

Union Proposal IX

ARTICLE 19 EQUAL EMPLOYMENT OPPORTUNITY

Section 3. EEO Plans of Action

Each AFLC subordinate activity will develop appropriate plans of action which will specifically address: (1) All personnel functions which impact equal employment opportunity for any employees; (2) existing problems; and (3) forseen future problem areas. Union input to these plans will be requested at appropriate times in their development, and ideas from union representatives will be solicited concerning various aspects of the plans as they are developed. Negotiations of these plans will be scheduled promptly when requested by the union.

A. The AFLC Plan. The AFLC EEO Plan will contain provisions to insure that commanders at all activities will develop comprehensive plans which will reflect a full commitment toward the realization of full equal employment opportunity for all their employees. The AFLC plan will state command policies and objectives and establish command goals. (1) It is agreed that the command will, at least quarterly, review reports on installation and command progress toward realization of all objectives and goals, and will provide assessments of progress, and appropriate guidance to subordinate commanders on a timely basis. Such reports will be forwarded to the Council President within 10 days of service on Local Commander.

(2) Annually, the command will consolidate data of the year's progress, and issue assessments of progress toward the command's objectives and goals, and those of each subordinate commander, with appropriate further guidance. A copy of the report will be furnished to the Council President.

(3) The AFLC Plan will direct activity commanders to develop plans which will reflect the commitment of their management to all Air Force policies and objectives in support of full equal employment opportunity. These policies and objectives will direct the inclusion of provisions to:

a. Make every effort to eliminate every vestige of local prejudice and discrimination.

b. Issue a statement to employees indicating management's commitment to achieve that goal.

c. Take actions to assure that all sources of qualified minority group applicants understand the EEO Program.

d. Develop plans to establish and maintain contacts with the minority work force and community groups and to participate in cooperative action with schools, universities, and other public and private groups to improve employment opportunities and conditions affecting employability.

e. Insure vigorous performance in the positive application of the policy of equal opportunity by supervisory and managerial personnel who direct the activities of employees covered by this agreement.

f. Make maximum effort to assure all employees and recognized employee organizations understand the policies and program.

g. Consider and adjudicate complaints of discrimination carefully, justly, and expeditiously.

h. Brief new key staff personnel and emphasize their responsibility for implementing the EEO Program.

i. Include the subject of equal employment opportunity in all supervisory development programs.

j. During orientation programs, insure all persons understand all personnel actions are on a merit basis without regard to race, color, religion, sex, or national origin.

k. Seek the support and cooperation of management with EEO counselors and other officials in bringing about informal resolutions of complaints.

B. Activity EEO Plans of Action. Development of each activity's EEO annual plan of action will be done in a timely manner, will be complete, comprehensive, and adequate in response to the assessments of EEO problems. Prior to implementation, it will be submitted to the union for review. The union may submit proposals on the plan and shall negotiate the plan in accordance with Article Supplemental Agreements. The parties agree that each activity EEO Plan will contain information which will focus on specific personnel functions and existing problems, and foreseen potential problems. It will specifically examine the following areas:

1. Adequate organization and resources to administer the command EEO program in a positive and effective manner, with criteria for staffing that will assure effective performance in all program aspects, including affirmative action and processing of discrimination complaints.

2. An analysis of relevant statistical data on the agency workforce to show composition of the agency's and subordinate organization's workforce by racial, ethnic and sex groupings at the various grade levels.

3. Data to show the composition of each major occupation (job series) by racial, ethnic and sex groupings at the various grade levels.

4. A survey of current skills and training of the command's workforce, and the labor market which the installation uses as its recruiting source, to determine the availability of employees, including minorities and women, having skills required to meet staffing needs. This data will also be available for use in identifying under-utilized employees so they may be considered for positions which will make full use of their skills, training and experience.

5. Turnover information analyzing voluntary and involuntary actions, to determine the characteristics of those employees leaving Air Force employment and those hired as replacements.

6. The number and kinds of jobs expected to be filled in the coming year, based on a review of past turnover rates in each of the major occupations, and anticipated expansion or contraction of programs.

7. Career progression by organization and grade to ascertain whether the percentages of minority and non-minority eligibles for promotion are appearing on promotion certificates and whether an appropriate number are being selected.

8. Training opportunity allocations to insure they are being allotted on an equitable basis and the results of such training experiences are considered equitably for minority and non-minority career progression.

9. Selection for jobs to ascertain whether irrelevant characteristics may discriminate against a particular group of employees.

10. Utilization of information by occupational area and grades to determine whether different groups are not being fully used by virtue of past work or training experience, educational achievement, or other capabilities. This area should also include studies of time in grade before promotion, input grade as related to training, skills, and education.

11. Studies of organizational makeup to determine whether existing grades and occupations indicate past or continuing inequality of employment conditions.

12. Continuing review of awards and disciplinary actions by grade, occupation and by organization.

13. The designation of groups of positions to provide opportunities for employees to enhance their skills, perform at their highest potential and advance in accordance with their abilities through a formal upward mobility program. Specifics of installation upward mobility programs will be negotiated locally.

14. Attitude measurement of the workforce and toward the activity EEO program. It will incorporate attempted solutions to specific, identified problems and describe them in terms of specific activities, responsibilities, and target dates. Follow-up studies will be performed to determine the results of the implemented solutions.

15. A continuing review and analysis by organization of the sources of and the kinds of discrimination complaints received and how they reflect on practices and policies that might result in unequal or preferential treatment.

16. Two special emphasis areas will be covered in each plan, as appropriate. They are: (1) Air Force Federal Women's Program 1 and (2) Spanish-speaking Program. The first will recognize and lend visibility to

matters affecting the employment and utilization of women in the Air Force. The second is to assure equal opportunities in Air Force employment of the Spanish-speaking population, and to eliminate barriers against full equal opportunity for this group.

APPENDIX B

Union Proposal XII

ARTICLE 33 NEGOTIATIONS DURING THE TERM OF THIS AGREEMENT

Section 3. Mid - Term Negotiations

Any proposed change implementing new or changes to existing DoD or Air Force regulations or proposed changes to AFLC or ALC regulations resulting in changes in personnel policies, practices, or matters affecting working conditions not specifically covered in this agreement will not be implemented without prior written notification and negotiation with the union as prescribed below or in Article ____, (Negotiations of Supplemental Agreement.) Notifications will include a copy of the proposed change and a detailed explanation of what is proposed.

A. Mid-Term Negotiations at Command AFLC Level. Negotiations of Supplemental Agreement, or if the employer desires to make changes in personnel policies, practices, or working conditions prior to the annual contract reopener authorized by Article ____ (Duration of Agreement.) The following procedures apply:

1. The employer shall serve by certified mail on the Council President and each Local President a copy of the proposed change and a brief rationale on the reasons for the change.

2. The Council President or his designee shall notify the AFLC Commander when the union chooses to negotiate on the change. Notice must be served on the AFLC Commander 20 calendar days after receipt of the proposed change.

3. Negotiations shall begin within 30 days from notice of the union's demand to bargain. Mid-term negotiations not conducted at the annual reopener shall be held at Headquarters AFLC, Dayton, Ohio or other ALC upon mutual agreement of the parties. Travel and per diem for union representatives, who are Air Force Employees, shall be paid by the employer. The number of union representatives for whom travel and per diem will be paid shall not exceed the number of management representatives.

4. The parties will negotiate five days a week for eight hours a day.

5. Should the parties fail to reach agreement after two weeks of negotiations, including mediation, the AFLC shall notify the union in writing of its intention to implement its proposal(s).

6. The union may submit the issue to the FSIP for resolution within 15 days of receipt of the notice to implement.

7. Should the union choose to submit the issue to the FSIP the employer will not, except for overriding exigencies or unreasonable delay of implementation of management rights, implement the change before the Panel has completed its work.

8. Should the employer unilaterally implement the change in accordance with Section 7 above before the Panel has completed its work the decision of the Panel will be applied retroactively to the date of implementation.

9. The impasse procedure of 5, 6, 7, 8, and above will apply when the employer chooses to negotiate on mid-term changes at the annual reopener.

10. All changes to personnel policies and practices or matters affecting working conditions negotiated at the command level shall become supplements to this Agreement and remain in effect for its duration as prescribed in Article ____, Duration.

B. Mid-Term Negotiations at Local Level. For Directorate level matters and above, the union will have 14 calendar days after the proposed changes are received to respond to such proposals. For other proposed changes, if the union does not respond within the time period stated above, the employer may implement the proposed changes. The union may request a meeting to negotiate with the employer in accordance with the following procedures:

1. The designated union representative shall submit a written request for a meeting to the responsible management official in response to the employer's notification of a proposed change.

a. The designated union representative for matters below division level will be the division steward.

b. The designated union representative for matters at the division level shall be the directorate steward.

c. On matters at the directorate level, the designated union representative is the Chief Steward.

d. Matters which have activity-wide impact will be negotiated by the President of the union.

e. In the absence of an appropriate designated union representative, the union will name a representative to attend the meeting who will have the authority to bind the union.

f. The designated steward at the next lower organization level where the change is proposed may attend the meeting if desired by the union.

2. Activity-wide mid-term contract changes negotiated between the President of the union and the Commanding Officer or their designees shall be incorporated into local supplements and remain in effect for the duration of local supplement unless the parties agree to a different duration term on a specific activity-wide mid-term change.

3. Attendance at such meetings shall be on official time for employees who would otherwise be in a duty status. Such official time will be in accordance with Title VII.

4. Only the designated union representative shall have the authority to bind the union on such accords that may be reached at these meetings. These accords may not conflict with existing provisions of this agreement.

5. The meeting will normally take place within three days after the union's request for a meeting is received.

6. Should the parties fail to reach agreement after mediation, the employer may unilaterally implement change, provided a minimum of 15 days advance notice has been give to the union. If the union chooses to submit the issue to the Federal Service Impasses Panel during this period, except for overriding exigencies or unreasonable delay of implementation of management rights, the employer will not implement the change and will maintain the status quo until the Panel has completed its dispute resolution process.

7. Should the employer unilaterally implement the change in accordance with Section 6 above, the decision of the Panel will be applied retroactively to the date of implementation.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

American Federation of Government
Employees, Local 3669, AFL-CIO

(Union)

and

Case No. 0-NG-47

Veterans Administration Medical
Center, Minneapolis, Minnesota

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

Union Proposal

Article XV, Hours of Work, Section 3

Nurses shall have their tours of duty arranged to permit each person to have two consecutive days off in each calendar work week. Any nurse may request to waive the right in writing. Days may be split preceding or following a weekend off. Saturday and Sunday will not normally be scheduled off unless both are scheduled off. Nurses will have every other weekend off. [Only the underscored sentence is at issue.]

Question Here Before the Authority

The question is whether the union's proposal is a matter within the agency's duty to bargain under the Federal Service Labor-Management Relations Statute (the Statute) or is a matter within the scope of section 7106(b)(1) of the

Statute, i.e., negotiable only "at the election of the agency," 1/ as alleged by the agency. 2/

Opinion

Conclusion: The proposal concerns a matter which is negotiable only at the election of the agency under section 7106(b)(1) of the Statute. Accordingly, pursuant to section 2424.8 of the Authority's Rules and Regulations (44 Fed. Reg. 44740 et seq. (1979)), the agency's allegation that the disputed proposal is not within the duty to bargain is sustained.

Reasons: In National Treasury Employees Union Chapter 66 and Internal Revenue Service, Kansas City Service Center, Case No. 0-NG-19, 2 FLRA No. 106 (Sept. 13, 1979), Report No. , the Authority recently stated, with regard to the meaning and intent of section 7106(b)(1) of the Statute, as follows:

> Under the plain language of section 7106(b)(1) of the Statute (and in the absence of any contrary indication in the legislative history of such language) the clear meaning of this section is to render the numbers, types, and grades of employees assigned to a tour of duty negotiable at the agency's election. A proposal otherwise consistent with the Statute, which, by its direct or integral relationship to the numbers, types, or grades of employees or positions assigned to a tour of duty, would be determinative of such numbers, types, or grades, likewise would be negotiable at the election of the agency. [Footnotes omitted.] 3/

1/ Section 7106 of the Statute (92 Stat. 1198) provides, in pertinent part:

> § 7106. Management rights
>
> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating --
>
> > (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods and means of performing work[.] [Emphasis added.]

2/ In view of the Authority's decision herein, it is unnecessary to reach the agency's additional allegation that the union's proposal is inconsistent with an agency regulation for which a compelling need exists and is therefore outside the duty to bargain under section 7117(a)(2) of the Statute.

3/ In this regard, the Authority noted that proponents of the bill endorsed this approach towards negotiation on these subjects as mandated by the final version of Title VII, citing the following remarks of Rep. Ford (at 124 CONG. REC. H 9649 (daily ed. Sept. 13, 1978)):

(Continued)

In the present case, while the language of the proposal does not explicitly relate to the numbers, types, and grades of employees assigned to a tour of duty or to the organizational subdivision herein, so as to come within the literal language of section 7106(b)(1), it is nevertheless so directly and integrally related to the numbers, types, and grades of employees assigned thereto as to be determinative of such numbers, types and grades and therefore is negotiable at the election of the agency. 4/

The record indicates that the activity herein is responsible for the medical care and treatment of veterans. In order to meet this responsibility, the activity must have professional medical personnel in continuous attendance. Thus, the activity must establish tours of duty with sufficient numbers

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(Continued)

> In adopting this course, in the Udall compromise, we implement the rationale of several decisions of relevant oversight agencies for Federal sector labor relations. The Federal Labor Relations Council, for example, has ruled that a proposal must directly relate to the "numbers, types, and grades of positions or employees" before that proposal can be ruled nonnegotiable because it infringes on the management right under the Executive order to determine those matters.
>
> . . . . . .
>
> As the sectional analysis makes clear, the Udall substitute is drafted so as to embody in the statute the approach of these and similar decisions. . . .

See also, 124 CONG. REC. H 9638 (daily ed. Sept. 13, 1978)(remarks of Rep. Clay).

4/ While the terms of the parties' expiring agreement provided that "every effort will be made to provide 1 weekend off out of every 3 or more if possible" and the activity may have proposed to continue that assurance during the negotiations herein, it is clear from the legislative history of section 7106(b) that the activity had not thereby made an irrevocable "election" to negotiate a provision concerning nurses' weekends off. Thus, during the floor debate on the final version of section 7106, Rep. Ford stated in response to questions as to the nature of management's duty to bargain on the "numbers, types, and grades of positions or employees assigned to an organizational unit, work project, or tour of duty," as follows:

> I might say that not only are [agencies] under no obligation to bargain, but in fact they can start bargaining and change their minds and decide they do not want to talk about it any more, and pull it off the table. It is completely within the control of the agency to begin discussing the matter or terminate the discussion at any point they wish without a conclusion, and there is no appeal or reaction possible from the parties on the other side of the table.

See 124 CONG. REC. H 9646 (daily ed. Sept. 13, 1978).

and types of professional medical personnel to provide the requisite round-the-clock services to its patients. In determining the number and types of such personnel to be assigned to each tour of duty, management must consider such factors as the number and types of personnel actually in its employ; the additional number, if any, it is authorized to hire; the number and types of medical personnel required to provide quality medical care during each tour of duty; and the qualifications and abilities of individual employees.

The instant proposal guaranteeing that "[n]urses will have every other weekend off," would negate the activity's discretion to take into account the medical care needs of the patients and the professional skills of the nurses involved, when assigning individual nurses to weekend tours of duty. That is, regardless of the particular nursing skills and specializations required during the weekends in order to ensure quality medical care and treatment of patients, 5/ management would be required to make such assignments solely on the basis of which nurses had not received the previous weekend off. Under these circumstances, as the agency's statement of position asserts and the union does not contradict, the activity would be forced to hire additional nurses with the necessary qualifications in order to accomplish its mission and comply with such an agreement. 6/ In light of the above, the Authority concludes, in the circumstances of this case, that the union's proposal, requiring that nurses in the bargaining unit be assured alternate weekends off, is integrally related to, and consequently determinative of, the numbers, types, or grades of employees assigned to a work project or tour of duty and, accordingly, negotiable at the election of the agency under section 7106(b)(1) of the Statute.

5/ In a survey and evaluation of hospital operations conducted by the activity's Chief of Nursing Service in 1978 and 1979, the results of which were attached to the agency's statement of position, "every ward/unit had been able to maintain a 'weekend off' frequency of better than one-third, but 19 out of 23 areas were unable to achieve the hoped for average of 50%," because of a need for but an insufficient number of full-time registered nurses (RNs) qualified to assume overall ward responsibilities. The survey concluded that "there is no means by which 50% of the weekends can be scheduled off duty for all RNs in all areas."

6/ The agency alleges, without contradiction, that there is a Federally-imposed personnel ceiling in effect which restricts management's authority to hire the desired number of nurses. However, even if there were no ceiling on hiring additional qualified nurses, as the agency asserts, the requirement to hire additional personnel in order to comply with the terms of the union's proposal underscores the direct and integral relationship between such proposal and the activity's staffing patterns -- i.e., the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty." The union tacitly acknowledges this direct relationship in its response to the agency's statement of position, but merely states that ". . . management has already agreed to the portion of the [proposal] that is integrally related to and interferes with management's right to establish staffing patterns that are necessary for the proper operation of the hospital when they agreed to arranging the nurses' tour of duty to permit each person to have two consecutive days off each calendar work week."

Therefore, the proposal at issue is not within the agency's duty to bargain under the Statute, and the agency's allegation that the proposal is negotiable only at the election of the agency must be sustained.

Issued, Washington, D.C., February 4, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

American Federation of Government
Employees, AFL-CIO, Local 2991

(Union)

and

Case No. O-NG-191

Department of Health, Education
and Welfare, Social Security
Administration, El Paso District,
Texas

(Activity)

DECISION ON NEGOTIABILITY APPEAL

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 et seq.).

During the term of the parties' negotiated agreement, the union requested negotiations on the statistical forms to be implemented for accountability of various groups of employees. In response to the union's request, the activity stated, in part:

> If you have a proposal that you would like to negotiate you may submit it and we will make every effort to determine if the issue is negotiable.

The union subsequently filed the instant appeal with the Authority, but did not provide the Authority with any specific proposal on the matter which it seeks to negotiate.

In all material respects, this case is substantially identical to Association of Civilian Technicians, Alabama ACT and State of Alabama National Guard, Case No. O-NG-27, 2 FLRA No. 39 (Dec. 28, 1979), Report No. __. In that case the Authority decided that a petition which never presented a proposal sufficiently specific and delimited in form and content as to permit the Authority to render a negotiability decision did not meet the conditions for review. For the reasons fully set forth in that decision, the instant petition does not meet the conditions for review prescribed in section 7117 of the Statute and section 2424.1 of the Authority's rules of procedure.

In conclusion, the union's appeal does not meet the conditions for review under section 7117 of the Statute and section 2424.1 of the Authority's rules and regulations. Accordingly, the appeal is dismissed.

Issued, Washington, D.C., February 4, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 0-PS-8

DECISION ON REQUEST FOR GENERAL STATEMENT
OF POLICY OR GUIDANCE

As previously announced,[1/] the Authority received a request from the National Treasury Employees Union (NTEU) that the Authority issue a major policy determination concerning the effect of certain provisions of the Civil Service Reform Act of 1978 (92 Stat. 1111) on allegedly inconsistent provisions of collective bargaining agreements.

The specific matters at issue, substantially as stated by NTEU, are as follows:

1. Do the provisions of section 7114(a) of the Federal Service Labor-Management Relations Statute (92 Stat. 1202), concerning the rights accorded exclusive representatives of the employees supersede, by operation of law, inconsistent provisions of collective bargaining agreements negotiated prior to January 11, 1979, or do the inconsistent provisions of the agreements take priority over provisions of the Statute, pursuant to section 7135 (a)(1) (92 Stat. 1215)?

2. Do the provisions of section 7121(b)(3)(C) of the Statute (92 Stat. 1211), providing binding arbitration for any grievance not satisfactorily settled under the negotiated grievance procedure, supersede, by operation of law, inconsistent provisions of collective bargaining agreements negotiated prior to January 11, 1979, or do the inconsistent provisions of the agreements take priority over the provisions of the Statute, pursuant to section 7135(a)(1)?

3. Do the provisions of section 4302 of the Civil Service Reform Act of 1978 (92 Stat. 1132, 1133), particularly those dealing with the rights of employees to participate in the establishment of performance standards, supersede, by the operation of law, inconsistent provisions of the collective bargaining agreements negotiated prior to January 11, 1979, or do the inconsistent provisions of the agreements take priority over the provisions of the Act, pursuant to section 7135(a)(1)?

4. Do the provisions of section 7116(a)(7) of the Statute (92 Stat. 1204), providing that it shall be an unfair labor practice for an

1/ Federal Labor Relations Authority, Notice Relating to the Issuance of a Policy Statement, 44 F.R. 45997 (Aug. 6, 1979).

> agency to enforce any rule or regulation which is in conflict with any collective bargaining agreement if the agreement was in effect before the date the Rule or Regulation was prescribed, supersede, by operation of law, inconsistent provisions of collective bargaining agreements negotiated prior to January 11, 1979, or do the inconsistent provisions of the agreements take priority over the provisions of the Statute, pursuant to section 7135(a)(1)?

Before deciding whether issuance of a policy statement was warranted, the Authority invited interested persons to express their views in writing with respect to the question of whether the Authority should issue a policy statement on these matters. The views submitted to the Authority were most thorough and helpful.

The Authority has carefully considered this request and has determined that it does not satisfy the standards governing the issuance of general statements of policy and guidance set forth in section 2427.5 of the rules of the Federal Labor Relations Authority, which provides in pertinent part:

> § 2427.5 Standards governing issuance of general statements of policy and guidance.
>
> In deciding whether to issue a general statement of policy or guidance, the Authority shall consider:
>
> (a) Whether the question presented can more appropriately be resolved by other means;
>
> (b) Where other means are available, whether an Authority statement would prevent proliferation of cases involving the same or similar question;
>
> (c) Whether the resolution of the question presented would have general applicability to the overall program[.]

The questions presented in this request for a major policy determination can be more appropriately resolved by other means. For example, procedures set forth in the Statute and appropriate regulations for the resolution of unfair labor practices provide a mechanism for the adjudication of issues of fact with respect to the varied circumstances presented by the questions.2/

Moreover, Authority action on this request is not warranted since it would not prevent the proliferation of cases involving the same or similar questions. In the request it is indicated that the questions presented

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2/ In this connection, it is noted that NTEU has filed several unfair labor practice charges with the Authority in which it raises the same questions presented in the request.

are merely illustrative of a great many similar questions involving the effect of the Act on allegedly inconsistent provisions of existing collective bargaining agreements entered into by NTEU and certain agencies. It is apparent that similar questions could arise with respect to virtually all existing collective bargaining agreements and many other provisions of the Act. In such a situation, given the variety of agreement provisions and the provisions of the Act which could be involved, issuance of an Authority statement might serve to engender more questions than it would answer and in so doing create more cases than it would prevent.

Finally resolution of the questions presented would not have general applicability to the overall program. As previously noted, given the variety of agreement provisions and the provisions of the Act which could conceivably be brought into play, resolution of the questions presented apparently would only have applicability to the specific contractual relationships in existence between NTEU and certain agencies.

Accordingly, the request for a major policy determination cannot be granted.

Issued, Washington, D.C., February 4, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 32 REPORT OF CASE DECISIONS March 10, 1980

REPRESENTATION CASES

2 FLRA No. 82 (February 21, 1980)

Red River Army Depot, Texarkana, Texas, Case No. 6-CU-3. The Authority, upon a petition filed by the activity seeking to exclude, among other employees, a miscellaneous documents examiner from the unit represented by NFFE Local 803, held that the employee was not a confidential employee within the meaning of section 7112(b)(2) of the Statute, as the activity alleged. In so holding, the Authority found that in the absence of evidence in the Hearing Officer's record of an integral relationship between the work of the miscellaneous documents examiner and the work of the activity's chief legal officer in the field of labor-management relations, neither mere access to labor relations materials nor overhearing by chance one discussion of a labor relations matter was sufficient to establish confidential capacity within the meaning of the Statute. The Authority concluded that the miscellaneous documents examiner was properly included in the unit and, therefore, dismissed the activity's petition as to that employee. (Decision and Order attached.)

2 FLRA No. 83 (February 21, 1980)

U.S. Air Force Military Airlift Command, 76 Military Airlift Wing, 76 Air Base Group, Andrews Air Force Base, Washington, D.C., Assistant Secretary Case No. 22-09518(CU). Upon a petition filed by the activity under E.O. 11491, seeking to clarify a unit represented by the union (AFGE, 14th District Council of Air Force Locals), the Authority found, in agreement with the activity, that the disputed job classifications were supervisory in nature and, therefore, must be excluded from the unit under section 2(c) of the Order. Accordingly, the Authority ordered the unit be clarified in accordance with its findings. (Decision and Order Clarifying Unit attached.)

UNFAIR LABOR PRACTICE CASE

2 FLRA No. 84 (February 21, 1980)

Veterans Administration Regional Office, Denver, Colorado, Assistant Secretary Case No. 61-4246(CA). Upon a complaint filed by the union (AFGE Local 1557) under E.O. 11491, the ALJ concluded that the activity had violated section 19(a)(1) and (2), but not section 19(a)(4) of the Order when it reprimanded the union's president for the particular language he used in presenting a grievance. The Authority adopted the findings, conclusions, and recommendations of the ALJ and issued a remedial order as to the section 19(a)(1) and (2) allegation of the complaint, and dismissed the section 19(a)(4) allegation. (Decision and Order attached.)

ARBITRATION CASES

Case No. 0-AR-34 (February 11, 1980)

Overseas Education Association and Office of Dependents Schools, Department of Defense (Zumas, Arbitrator). The arbitrator found that the activity had misinterpreted the parties' negotiated agreement when it refused to allow the grievant to take leave without pay until he had used his full 90 days of Release Time. The activity filed a petition for review of the arbitrator's award with the Authority. The Authority, pursuant to the applicable rules of procedure, accepted the union's petition for review on the issue of whether the award fails to draw its essence from the parties' negotiated agreement, as the activity alleges.

2 FLRA No. 85 (February 21, 1980)

Federal Aviation Science and Technological Association and Federal Aviation Administration, Albuquerque Airway Facilities Sector, Southwest Region (Cohen, Arbitrator), Case No. 0-AR-20. The arbitrator concluded, from the evidence and testimony presented, that the activity suspended the grievant for just and substantial cause for improperly effectuating a transfer of metal lathe parts in the possession of the activity to a successful bidder on surplus property, but directed that the length of the suspension be reduced as it was too severe. The union appealed to the Authority, alleging that the arbitrator's award was contrary to the evidence, arbitrary and capricious, and based on an improper conclusion. The Authority, without deciding whether such assertions presented a basis for review of an arbitrator's award in the Federal sector, found that the union had not demonstrated in its petition in what way the award

was as the union alleged. The Authority concluded that the union's petition did not meet the requirements for review under the applicable rules of procedure and therefore denied the appeal. (Decision attached.)

2 FLRA No. 86 (February 21, 1980)

Local 1867, American Federation of Government Employees (AFL-CIO) and United States Air Force Academy (Gorsuch, Arbitrator), FLRC No. 78A-156. The arbitrator rejected the activity's position that the grievant, a collator operator, had not performed the higher graded duties of offset press bindery foreman on a continual basis during the period the grievant claimed, but acted in that capacity only in the absence of the printing plant manager. The arbitrator therefore sustained the grievance, holding that the activity violated the parties' agreement by not temporarily promoting the grievant. As an award, the arbitrator found that the grievant was entitled to backpay for the period at issue, less 60 days. The Authority accepted the agency's petition for review of the arbitrator's award insofar as it related to the agency's exception which alleged that the award violated appropriate regulation. The Authority also granted the agency's request for a stay (Report No. 2). Based upon an interpretation of pertinent Civil Service regulations rendered by the Office of Personnel Management in response to a request from the Authority, the Authority found that the award did not violate appropriate regulation; but that in computing the amount of backpay due the grievant, a determination must be made as to the specific period(s) of time in which the grievant performed in the higher level position beyond 60 continuous days, and the payment of backpay limited to that period. The Authority thereupon sustained the award and vacated the stay that had been granted. (Decision attached.)

2 FLRA No. 87 (February 21, 1980)

Federal Aviation Administration and Federal Aviation Science and Technological Association (Peck, Arbitrator), FLRC No. 78A-147. The dispute arose when, because of a snowstorm, the two grievants here involved were directed to work an additional tour of duty which encompassed an 8-hour period of standby time, during which the grievants did not perform any work. As part of his award, the arbitrator found that the agency had violated the parties' negotiated agreement by applying the Comptroller General's two-thirds rule (which permits an agency to treat 8 hours of standby time out of a 24-hour period of work as eating and sleeping time and thus not compensable) in rejecting the grievants' claim for overtime pay for the time they spent on standby. As a remedy, the arbitrator directed the agency to pay the grievants overtime for the 8 hours of standby time in

dispute. The Authority accepted the agency's petition for review which excepted to the award on the ground that the award violated applicable law (Report No. 2). Based upon an interpretation rendered by the Office of Personnel Management in response to a request from the Authority, the Authority concluded that the part of the arbitrator's award here in dispute violated applicable law. Accordingly, the Authority set aside that part of the award. (Decision attached.)

2 FLRA No. 88 (February 21, 1980)

American Federation of Government Employees, AFL-CIO, Local 2094 and Veterans Administration Hospital (Wolf, Arbitrator), Case No. 0-AR-24. The arbitrator found that the activity had just cause for admonishing the grievant, a medical technician, for failing to adequately search for a patient's Blood Bank record card. The union filed a petition for review of the arbitrator's award, alleging as an exception that the award was contrary to law, rule or regulation. The Authority held that the union did not present sufficient facts and circumstances to support its exception. Accordingly, the Authority denied the union's petition because it failed to meet the requirements for review under the applicable rules of procedure. (Decision attached.)

2 FLRA No. 89 (February 22, 1980)

National Association of Government Employees, Local R2-100 and State of New Jersey, Department of Defense (Kramer, Arbitrator), Case No. 0-AR-70. The Authority found that the activity's exceptions to the arbitrator's award were untimely filed under the Statute and therefore dismissed the appeal. (Decision letter attached.)

Attachments (8)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

RED RIVER ARMY DEPOT,
TEXARKANA, TEXAS

Activity-Petitioner

and

Case No. 6-CU-3

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, INDEPENDENT, LOCAL 803

Labor Organization

DECISION AND ORDER

Upon a petition duly filed with the Federal Labor Relations Authority under section 7111(b)(2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. secs. 7101-7135, a hearing was held before Hearing Officer Harold L. Shanteau on May 31, 1979. The Authority has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case, including a brief filed by the Activity-Petitioner, the Authority finds:

The Activity, Red River Army Depot, Texarkana, Texas, filed a petition for clarification of unit (CU) seeking to exclude five employees as confidential employees from the unit of exclusive recognition represented by the National Federation of Federal Employees, Independent, Local 803 (NFFE). 1/ At the hearing, the parties stipulated that four of the incumbents in five clerical positions in question should be excluded from the unit as confidential

1/ The NFFE holds exclusive recognition for a unit of all General Schedule employees employed at the Red River Army Depot, except the following:

1. Professional employees.
2. All employees under other exclusive recognitions.
3. Temporary employees.

employees. 2/ Accordingly, the only dispute is whether the miscellaneous documents examiner (stenography), GS-5, should be excluded as a confidential employee because of her work relationship with the Activity's chief legal officer.

Section 7112(b)(2) of the Statute provides that a unit will not be appropriate for labor organization representation if it includes a confidential employee. Section 7103(a)(13) of the Statute defines a "confidential employee" as one "who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations." The issues presented herein are whether the chief legal officer formulates or effectuates management policies in the field of labor-management relations, and, if so, whether the employee in dispute acts in a confidential capacity to him when he is performing his duties in the field of labor-management relations. The position of miscellaneous documents examiner (stenography), GS-5, is the only clerical position in the Activity's legal office, which in addition is comprised of an assistant legal officer and the chief legal officer, who, among his other duties, has been designated as the installation labor counselor.

The chief legal officer has helped to prepare three arbitration cases for hearing, has advised management on proposals concerning three or four contract negotiations in the last three or four years, and has been consulted by management regarding the handling of unfair labor practice cases. Thus, it is clear from the record that the chief legal officer is an individual who formulates or effectuates management policies in the field of labor-management relations, within the meaning of section 7103(a)(13) of the Statute.

The miscellaneous documents examiner serves as the secretary to the chief legal officer. In this connection, the record discloses that all mail coming to the chief legal officer goes through this employee and that she has access to the file cabinet where the labor relations materials and case files are kept. However, the record reveals that she has not seen any documents or heard any discussions concerning unit determinations, contract proposals, unfair labor practice cases (other than as a complaining party in two unfair labor practice cases), or other labor relations matters. Further, this employee has had no involvement with arbitrations except for once overhearing discussions between the chief legal officer and witnesses in preparation for arbitration due

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2/ The parties stipulated that the secretary to the Commander, the secretary to the Civilian Executive Assistant to the Commander, the secretary to the Civilian Personnel Officer, and the secretary to the Labor Relations Officer are confidential employees, and, therefore, should be excluded from the unit. In the context of a unit clarification petition, such a stipulation will be viewed by the Authority as a motion to amend the petition in order to delete and, in effect, withdraw the petition as to the stipulated job classifications. Under these circumstances, the motion to amend is hereby granted, and the Authority therefore finds it unnecessary to clarify the status of the employees in the stipulated job classifications.

to the fact that her desk was physically located just outside the chief legal officer's office.

The record herein is devoid of evidence that the miscellaneous documents examiner acts in a confidential capacity to the chief legal officer when he is engaged in the performance of his duties in the field of labor-management relations. In the absence of evidence of an integral relationship between the work of the miscellaneous documents examiner and the work of the chief legal officer in the field of labor-management relations, neither mere access to labor relations materials nor overhearing by chance one discussion of a labor relations matter is sufficient to establish confidential capacity within the meaning of the Statute. In light of these circumstances, the Authority finds that the employee in the position of miscellaneous documents examiner (stenography), GS-5, is not a confidential employee within the meaning of the Statute. As the employee in the classification at issue is properly included in the exclusively recognized unit represented by the NFFE, the petition herein shall be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 6-CU-3 be, and it hereby is, dismissed.

Issued, Washington, D.C., February 21, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. Air Force Military Airlift
Command, 76 Military Airlift Wing,
76 Air Base Group, Andrews Air Force Base,
Washington, D.C. 1/

Activity/Petitioner

and

Assistant Secretary
Case No. 22-09518(CU)

14th District Council of Air Force Locals,
American Federation of Government Employees,
AFL-CIO

Exclusive Representative

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Donald J. Brizzi. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Upon the entire record in this case, including briefs filed by both parties, the Authority finds:

The Activity filed a petition for clarification of unit (CU) seeking to clarify a unit represented by 14th District Council of Air Force Locals, American Federation of Government Employees, AFL-CIO (AFGE). 2/ Specifically, the Activity

1/ The name of the Activity appears as amended at the hearing.

2/ The AFGE was certified as the exclusive representative on November 3, 1977, in Case No. 22-07992(UC), in a unit defined as follows:

> All Wage Grade employees Andrews Air Force Base; all General Schedule and Wage Grade employees Bolling Air Force Base; all General Schedule and Wage Grade employees in "off-base" organizations attached to Bolling Air Force Base for administrative support; all General Schedule employees assigned to Det 29

(Continued)

seeks to exclude from the unit employees in the following job descriptions: Aircraft Hydraulic Systems Mechanic, WG-8268-11; Aircraft Propeller Mechanic, WG-8554-11; Aircraft Integral Tank Sealer, WG-8871-11; Painter, WG-4102-11; Pneudraulic Systems Mechanic, WG-8255-12; Sheet Metal Mechanic (Aircraft), WG-3806-12; Aircraft Mechanic, WG-8852-11; Fabric Worker, WG-3105-09; and Aircraft Electrician, WG-2892-11. The Activity contends that the employees in these positions, known as Small Shop Chiefs, are supervisory, and, in accordance with section 2(c) of Executive Order 11491, as amended, should be excluded from the bargaining unit. The AFGE contends that the Small Shop Chiefs are not supervisors, but merely work leaders with technical responsibilities in their shop, and should remain in the unit.

The positions in question, which are located in the 459th Tactical Airlift Wing (TAW), Andrews Air Force Base, Washington, D.C., are all referred to as "Small Shop Chief" positions, and are all required to be manned by Air Reserve Technicians (ART). The TAW is a tenant activity of the Andrews Air Force Base, and is serviced by the 76 Air Base Group, Civilian Personnel Office. The TAW is an Air Force Reserve (AFRES) unit responsible for flying and maintaining eight C-130 aircraft, and although an AFRES unit, its organization is similar to an active duty unit. The nine Small Shop Chief positions in question are located in the Field Maintenance Branch and Avionics Branch of the 459 Maintenance Squadron of the TAW. Each Branch is headed by a superintendent and is organized into four sections, each headed by a foreman. 3/ Each section is further organized into shops, which are headed by the Small Shop Chiefs, which have one or two journeymen mechanics. The Small Shop Chiefs are at least one grade higher than the journeymen that work for them.

The Small Shop Chiefs' duties as noted in their job descriptions include: scheduling work; planning work for military reservists assigned to their shop; assigning tasks on a job; providing technical assistance; ensuring equipment, tools and parts are available, reviewing work in progress; making final inspection of work; taking time and attendance; making appraisals of subordinates; preparing leave schedules and obtaining approval of same from supervisor and recommending to supervisor on selection of new employees, reassignment, promotions, step increases and disciplinary actions. Each Small Shop Chief is the

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Continued

> San Antonio Air Logistic Center, Cameron Station, Alexandria, Virginia, all which are serviced by the Andrews Air Force Base Central Civilian Personnel Office, excluding supervisors, professionals, and management officials, employees included in other units of exclusive recognition at Andrews or Bolling Air Force Base, employees engaged in Federal personnel in other than a purely clerical capacity, confidential employees, guards, temporary employees with appointments of 90 days or less with no expectation of reappointment and the 1035th Technical Operations Group.

3/ The foreman is also known as a Section Chief.

highest qualified individual in the unique technology or skill which is the specialty of his shop and is responsible for all actions concerning the operation of his shop. 4/

There has been some confusion within the Activity concerning the duties of the Small Shop Chiefs. The record indicates that five 5/ of the nine Small Shop Chiefs have exercised all the duties outlined in their job descriptions, including effectively recommending hiring of employees, giving performance appraisals of subordinates, and effectively recommending disciplinary actions, promotions and awards. The other Small Shop Chiefs, except for sporadic occasions, were, until recently, precluded from exercising their supervisory functions by either their branch superintendent or section chief. The record further indicates that when this situation came to the attention of the Activity, memos and directives were issued to the branch superintendents and section chiefs reminding them that the Small Shop Chiefs were supervisors, and that they should be allowed to carry out their duties as stated in their job descriptions. The record disclosed that after these memos and directives had been issued, the Small Shop Chiefs were informed by their section chiefs that they were now responsible for all supervisory duties found in their job descriptions.

Section 2(c) of Executive Order 11491, as amended, defines a supervisor as ". . . an employee having authority . . . to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment, . . ." It has been held by the Federal Labor Relations Council (FLRC) that supervisory status was intended to be determined on the basis of an individual's authority, not on the basis of the number of subordinates, 6/ and that, because the definition of supervisor is written in the disjunctive, any individual who possesses the authority to perform a single function described in section 2(c) of the Order, providing he does so utilizing independent judgment, is a supervisor. 7/

4/ Small Shop Chief positions are unique, in that, although they are assigned certain supervisory duties, they are not classified as WS employees because under Office of Personnel Management rules, an employee can not be classified a WS unless he supervises at least three employees.

5/ Two of these men had recently been promoted to Small Shop Chiefs. However, they had both worked for their respective predecessors, and testified as to the duties performed by those men.

6/ See United States Department of Agriculture, Northern Marketing and Research Division, Peoria, Illinois, 1 FLRC 294 (1973).

7/ United States Naval Weapons Center, China Lake, California, 1 FLRC 404 (1973).

Under all the above circumstances, the Authority finds that the employees in the subject job classification are supervisors within the meaning of section 2(c) of the Order. 8/ Thus, the record clearly establishes that employees in these classifications are authorized, and either have or will be required to exercise the authority, to effectively recommend the hiring of employees, disciplinary actions, promotions and awards, and to adjust grievances. Accordingly, the Authority shall order that employees in the disputed job classification be excluded from the exclusively represented unit. 9/

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein for which the 14th District Council of Air Force Locals, American Federation of Government Employees, AFL-CIO was certified on November 3, 1977, be, and it hereby is, clarified by excluding from the unit the employees in the following positions: Aircraft Hydraulic Systems Mechanic, WG-8268-11; Aircraft Propeller Mechanic, WG-8554-11; Aircraft Integral Tank Sealer, WG-8871-11; Painter, WG-4102-11; Pneudraulic Systems Mechanic, WG-8255-12; Sheet Metal Mechanic (Aircraft), WG-3806-12; Aircraft Mechanic, WG-8852-11; Fabric Worker, WG-3105-09; and Aircraft Electrician, WG-2892-11.

Issued, Washington, D.C., February 21, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

8/ Department of Health, Education and Welfare, Social Security Administration, Office of Hearings and Appeals, Region II, Puerto Rico, 1 FLRA No. 110 (1979).

9/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order clarifying unit does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

CORRECTED COPY

2 FLRA No. 84

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Veterans Administration Regional Office,
Denver, Colorado

Respondent

and

Assistant Secretary
Case No. 61-4246(CA)

American Federation of Government
Employees, Local 1557, AFL-CIO

Complainant

DECISION AND ORDER

On October 3, 1979, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent violated section 19(a)(1) and (2) of Executive Order 11491, as amended, when it issued a reprimand to James E. Ross, the president of American Federation of Government Employees, Local 1557, AFL-CIO, based on the language he used in a grievance filed on behalf of a unit employee. The Administrative Law Judge further found that such conduct by the Respondent was not violative of section 19(a)(4) of the Order, and, therefore, he recommended dismissal of that portion of the complaint. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's transition rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire

record in this case, and noting particularly the absence of exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions 1/ and recommendations. 2/

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Veterans Administration Regional Office, Denver, Colorado shall:

1. Cease and desist from:

(a) Reprimanding or otherwise discriminating against any employee in any manner with regard to hire, tenure, promotion, or other conditions of employment, in order to discourage membership in or activities on behalf of the American Federation of Government Employees, Local 1557, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Order.

(a) Remove or expunge from its files any reference to the reprimand given James Ross on September 26, 1978, and acknowledge the removal to Ross in writing.

(b) Post at all Veterans Administration, Regional Office, Denver, Colorado, facilities and installations copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicious places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by other material.

(c) Notify the Federal Labor Relations Authority in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

1/ Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, 2 FLRA No. 7 (1979).

2/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

IT IS HEREBY FURTHER ORDERED that the Section 19(a)(4) allegation of the complaint be, and it hereby is, dismissed.

Issued, Washington, D.C., February 21, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT reprimand or otherwise discriminate against any employee in any manner with regard to hire, tenure, promotion, or other conditions or employment, in order to discourage membership in or activities on behalf of the American Federation of Government Employees, Local 1557, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL remove or expunge from our files any reference to the written reprimand given James Ross on September 26, 1978, and acknowledge the removal to Ross in writing.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority whose address is: City Center Square, Suite 680, 1100 Main Street, Kansas City, Missouri 64105; and whose telephone number is: (816) 374-2199.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
VETERANS ADMINISTRATION REGIONAL OFFICE, DENVER, COLORADO Respondent	
	Case No. 61-4246(CA)
and	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Complainant	

DOUGLAS DOAN, ESQ.
Veterans Administration
Denver Federal Center
Denver, Colorado
For the Respondent

KENNETH BULL
National Representative
American Federation of Government Employees
5001 South Washington
Englewood, Colorado 80110
For the Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on May 9, 1979 by the Regional Director, Kansas City Region, Federal Labor Relations Authority, a hearing was held before the undersigned in Denver, Colorado.

This proceeding was initiated under Executive Order 11491, as amended (herein called the Order). It was based on a complaint filed on November 5, 1978 and on an Amended Complaint filed on January 10, 1979 by American Federation of Government Employees, AFL-CIO, Local 1557 (herein called Complainant and Local 1557 AFGE) against Veterans Administrat

Regional Office, Denver, Colorado (herein called Respondent and VA). The said Amended Complaint alleges that Respondent violated Sections 19(a)(1)(2) and (4) of the Order by reprimanding Local 1557 AFGE President, James E. Ross, for the language he used in a grievance he had filed.

Both parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence and to examine and cross-examine witnesses. Thereafter both parties filed briefs which have been duly considered by the undersigned.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following recommended findings and conclusions.

Findings of Fact

1. At all times material Local 1557 AFGE was the exclusive collective bargaining representative for a unit composed of Respondent's professional and non-professional employees and a collective bargaining agreement which contained a grievance procedure was in effect.

2. At all times material Mr. James Ross was president of Local 1557 AFGE.

3. By letter dated September 19, 1978, on Local 1557 AFGE letterhead, Local 1557 AFGE President Ross filed a grievance. The letter was addressed to Respondent's Director N. Halverson and states that the grievance is filed in accordance with Article 23, Section 4 of the collective bargaining agreement, and that the grievance is directed against the actions of Mr. John Isaac, in denying a union Steward, while processing an employee grievance, permission to be present at a desk audit and in denying that there was a "target grade" on a specific position.

4. In the September 19 grievance letter Local 1557 AFGE President Ross referred to Respondent's Personnel Officer Caffey's 1/, "inability to explain his capricious and arbitrary actions in denying the employee promotion." President Ross stated further "Mr. Caffey continues to evidence a fundamental inability to correctly apply the provisions of the Federal Personnel Manual. . ." and that "Mr. Caffey appears to believe that he is free to target certain individuals for demotion without cause or explanation. . . ." Finally the September 19 letter states,

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1/ At the time of the letter Mr. Caffey had been the Respondent's Personnel Officer for about 4 months.

"Mr. Isaac's actions only serve to reinforce the appearance of an incompetent Personnel Officer assigning a Personnel Management Specialist to cover the malevalent actions of the Personnel Officer with regard to attacks not only on the position of selected employees but also against the employee's right to representation and due process."

5. Mr. Ising investigated the grievance and concluded that the subject matter of the grievance had been handled properly by the Personnel Officer and that Mr. Ross was not justified in using the words "incompetent" and "malevalent" to decribe Mr. Caffey.

6. Mr. Ising issued a letter of reprimand dated September 26, 1978 to Local 1557 AFGE President Ross 2/ stating, inter alia, that Mr. Ross' attack on the Personnel Officer meets the test of "deliberate and reckless untruth"; that the issue of "incompetent" and "malevalent" falsely accuses Mr. Caffey of improperly "targeting the employee for an unjustified classification action"; and that such an attack on an agency employee is beyond the protection of the Federal Labor Management Relations programs and violates VA Regulation 820(B). 3/

Conclusions of Law

The object of the Order was to grant federal employees the right, if they choose, to be effectively represented in collective bargaining by a labor organization. In order to achieve this objective a labor organization must be free to act relatively freely, within the limitations specifically or impliedly set forth in the Order, so that it can, in its best judgment, best represent its constituents. This involves acting effectively in all aspects of collective bargaining, including enforcing and attempting to police a collective bargaining agreement through utilization of a collectively bargained grievance procedure.

Utilization of a grievance procedure is an integral and fundamental part of a labor organization's right to effectively represent employees. A labor organization must be free to write and express itself in a grievance in terms which it

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2/ The letter was placed in Mr. Ross official personnel file but was removed because, soon after those incidents occurred, Mr. Ross resigned from Respondent.

3/ VA Regulation 820(B) prohibits the making of "false or unfounded statements about employees which are slanderous or defamatory. . . ."

feels, correctly or incorrectly, will most successfully accomplish its ends. To subject a union representative to discipline because he records a grievance in a way that displeases management, or because management believes the wording is incorrect or untruthful, would be to unreasonably limit and interfere with a labor organization's effectiveness. Such potential discipline would necessarily inhibit an employee, when acting in the capacity of a union official, from taking those actions which he might feel would most effectively represent the employees.

The Assistant Secretary recognized that during collective bargaining negotiations a labor organization representative could use "profanity" and "abusive language". U.S. Small Business Administration, A/SLMR No. 631. The Assistant Secretary relied on Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin, 461 US 264 (1964) in which the Supreme Court concluded that the Executive Order did not intend to restrict, in any way, the "robust debate" which has been protected under the National Labor Relations Act. Thus Respondent's reprimand of Mr. Ross because of the language he used in presenting grievance necessarily interfered with his right to effectively act on behalf of the Complainant and constituted unlawful discrimination. Accordingly it is concluded that the reprimand constituted a violation of Section 19(a) (1) and (2) of the Order.

In the subject case the union official, in referring to the Personnel Officer as "incompetent" and "malevalent" was merely utilizing traditional collective bargaining language in criticizing management. They are descriptive terms whose accuracy cannot be precisely measured or quantified. Rather they are examples of classical labor relations rhetoric and management cannot be so thin skinned as to take offense at such terms. 4/ Thus Respondent cannot be permitted, in applying VA Regulation 820(B), to improperly limit the actions of an employee when that employee is acting in the capacity of a union official.

In so concluding this decision does not mean that an employee, who is a union official, is free to do and say what he wishes with impunity. First when acting as an employee only, he is under exactly the same constraints as other employees. When acting officially in his capacity as an

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4/ They are somewhat analogous to characterizing an administrative law judge as "arbitrary" and "capricuous". Again, rhetorical terms at which no judge should take offense.

official of a labor organization, a union official must have very broad latitude in speech and action. However even then there are some actions or statements that would be so extreme as to be unprotected. In the instant case, however, the language of the grievance was rather standard labor relations rhetoric and clearly not such as to be unprotected. Further, although Mr. Ross is no longer an employee of Respondent, it is concluded the matter is not moot because Respondent continues to contend that its reprimand of Mr. Ross was proper and justified and that it would continue to follow such a policy.

The record contains no evidence that Mr. Ross' reprimand had anything to do with the filing of any unfair labor practice complaint or with testifying with respect to any such complaint. Accordingly, it is concluded that Respondent did not violate Section 19(a)(4) of the Order.

Recommendations

Having found that Respondent engaged in conduct which is violative of Sections 19(a)(1) and (2) of the Order but not violative of Section 19(a)(4) of the Order, I recommend that the Federal Labor Relations Authority adopt the following order which is designed to effectuate the policies of Executive Order 11491, as amended:

ORDER

Pursuant to section 24002. of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Veterans Administration, Denver Regional Office, shall:

1. Cease and desist from:

(a) Reprimanding or otherwise discriminating against any employee in any manner with regard to hire, tenure, promotion, or other conditions of employment, in order to discourage membership in or activities on behalf of the American Federation of Government Employees, Local 1557, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order.

(a) Post at all Veterans Administration, Regional Office, Denver, Colorado, facilities and installations copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by other material.

(b) Notify the Federal Labor Relations Authority in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS HEREBY ORDERED that the Section 19(a)(4) allegation of the complaint be, and it hereby is, dismissed.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: October 3, 1979
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODES

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT reprimand or otherwise discriminate against any employee in any manner with regard to hire, tenure, promotion, or other conditions of employment, in order to discourage membership in or activities on behalf of the American Federation of Government Employees, Local 1557, or any other labor organization.

WE WILL NOT in any like or related manner interfer with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address is: City Center Square, 1100 Main Street, Suite 680, Kansas City, Missouri 64105.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL AVIATION SCIENCE AND
TECHNOLOGICAL ASSSOCIATION

Union

and

Case No. 0-AR-20

FEDERAL AVIATION ADMINISTRATION,
ALBUQUERQUE AIRWAY FACILITIES
SECTOR, SOUTHWEST REGION

Activity

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator Sanford Cohen filed by the union under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)).

According to the arbitrator, the grievant is an electronic technician at the activity. This matter arose when a successful bidder on certain surplus government property (a metal lathe) attempted to recover some parts which he believed had been stolen from the lathe after he had submitted the successful bid. In an effort to find the parts, the bidder sought the assistance of a friend, the grievant, who was able to locate the missing parts of the lathe and deliver them to the bidder. The parts were on the premises of the activity. Subsequently, the grievant was notified that the activity had made a final decision to suspend him for 20 days for "unauthorized receipt and disposal of government property." The grievant alleged that the suspension was in violation of the parties' negotiated agreement. The matter ultimately was submitted to arbitration.

The parties stipulated that the issue before the arbitrator was:

> Did the FAA suspend the grievant . . . for just and substantial cause and, if so, was the suspension of 20 work days a proper penalty?

The arbitrator found, on the basis of the evidence and testimony before him, that the grievant did not act with any intent to defraud the government. However, he stated that at the time the grievant became involved in the dispute between the activity and the successful bidder, the property at issue was in the possession of the agency. Therefore, according to the arbitrator, "it was improper for the grievant to have effectuated a transfer of the property from the FAA to [the successful bidder]." Thus the arbitrator found that the agency had just and substantial cause to discipline the grievant. However, the arbitrator further found that the penalty of a 20 day suspension was too severe, and therefore reduced it to a 10 day suspension. The arbitrator's award was:

1. The FAA suspended the grievant . . . for just and substantial cause.

2. On the basis of considerations set forth above, the suspension of 20 work days is reduced to a suspension of 10 work days.

The union filed a petition for review of the arbitrator's award pursuant to the rules of procedure set forth in 5 C.F.R. part 2411 (1978), which, to the extent consistent with the provisions of section 7122(a) of the Federal Service Labor Management Relations Statute (5 U.S.C. §7122(a)) and as amended by section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority (44 Fed. Reg. 44741), remain operative with respect to this case. The union seeks Authority acceptance of its petition on the basis of the exception discussed below. The agency did not file an opposition.

Pursuant to section 2411.32 of the amended rules and section 7122(a) of the Statute, the Authority will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award is deficient because it is contrary to law or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations.

In its exception, the union alleges that the arbitrator's award is contrary to the evidence, is arbitrary and capricious, and is based on an improper conclusion. In support of this exception, the union asserts that the arbitrator could not find that the activity had just and substantial cause to discipline the grievant for "unauthorized receipt and disposal of government property" absent a threshold finding concerning the ownership of the property. The arbitrator made no such finding, noting that "legal ownership of the . . . parts is not at all clear . . . ." In the union's view, the arbitrator's finding regarding the grievant's conduct in effectuating the transfer of the property "is completely incompetent in the absence of the resolution of the threshold question." Therefore, according to the union, the award is arbitrary and capricious, contrary to the evidence, and based on an improper conclusion.

Without deciding whether such assertions present a basis for review of an arbitrator's award in the Federal sector, the union has not demonstrated in its petition in what way the award is contrary to the evidence, is arbitrary and capricious, and is based on an improper conclusion. The thrust of the union's exception to the award is that the arbitrator failed to decide the question of ownership of the property in issue and that such a failure somehow negates the arbitrator's determination, in answer to the question submitted to him and based on the testimony and evidence before him, that the activity's suspension of the grievant was for just and sufficient cause. The union's exception, in effect, represents a disagreement with the reasoning employed by the arbitrator on the merits of the issue before him. It is settled law in the private sector that an arbitrator's award is not open to review on the merits. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); International Brotherhood of Pulp, Sulphite and Paper Mill Workers, Local Union No. 874 v. St. Regis Paper Co., 362 F.2d 711 (5th Cir. 1966); Crigger v. Allied Chemical Corporation, Semet-Soluary Division, 500 F.2d 1218 (4th Cir. 1974). And the merits embrace "not only asserted errors in determining the credibility of witnesses, the weight to be given their testimony, and the determination of

factual issues, but also the construction and application of the collective bargaining agreement. . . ." International Brotherhood of Pulp, Sulphite and Paper Mill Workers, Local Union No. 874, 362 F.2d at 714. This principle applied by Federal courts in private sector cases is likewise applicable to Authority review of arbitration awards in the Federal sector.1/ Thus, the Authority will not grant a petition for review where, as in this case, it appears from the facts and circumstances presented that the union is disagreeing with the reasoning employed by the arbitrator on the merits of the issue before him. Therefore, the union's exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules.

Accordingly, the union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the amended rules of procedure.

Issued, Washington, D.C., February 21, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELAITONS AUTHORITY

1/ The legislative history to the Statute makes it clear that the scope of the Authority's review of arbitration awards is to be a limited one:

> The Authority will only be authorized to review the award of the arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector. S. Rep. No. 95-1272, 95th Cong., 2d Sess. 153 (1978).

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

LOCAL 1867, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES (AFL-CIO)

Union

and

FLRC No. 78A-156

UNITED STATES AIR FORCE ACADEMY

Activity

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

According to the arbitrator, the grievant was employed as a collator operator in the activity's printing plant. During a period of approximately 13 months, the position of offset press bindery foreman at the plant remained officially vacant and the grievant claimed that during this period of time he performed the duties of acting foreman. The grievant alleged that this constituted a detail in excess of 60 days, entitling him, under the parties' negotiated agreement, to a temporary promotion to the higher graded position. The matter ultimately was submitted to arbitration.

The Arbitrator's Award

The parties stipulated that the issue before the arbitrator was:

> In accordance with Article 21, Section A, or Article 22, Section E, was Management obligated to temporarily promote Grievant to a WS-9 for the period 20 February 1977 through 18 March 1978 based on the Grievant's performance of the press bindery foreman's job for more than 60 workdays?

At the arbitration hearing, the activity alleged in part that the grievant did not perform the higher graded duties on a continual basis but acted only in the absence of the printing plant manager. The arbitrator sustained the grievance, holding that the activity violated the agreement[1/] by not

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1/ According to the arbitrator, Article 21, Section A of the parties' agreement provides, in relevant part:

> Section A. Details are official personnel actions by which an employee receives credit for experience and training while assigned

(Continued)

temporarily promoting the grievant. As an award, he found the grievant entitled to backpay for the period at issue, less 60 days.

Agency's Appeal

The agency filed a petition for review of the arbitrator's award with the Federal Labor Relations Council. This case was pending before the Council on December 31, 1978. In accordance with section 2400.5 of the transition rules of the Federal Labor Relations Authority (44 Fed. Reg. 44741) and section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215), the rules of procedure of the Council, 5 C.F.R. part 2411 (1978), remain operative with respect to the present case, except that the word "Authority" is substituted, as appropriate, wherever the word "Council" appears in such rules.

Pursuant to section 2411.32 of the rules as so amended, the Authority accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violates appropriate regulation. Also pursuant to section 2411.47(f) of the amended rules, the Authority granted the agency's request for a stay of the award pending determination of the appeal.

Opinion

Section 2411.37(a) of the amended rules of procedure provides:

> (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously noted, the Authority accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violates appropriate regulation. Because this case involved a matter for which the Civil Service Commission was responsible for prescribing regulations,

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(Continued)

> away from his/her official position, but receives the salary attached to his/her position. Details may be used to meet situations such as: irregular workloads, change in organization, unanticipated absences such as sick or emergency leave, pending official assignments, pending description and classification of new positions, pending security clearance, and for cross training to positions of like grade. To the maximum extent feasible, details will not be made to lower grade duties. Details to higher grade positions will not exceed sixty (60) days.

Article 22, Section E provides, in relevant part:

> Assignment to higher grade positions by temporary promotion in lieu of detail is required for periods in excess of sixty (60) days. No temporary promotion will be made for less than sixty (60) days or to exceed one year. Selection for temporary promotion will be made in accordance with the competitive provisions of this article.

and since under section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224) this appeal must be resolved as if the Civil Service Reform Act had not been enacted, the Authority requested from the Office of Personnel Management (the successor agency to the Civil Service Commission with respect to the matters involved herein) an interpretation of pertinent Civil Service Commission regulations as they pertain to the arbitrator's award in this case. The response of the Office of Personnel Management is set forth below in relevant part:

> In this case the union alleged before the arbitrator that the grievant, a WG-10 Power Collater Operator, was detailed to a higher grade position (Offset Press/Bindery Foreman, WS-9) for a period of 60 days and, in accordance with the parties' negotiated agreement, was entitled to a temporary promotion commencing with the 61st day. The parties' negotiated agreement provides that details to higher graded positions will not exceed sixty (60) days, and assignement to higher graded positions for periods in excess of sixty (60) days will be accomplished by temporary promotion. The grievant allegedly performed the duties of foreman for approximately 13 months. Management alleged in pertinent part that the grievant did not perform the higher graded foreman duties on a continual basis but acted only in the absence of the printing plant manager. The arbitrator found that the grievant should have received a temporary promotion and, therefore, is entitled to back pay for the period at issue less the 60-day period provided for in the parties' negotiated agreement. We have been asked whether the arbitrator's award conflicts with applicable regulations.
>
> With reference to the various time constraints concerning details and temporary promotions, it has been the policy of the Civil Service Commission to deal with these time frames in terms of continuous days. This policy was affirmed by the General Accounting Office when it decided the Matter of William G. Atherton, B-173783.200, July 31, 1978. (See also U.S. Civil Service Commission Bulletin No. 300-43, GAO Decisions on Consecutive Details and Backpay Awards, October 30, 1978.) In pertinent part the GAO noted:
>
> > It is evident from all of the above that the rule concerning retroactive temporary promotions for extended details only applies when a given detail lasts more than 120 days, as an agency may detail an employee for a lesser period without prior Commission approval. The fact that an employee may have been detailed two or more times, each detail being less than 120 days but all of the details together aggregating more than 120 days, does not alone entitle him to a retroactive temporary promotion. Each detail is a separate personnel action and for the purpose of applying our Turner-Caldwell decisions each detail must have exceeded 120 days before a determination may be made that the employee must receive a retroactive temporary promotion.
>
> (NOTE: The GAO's reference to 120 days stems from Civil Service Commission instructions which place a 120-day limitation on details to higher graded positions without prior Civil Service Commission approval. Turner-Caldwell established that backpay could be awarded for retroactive

temporary promotions of employees detailed to the higher graded position beyond 120 days without prior CSC approval. These issues are discussed at length in CSC Bulletin No. 300-40, May 25, 1977.)

While the GAO decisions deal in terms of 120 days as the maximum allowable detail to a higher graded position without prior CSC approval, it is well established that an agency may properly include within a collective bargaining agreement a commitment to temporarily promote an employee serving in a higher graded position before reaching the 120-day ceiling (e.g., after 60 days). In this case, the arbitrator has noted, see below, that the parties agreed that the 60 days must be continuous. However, OPM regulations do not require that a contractually arrived at "trigger" for temporary promotion be of any specific duration, nor that it must be continuous. Such a limitation then becomes a nondiscretionary agency policy and must be complied with by the agency when the stated criteria have been satisfied. Therefore, with respect to the instant case, a finding must be made that the grievant served 60 continuous days in the higher graded position before the employee would be entitled to a temporary promotion.

In summary, the extent to which the arbitrator's award may be implemented hinges on a specific determination of when the grievant performed the duties of the higher graded position. If the grievant performed the duties of the higher graded position for the entire 13-month period the arbitrator's award does not conflict with applicable rules and regulations. However, the record suggests that the duties were performed on a sporadic basis:

> The parties have stipulated that the only sensible meaning of 60 work days within the governing contract provision is 60 continuous days. From testimony adduced at the hearing it is impossible for the Arbitrator to specify what 60-day period was satisfied as it relates to the Grievant since neither side produced hourly schedules disclosing who worked in what capacity, and when. Nonetheless, the Arbitrator is sufficiently convinced and persuaded by the Union's case that Grievant did, in fact, act as a supervisor for a period in excess of 60 days, and that between February 20, 1977 and March 18, 1978 he was neither temporarily promoted nor provided with compensation commensurate with his added job responsibilities.

The implication of the above is that the grievant did not serve in the higher level position for the entire period between February 20, 1977, and March 18, 1978. If that is so, the award, as granted by the arbitrator, is in conflict with applicable rules and regulations.

Nevertheless, the arbitrator did find that "the Grievant did, in fact, act as a supervisor for a period in excess of 60 days..." An award of backpay would require a determination of the specific period(s) of time in which the grievant served at the higher level, extending beyond the "trigger" of 60 continuous days.

Based upon the foregoing interpretation of applicable regulations by the Office of Personnel Management, we find that the arbitrator's award in this case does not violate appropriate regulations. However, implementation of this

award must be in accordance with applicable laws and regulations and thus, in computing the amount of backpay due the grievant, a determination must be made as to the specific period(s) of time in which the grievant performed in the higher level position beyond 60 continuous days and the payment of backpay limited to that period.2/

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the amended rules of procedure, we sustain the award. Implementation of the award must be consistent with this decision. The stay of the award is hereby vacated.3/

Issued, Washington, D.C., February 21, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ We note that the arbitrator, as part of his award, retained limited jurisdiction over the award as follows:

> The parties stipulated at the hearing that they would have 30 days from the date of this decision to agree upon a suitable back pay sum, and should they not be able to so agree the Arbitrator, in his sole discretion and upon the request of either party, will make a decision concerning the amount of compensation to be awarded.

Thus it would appear that should the parties be unable to agree on the backpay due the grievant in this case, either party may request a decision from the arbitrator as to the amount of compensation to be awarded. However, in determining the amount of that compensation the arbitrator is likewise bound by applicable laws and regulations and must determine specific periods of time in which the grievant performed in the higher level position beyond 60 continuous days.

3/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the instant case was decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision does not prejudge in any manner either the meaning or application of related provisions of the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Order.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL AVIATION ADMINISTRATION

Activity

and

FLRC No. 78A-147

FEDERAL AVIATION SCIENCE AND
TECHNOLOGICAL ASSOCIATION

Union

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

According to the arbitrator, the dispute in this matter concerned a claim for overtime pay by two GS-12 employees (the grievants) working at the agency's facility near Ashton, Idaho. The dispute arose when a snowstorm made it impossible for the next scheduled crew to relieve the grievants. Consequently, the grievants were directed to work an additional tour of duty which encompassed an 8 hour period of standby time. During the standby period, the grievants did not perform any work. Following the standby period, the grievants returned to work. Thereafter, they claimed an entitlement to overtime pay for the time spent on standby. The agency, however, rejected the claim for compensation relying on the Comptroller General's two-thirds rule which permits an agency to treat 8 hours of standby time out of a 24 hour period of work as eating and sleeping time and thus not compensable time. The matter ultimately went to arbitration.

Arbitrator's Award

The arbitrator issued a 2-part award. Part 2 of his award, denying a third grievant's claim for overtime pay, is not at issue in this case. In part 1 of the award, the arbitrator determined that the agency violated the parties' negotiated agreement[1/] in applying the Comptroller General's two-thirds rule.

1/ The provision of the parties' agreement found to have been violated was Article 33, Sections 1 and 9. Section 1 provides:

> Employees shall be compensated for overtime work performed in accordance with applicable law and regulations, and in accordance with the applicable law and regulations which produce the maximum compensation.

Section 9 provides:

> Whenever an employee is held on duty beyond his/her regular shift, the employee will be compensated for this work in six (6) minute increments. Any irregular overtime of less than the six (6) minute increment shall be dropped on a weekly basis.

In order to remedy the violation, the arbitrator directed the agency to pay the grievants overtime for the 8 hours of standby time in dispute. The arbitrator reasoned that the standby time in dispute was "unscheduled standby time" as opposed to "scheduled standby time," but that there was "no reason to distinguish" one from the other. Thus, he found that "[s]ince the grievants do not receive premium pay [under 5 U.S.C. §5545(c)(1)] in lieu of overtime for unscheduled standby time, they are entitled to receive actual overtime payment [under 5 U.S.C. §5542] for the standby time spent on the night of January 5-6, 1978."

Agency's Appeal

The agency filed a petition for review of the arbitrator's award with the Federal Labor Relations Council. This case was pending before the Council on December 31, 1978. In accordance with section 2400.5 of the transition rules of the Federal Labor Relations Authority (44 Fed. Reg. 44741) and section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215), the rules of procedure of the Federal Labor Relations Council, 5 C.F.R. part 2411 (1978), remain operative with respect to the present case except that the word "Authority" is substituted, as appropriate, wherever the word "Council" appears in such rules. Under section 2411.32 of the rules as so amended, the Authority accepted the agency's petition for review which excepted to the award on the ground that the award violates applicable law.2/ The union filed a brief.

Opinion

Section 2411.37(a) of the amended rules of procedure provides:

> (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Authority accepted the agency's petition for review which excepted to the award on the ground that the award violates applicable law. Since the Civil Servce Commission was responsible for prescribing regulations concerning the matters involved in this case, and since under section 902(b) of the Civil Service Reform Act of 19783/ this appeal must

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2/ The agency requested and the Authority granted, pursuant to section 2411.47(f) of the amended rules of procedure, a stay of the award pending determination of the appeal.

3/ The Civil Service Reform Act of 1978, Pub. L. No. 95-454, sec. 902(b), 92 Stat. 1224, provides:

> (b) No provision of this Act shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

be resolved as if the Civil Service Reform Act had not been enacted, the Authority requested from the Office of Personnel Management (the successor agency to the Civil Service Commission with respect to the matters involved herein) an interpretation of Civil Service Commission regulations as they pertain to part 1 of the arbitrator's award. The Office of Personnel Management replied in relevant part as follows:

> The grievants in this case, John Stevens and Russell Hunter, are electronic technicians assigned to an FAA long range radar site in Idaho. Their regularly scheduled weekly tour of duty is performed in two intervals of 28 hours, each consisting of a 10-hour period of actual work, followed by an 8-hour period of standby duty (sleep period) and another 10-hour period of actual work. For this regularly scheduled tour of duty the grievants receive their basic rate of pay (GS-12) plus annual premium pay at a rate of 25 percent in accordance with 5 U.S.C. 5545(c)(1) and 5 C.F.R. 550.141-144. This annual premium pay is in lieu of all other pay under Subchapter V of Chapter 55 of Title 5, United States Code, except for "irregular, unscheduled overtime duty in excess of [their] regularly scheduled weekly tour of duty." In this case, the annual premium pay under 5 U.S.C. 5545(c)(1) is in lieu of all other premium pay for the two hours of regularly scheduled overtime work performed during each of the four 10-hour periods of actual work; for Sunday, holiday, and night work; and for remaining at their duty station for longer than ordinary periods of duty involving standby duty.
>
> On January 5, 1978, the grievants were nearing the end of a regularly scheduled 28-hour tour of duty when, due to a severe storm which impeded access by a relief crew, the grievants were requested by their supervisor to perform an additional period of "irregular, unscheduled overtime duty" which involved both actual work and standby duty. Mr. Stevens' additional tour of duty of 20 hours consisted of 6 hours of actual work, 8 hours of standby duty, and 6 hours of actual work. He then resumed his next regularly scheduled 28-hour tour of duty. Mr. Hunter's additional tour of duty of 24½ hours consisted of 6 hours of actual work, 8 hours of standby duty and 10½ hours of actual work. It is undisputed that the grievants performed no actual work during the standby period of their additional tour of duty.
>
> The agency paid the grievants overtime pay for the additional period of "irregular, unscheduled overtime duty" as provided in 5 U.S.C. 5542. In computing the "hours of work" for purposes of this section, the agency applied the two-thirds rule in accordance with paragraph S1-3d of Book 610 of FPM Supplement 990-2. Thus, Mr. Stevens was paid overtime under 5 U.S.C. 5542 for 12 hours of his 20-hour tour of duty and Mr. Hunter was paid for 16½ hours of his 24½-hour tour of duty.
>
> The grievants alleged that they were entitled to overtime pay for the 8 hours of unscheduled standby duty in addition to the overtime pay they received for the remaining hours of the additional tour of duty which they performed on January 5-6, 1978. The arbitrator found no reason to distinguish unscheduled standby time from scheduled standby time in the circumstances of this case. Accordingly, the arbitrator awarded the grievants actual overtime payment under 5 U.S.C. 5542 for the 8 hours of standby time they spent on the night of January 5-6, 1978.

It is a well established principle that Federal employees who perform longer than ordinary tours of duty involving standby status are entitled to compensation for such time under the provisions of either 5 U.S.C. 5545 or 5 U.S.C. 5542. Section 5545(c)(1) provides that an employee who spends time in a "standby status rather than performing work" may be compensated on an annual basis instead of receiving premium pay provided by other provisions of this subchapter. Those "other provisions" of the subchapter have been interpreted to mean the regular overtime provision contained in 5 U.S.C. 5542. See Comp. Gen. unpub. dec. B-170264, December 21, 1973. See also Farley v. U.S., 131 Ct. Cl. 776 (1955).

Furthermore, the courts have ruled that an employee who is required to remain for a 24-hour period at his duty station in a standby status is entitled on the basis of the two-thirds rule to compensation for 16 of those hours. England et. al. v. U.S., 133 Ct. Cl. 768 (1956) and Detling v. U.S., 193 Ct. Cl. 125 (1970). Under the two-thirds rule, time spent sleeping or eating, during which no substantial labor is performed, is not compensable. Gaeke v. U.S., 136 Ct. Cl. 756 (1956). Armstrong v. U.S., 144 Ct. Cl. 659 (1959); and Collins v. U.S., 141 Ct. Cl. 573 (1958). In Collins, the plaintiffs were paid under the provisions of the two-thirds rule which has been adopted by the Civil Service Commission (now the Office of Personnel Management) as "a convenient method of determining the compensation of men engaged in duties requiring round-the-clock presence." Supra, at 575.

In the instant case, the grievants are in receipt of annual premium pay for their regularly scheduled tour of duty under 5 U.S.C. 5545(c)(1). The additional period of "irregular, unscheduled overtime duty" meets the exception to Section 5545 and therefore must be paid pursuant to 5 U.S.C. 5542. In Section 5542, "hours of work" in excess of 40 hours in an administrative workweek, or in excess of 8 hours in a day are overtime work. For determining the "hours of work" for overtime pay under that section, the agency may properly apply the two-thirds rule to a tour of duty of 24 hours (or multiples thereof). The instructions for use of the two-thirds rule are contained in paragraph S1-3d of Book 610 of FPM Supplement 990-2.

The arbitrator found that the Comptroller General decisions that establish the principle of the two-thirds rule, and paragraph S1-3d of Book 610 of FPM Supplement 990-2 address only regularly scheduled standby duty, and therefore are not directly applicable to periods of unscheduled standby duty. We do not agree. As previously argued, employees who perform standby duty are entitled to overtime pay under either 5 U.S.C. 5542 or 5545(c)(1), and a period of "irregular, unscheduled overtime duty" which meets the exception to Section 5545 must be paid under Section 5542. Moreover, the two-thirds rule is proper for determining the "hours of work" for regularly scheduled tours of duty of 24 hours (round-the-clock presence) compensable under Section 5542. It therefore follows that the two-thirds rule would be proper for determining "hours of work" for an additional period of "irregular, unscheduled overtime duty" under Section 5542 as well. This principle has been expressed in OPM instructions for comparing the overtime pay entitlements under Title 5 and the Fair Labor Standards Act (FLSA) for employees engaged in fire protection activities

or law enforcement activities in FPM Letter 551-5, dated January 15, 1975 (see section B of attachment 3, and Example 1, Situations B and D, and Example 2, Situations B and D, in attachment 4 of FPM Letter 551-5).

In his award, the arbitrator focused on the narrow issue of the period of unscheduled standby duty, rather than on the entire additional tour of duty performed by the grievants in this case. It is clear from the facts outlined above that the grievants performed actual work and standby duty during this additional period of "irregular, unscheduled overtime duty", and that they performed no substantial labor during the period of unscheduled standby duty. The fact that the grievants received annual premium pay under 5 U.S.C. 5545(c)(1) for their regularly scheduled tour of duty does not create, by analogy or otherwise, an obligation for the agency to pay overtime under 5 U.S.C. 5542 for the period of unscheduled standby duty when no work is performed. The annual premium pay which the grievants receive for regularly scheduled tours of duty, including regularly scheduled standby periods, is not overtime payment for the hours spent in standby duty per se. Rather, this annual premium pay under 5 U.S.C. 5545 is payment in lieu of all other premium pay that they would otherwise receive during their regularly scheduled tours of duty, including standby duty.

Thus, the agency properly deducted 8 hours from the additional unscheduled tour of duty for which the grievants received overtime pay under 5 U.S.C. 5542. Mr. Hunter performed additional duty of 24½ hours, and the application of the two-thirds rule in his case entitled him to 16½ hours of overtime pay. While the additional tour of duty of Mr. Stevens was only 20 hours, he immediately commenced another regularly scheduled 28-hour tour of duty at "straight time pay" (basic rate of pay). Thus, the 20 hours of "irregular, unscheduled overtime duty," when combined with the first 4 hours of regular duty which is compensable at the employee's basic rate of pay, results in a continuous period of duty of 24 hours which is not compensable under 5 U.S.C. 5545(c)(1). Therefore, the application of the two-thirds rule entitled him to 12 hours overtime pay pursuant to 5 U.S.C. 5542 in addition to his basic rate of pay for 4 hours of regularly scheduled work during this 24-hour period.

For the reasons stated above, the arbitrator's award of "actual overtime" pursuant to 5 U.S.C. 5542 for the 8 hours during which the grievants performed no labor violates 5 U.S.C. 5542, as interpreted in court decisions and decisions of the Comptroller General, as well as in supplemental guidance issued by the Commission (OPM).

Based on the foregoing interpretation of the Office of Personnel Management, we conclude that part 1 of the arbitrator's award violates applicable law and, therefore, must be set aside.

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the amended rules of procedure, we hereby set aside part 1 of the arbitrator's award.4/

Issued, Washington, D.C., February 21, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

4/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the instant case was decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision does not prejudge in any manner either the meaning or application of related provisions of the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Order.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,
LOCAL 2094

Union

and

Case No. 0-AR-24

VETERANS ADMINISTRATION HOSPITAL

Activity

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator Benjamin H. Wolf filed by the union under section 7122(a) of the Federal Service Labor-Management Relations Statute (5.U.S.C. §7122(a)).

According to the arbitrator, the grievant, a medical technician employed at the Veterans Administration Hospital in New York City, challenged an admonishment issued for his alleged failure to adequately search for a patient's Blood Bank record card. The matter was ultimately submitted to arbitration.

Based on the evidence presented at the hearing, the arbitrator found that the only "credible explanation" for the grievant's failure to find the patient's card was the grievant's "inadequate search" at the Blood Bank and not the defense advanced by the union on behalf of the grievant. Consequently, the arbitrator denied the grievance, finding in his award that "just cause" existed for the action taken against the grievant.

The union filed a petition for review of the arbitrator's award pursuant to the rules of procedure set forth in 5 C.F.R. part 2411 (1978), which, to the extent consistent with the provisions of section 7122(a) of the Federal Service Labor Management Relations Statute (5 U.S.C. §7122(a)) and as amended by section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority (44 Fed. Reg. 44741), remain operative with respect to this case. The union seeks Authority acceptance of its petition on the basis of the exception discussed below. The agency did not file an opposition.

Pursuant to section 2411.32 of the amended rules and section 7122(a) of the Statute, the Authority will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award is deficient because it is contrary to law or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its exception to the award, the union contends that the award is "contrary to Law, Rule or regulation." In support of its exception, the union asserts that the arbitrator's handling of the case was "arbitrary and capricious," referring to the provisions of section 7701(c)(1)(B) of title 5, United States Code, and stating that the agency, in its case before the arbitrator, did not sustain the burden of proof required by that section.1/ The union also asserts that the arbitrator was arbitrary and capricious in his handling of evidence proffered by the union at the hearing, particularly evidence regarding alleged harrassment of the grievant by a superior.

The Authority will grant a petition for review of an arbitrator's award where it appears, based on the facts and circumstances described in the petition, that the award violates law or regulation. However, in this case the union has not presented sufficient facts and circumstances to support its exception.

The union has not demonstrated in its petition in what manner the arbitrator's award is contrary to the provisions of 5 U.S.C. §7701(c)(1)(B) and, on its face, that section pertaining to appellate review by the Merit Systems Protection Board would appear inapplicable to the arbitrator's award in this case.2/ As to the union's assertions regarding the arbitrator's handling of evidence proffered by the union at the hearing, it appears from the arbitrator's "Discussion" of the case that he considered the union's contention regarding the alleged harassment of the grievant. In this regard, the arbitrator stated that "[n]o matter what fault one might find with [the superior's] attitude towards [the grievant], we are faced with the fact that [the grievant] did not find . . . [the] card, the only credible explanation being that he made an inadequate search, a required procedure at the Blood Bank." The union's exception is in effect a disagreement with the reasoning employed by the arbitrator in reaching his award on the merits that the grievant's admonishment was for "just cause." The Authority will not grant a petition for review where it appears from the facts and circumstances presented that the petitioner is disagreeing with the reasoning employed by the arbitrator on the merits of the issue before him. Federal Aviation Science

1/ Section 7701 of title 5, United States Code, deals with appellate procedures of the Merit Systems Protection Board; section 7701(c)(1)(B) provides with respect to certain cases appealed to the Board that the decision of the agency shall be sustained only if the agency's decision is supported by a preponderance of the evidence.

2/ The Authority notes that under 5 U.S.C. §7121(e)(2), in certain matters an arbitrator is governed by the standards set forth in 5 U.S.C. §7701(c)(1). However, section 7121(e)(2) does not pertain to an admonishment given to an employee.

and Technological Association and Federal Aviation Administration, Albuquerque Airway Facilities Sector, Southwest Region, Case No. 0-AR-20, ___ FLRA No. ___ (_____, 1980), Report No.____. Therefore, the union's exception provides no basis for acceptance of its petition under 2411.32 of the amended rules.

Accordingly, the unions petition for review of the arbitrator's award is denied because it fails to meet the requirements of section 2411.32 of the amended rules for acceptance by the Authority of a petition for review of an arbitrator's award.

Issued, Washington, D.C., February 22, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

February 22, 1980

Lieutenant Colonel John T. Spruiell
Labor Relations Specialist
State of New Jersey
Department of Defense
Eggert Crossing Road, Box 979
Trenton, New Jersey 08625

Re: National Association of Government Employees, Local R2-100 and State of New Jersey, Department of Defense (Kramer, Arbitrator), Case No. 0-AR-70

Dear Colonel Spruiell:

This refers to your exceptions to the arbitrator's award in the above-entitled case, dated January 10, 1980, and filed with the Authority on January 15, 1980. For the reasons indicated below, it has been determined that your exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the Authority's regulations (copy enclosed) provides:

> (b) The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in your submission, is dated December 7, 1979. Therefore, under section 2425.1(b) of the Authority's regulations, your exceptions were due in the office of the Authority no later than January 7, 1980. However, as stated above, your exceptions, dated January 10, 1980, were not filed with the Authority until January 15, 1980. In this regard, the Authority is not empowered to extend or waive the time limit for filing exceptions to arbitrators' awards.

Accordingly, as your exceptions were untimely filed, and apart from other considerations, your appeal is hereby dismissed.

For the Authority.

Sincerely,

Samuel A. Chaitovitz
Executive Director

Enclosure

cc: D.W. Downes
NAGE

Item 1061-G-1 Y3.F31/21-3:9/case 33-36
& cont'd
9400

FLRA Report of Case Decisions and FSIP Releases

Contents of Package

This package should include the following items:

FLRA Report of Case Decision No. 33

FLRA Report of Case Decision No. 34

FLRA Report of Case Decision No. 35

FLRA Report of Case Decision No. 36

If any of the above items are not included, please contact the Administrative Office, Federal Labor Relations Authority, 1900 E Street, NW., Room 7469, Washington, D. C. 20424 - telephone 202- 653-8040.

For sale by the Superintendent of Documents, U.S. Government Printing Office Washington, D.C. 20402. Subscription Price: $36.00 per year; $9.00 additional for foreign mailing.

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 33 REPORT OF CASE DECISIONS May 16, 1980

UNFAIR LABOR PRACTICE CASES

2 FLRA No. 92 (February 29, 1980)

The Adjutant General-Georgia, Georgia National Guard, Department of Defense, Atlanta, Georgia, Assistant Secretary Case No. 40-9032(CA). The ALJ, upon a complaint filed by the union (Georgia Association of Civilian Technicians, ACT, Inc.) under E.O. 11491, and after reviewing the responsibilities of the incumbents of the 22 positions involved (to which the activity had added certain supervisory responsibilities and were generally described as small shop supervisors), concluded that 7 of the 22 were erroneously determined to be supervisory and that the activity had violated section 19(a)(1) of the Order when it suspended union dues withholding for the incumbents of those seven positions. Both the union and the activity filed exceptions to the ALJ's recommended decision and order. The Authority found that all of the incumbents, with the exception of one individual who had no employees directly assigned to his shop, were supervisors within the meaning of section 2(c) of the Order and that, consequently, the activity's termination of dues withholding for those employees, with the one noted exception, was privileged. Accordingly, the Authority dismissed the union's complaint as to 21 of the 22 employees, sustained the ALJ's findings, conclusions, and recommendations as to the remaining individual and issued an order reflecting its decision. (Decision and Order attached.)

2 FLRA No. 94 (February 29, 1980)

Veterans Administration Hospital, Temple, Texas, Case No. 6-CA-2. The ALJ, upon a complaint filed by the union (AFGE Local 2109) under E.O. 11491, found that the activity had not violated section 19(a)(1) of the Order when it questioned an employee/union steward, who had applied for a supervisory position, during an interview about her functioning as a union steward. However, the ALJ further found that the activity had violated section 19(a)(1) when it asked the same shop steward if she would file a grievance if she was not selected for the position. Finally, the ALJ found that the activity did not

violate either section 19(a)(1) or (2) of the Order by not selecting the employee. The Authority adopted the findings, conclusions, and recommendations of the ALJ and issued a remedial order as to the conduct of the activity found to constitute a violation of the Order, and dismissed the union's complaint insofar as it related to conduct of the activity which was found not to constitute such a violation. (Decision and Order attached.)

2 FLRA No. 95 (February 29, 1980)

Employment and Training Administration, Veterans Employment Service, Department of Labor, Civil Service Commission Case No. 110. The Hearing Officer, upon a complaint filed by the union (AFGE Local 2513) under E.O. 11491, found that the activity had not engaged in unfair labor practice conduct (allegedly harrassing two employees and delaying the promotion of a third in violation of section 19(a)(1), (2), and (4) of the Order). The Hearing Officer therefore recommended that the union's complaint be dismissed in its entirety. The Authority adopted the findings, conclusions, and recommendations of the Hearing Officer and dismissed the union's complaint. (Decision and Order attached.)

NEGOTIABILITY CASES

2 FLRA No. 91 (February 29, 1980)

National Treasury Employees Union and Internal Revenue Service, Case No. 0-NG-46. The dispute concerned the negotiability of union proposals under the provisions of E.O. 11491. Neither the union's petition for review nor the agency head's determination of nonnegotiability addressed the applicability of the Statute to the disputed proposals. Without passing on the merits of the appeal and without prejudice to submission of the dispute to the Authority in conformity with the Statute and its regulations, the Authority dismissed the union's petition as moot. (Decision letter attached.)

2 FLRA No. 93 (February 29, 1980)

American Federation of Government Employees, AFL-CIO, Local 2879 and Social Security Administration, San Diego, California, Case No. 0-NG-208. The union filed a petition for review with the Authority alleging that the activity violated its bargaining obligation by refusing to negotiate on union proposals concerning (1) promotions, (2) flexitime, and (3) negotiation at the district level of any contract changes that might be

proposed by management. In summary, the union contended that the only issue in the case was whether the activity had committed an unfair labor practice and/or violated the parties' agreement, and that the union's redress lay in another forum. The activity asserted, in substance, that because of a unit consolidation at the national level, its obligation to bargain with the local union on the subject proposals had ceased. In addition, the activity noted that with respect to proposals (2) and (3) the matters were subject to national negotiations and a controlling San Francisco Master Agreement, respectively. The Authority found that the essence of the parties' contentions related to the bargaining obligation of the parties under the circumstances involved and not whether the union's proposals themselves violated law or regulation. The Authority therefore held that the proper forum to raise the issues here presented was not a negotiability appeal, but an unfair labor practice proceeding pursuant to section 7118 of the Statute. The Authority further held that to the extent that the case involved a dispute over whether the union's proposal concerning flexitime was subject to national level negotiations only and/or the controlling effect of the San Francisco Master Agreement, the proper forum to resolve such disputes would be through proceedings adopted by the parties through their agreements. Accordingly, the Authority concluded that the union's appeal did not present issues which it could appropriately resolve under section 7117 of the Statute and Part 2424 of its rules and regulations. Accordingly, the appeal was dismissed. (Decision attached.)

Appeals withdrawn:

Case No.	Date
0-NG-115	February 7, 1980
0-NG-225	February 19, 1980
0-NG-230	February 19, 1980

ARBITRATION CASE

2 FLRA No. 90 (February 29, 1980)

Association of Civilian Technicians, Inc., New York Council and Division of Military and Naval Affairs, State of New York (Wolf, Arbitrator), FLRC No. 78A-149. The arbitrator ruled that the activity violated the parties' agreement in posting a particular vacancy announcement for a Supervisory Personnel Management Position, which precluded excepted technician employees who held military enlisted grades from applying for the position. As a remedy, the arbitrator directed management to rerun the vacancy announcement and to open competition to all excepted technician employees, including enlisted personnel. The agency filed a petition for review of the arbitrator's award with the Federal

Labor Relations Council, based on five exceptions alleging that the award violated (1) past practice, (2) appropriate regulation, (3) the parol evidence rule, (4) applicable law, and (5) Executive Order 11491. The agency also requested a stay of the award. As to (1) and (3), the Authority held that the exceptions did not state grounds upon which review of an award will be granted. As to (2), (4), and (5), the Authority held that the exception's were not supported by facts and circumstances described in the petition. Accordingly, the Authority denied the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the applicable rules of procedure. The Authority also denied the agency's request for a stay of the award. (Decision letter attached.)

Attachments (6)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

The Adjutant General-Georgia,
Georgia National Guard,
Department of Defense,
Atlanta, Georgia

Respondent

and

Assistant Secretary
Case No. 40-9032(CA)

Georgia Association of Civilian
Technicians, ACT, Inc.

Complainant

DECISION AND ORDER

On June 18, 1979, Administrative Law Judge Garvin Lee Oliver issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, both the Complainant and the Respondent filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions and briefs filed by both parties, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendations, as modified below.

The Administrative Law Judge found that the Activity had added certain supervisory responsiblilities to the position descriptions for some 22 positions at various locations of the Georgia National Guard. The positions were generally described

as small shop supervisors. The changes in the position descriptions for these 22 jobs were made at the direction of the National Guard Bureau, which retains classification authority for all civilian technicians positions nationwide. The Activity notified the union regarding the proposed changes within its jurisdiction. The parties discussed these proposed changes, with the union maintaining its position that none of the changes in job responsibilities warranted a change from nonsupervisory to supervisory status for the incumbents of these 22 positions. On June 26, 1978, the Activity unilaterally implemented the proposed changes and it notified the union of its intention to remove the 22 positions from the union's exclusive bargaining unit based on the change in their supervisory status. On July 2, 1978, dues withholding for the incumbents of these 22 positions was suspended.

The Administrative Law Judge found that the Activity had acted at its peril when it unilaterally suspended dues withholding privileges for the incumbents of the 22 affected positions. Therefore, he noted that, in effect, any determination as to whether the Activity had acted properly must be based on a determination as to whether the affected employees had actually acquired the supervisory status ascribed to them. The Administrative Law Judge, after reviewing the responsibilities of the incumbents of all 22 positions in question herein, concluded that seven of the 22 employees were erroneously determined to have become supervisors on June 26, 1978, and that by removing these employees from checkoff, the Activity had violated section 19(a)(1) of the Order.

The Authority finds that all the small shop supervisors, with the exception of one individual who had no employees directly assigned to his shop, are supervisors within the meaning of the Order. The small shop chiefs' duties as noted in their job description include: planning, organizing, and scheduling of work assignments and the establishment of production controls; explaining work requirements, work methods, and the standards of quality and quantity to be met; monitoring work and giving instruction on difficult operations; making adjustments in work assignments and methods as needed; and scheduling leave, appraising performance, recommending promotions, and initiating disciplinary action as needed. Each small shop supervisor has responsibility for control over work operations performed by the other civilian technicians assigned to his shop and they are accountable for the quantity and quality of work performed. While some of the small shop supervisors assumed their new responsibilities immediately after their change in status on June 26, 1978, others waited a period of time before they begin fulfilling all of their responsibilities. Nevertheless, the Authority finds that all the small shop supervisors were responsible for performing the supervisory duties outlined in their job description as of June 26, 1978, and that they are all exercising these responsibilities.

Under all the above circumstances, the Authority finds that the small shop supervisors herein are supervisors within the meaning of section 2(c) of the Order. 1/ Thus, the record clearly establishes that employees in these positions are authorized, and either have or will be required to exercise the authority, to effectively direct work for their subordinates, to initiate disciplinary action, to approve leave, to evaluate employees, and to recommend the hiring of

1/ See U.S. Air Force Military Airlift Command, 76 Military Airlift Wing, 76 Air Base Group, Andrews Air Force Base, Washington, D.C., 2 FLRA No. 83, involving essentially similar employees.

employees. Consequently, the Authority finds that the Activity's termination of dues withholding for the small shop supervisors, with the exception noted below, was privileged, and the Authority shall order that the complaint be dismissed in that regard.

As found by the Administrative Law Judge, the Fabric Worker position (WG-11, Job No. F9214000) presently held by employee James E. Newman, has no subordinate employees over whom he exercises any authority. Therefore, the Authority finds that the incumbent of the Fabric Worker, WG-11 position is not a supervisor within the meaning of section 2(c) of the Order and adopts the Adminstrative Law Judge's conclusion that the Activity violated section 19(a)(1) of the Order by withdrawing dues withholding privileges for the incumbent of this position subsequent to July 2, 1978. 2/

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Adjutant General, Georgia National Guard, Department of Defense, shall:

1. Cease and desist from:

(a) Interfering with, restraining or coercing unit employee James E. Newman by erroneously determining that he is a supervisor within the meaning of section 2(c) of the Executive Order 11491, as amended; by refusing to recognize his exclusive representative, Georgia Association of Civilian Technicians; and by cancelling his dues withholding authorization executed on behalf of that labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Executive Order 11491, as amended:

(a) Accord appropriate recognition to Georgia Association of Civilian Technicians as the exclusive representative of unit employee James E. Newman.

(b) Commencing with the first pay period after the date of this order deduct regular and periodic dues of the Georgia Association of Civilian Technicians from the pay of James E. Newman, and remit the dues to the above-named labor organization, provided such employee has made a voluntary allotment for

2/ In agreement with the Administrative Law Judge, we conclude that the Activity violated section 19(a)(1) of the Order by improperly failing to accord appropriate recognition to the union herein by revoking dues withholding privileges for the employee it improperly classified as supervisors.

that purpose in accordance with the existing agreement covering voluntary allotments for payments of dues with Georgia Association of Civilian Technicians.

(c) Post at all facilities and installations of the Georgia National Guard, Department of Defense, copies of attached notice marked Appendix on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Adjutant General, Georgia National Guard, Department of Defense, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Adjutant General shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(d) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that all other allegations in the complaint in Case No. 40-9032(CA) be, and they hereby are, dismissed. 3/

Issued, Washington, D.C., February 29, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce unit employees James E. Newman by erronerously determining that he is a supervisor within the meaning of section 2(c) of Executive order 11491, as amended; by refusing to recognize his exclusive representative, Georgia Association of Civilian Technicians; and by cancelling his due withholding authorization executed on behalf of that labor organization.

WE WILL NOT *in any like or related* manner interfere with, restrain, or coerce our employees in the exercise of rights assured by Executive Order 11491, as amended.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Suite 501, North Wing, 1776 Peachtree Street, NW., Atlanta, Georgia 30309, and whose telephone number is (404) 881-2324.

FEDERAL LABOR RELATIONS AUTHORITY

OFFICE OF ADMINISTRATIVE LAW JUDGES
1111-20th Street, N.W., Suite 700
Washington, D.C. 20036

In the Matter of THE ADJUTANT GENERAL-GEORGIA GEORGIA NATIONAL GUARD DEPARTMENT OF DEFENSE ATLANTA, GEORGIA Respondent and GEORGIA ASSOCIATION OF CIVILIAN TECHNICIANS, ACT, INC. Complainant	Case No. 40-9032(CA)

Benjamin H. Bruce
Colonel, Georgia Air National Guard
Personnel Officer
P. O. Box 17965
Atlanta, Georgia
For the Respondent

Neil A. Bales
National Field Representative
Association of Civilian Technicians
165 W. Wieuca Road, NE, Room 204
Atlanta, Georgia 30342
For the Complainant

Before: GARVIN LEE OLIVER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arose pursuant to Executive Order 11491, as amended, as a result of an unfair labor practice complaint filed on August 15, 1978 by the Georgia Association of Civilian Technicians, ACT, Inc. (hereinafter called the Complainant or Union), against the Adjutant General, Georgia National Guard, Department of Defense, Atlanta, Georgia (hereinafter called the Respondent).

The complaint alleged, in substance, that the Respondent violated Sections 19(a)(1), (2) and (6) of the Executive Order by making a unilateral change in the bargaining unit by unilaterally determining that twenty-four employees were excluded from the exclusive unit as supervisors and terminating their union dues withholding.

A hearing was held in this matter before the undersigned in Atlanta, Georgia. Both parties were represented and afforded full opportunity to be heard, to adduce relevant evidence, and to examine and cross-examine witnesses. Post-hearing briefs have been received from both parties and duly considered.

Based on the entire record herein, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence, adduced at the hearing, and the briefs, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Complainant is the exclusive collective bargaining representative of a unit of federal employees employed by the Respondent.

The authority to classify positions and establish pay grades for both the Army and Air National Guard technicians is the responsibility of the Chief, National Guard Bureau, and such authority has not been delegated to the various states. (Mgt. Exh. Y-1).

During the period December 10, 1974 to May 16, 1978 it was the policy of the National Guard Bureau that first level supervision should not extend below the Foreman (WS) level. (Mgt. Exh. Y-1). Consequently, it was the policy of the Respondent that only WS's could be designated as supervisors, or render performance ratings. (Exh. No. C-21).

The policy as it affected certain small shop chiefs was changed by the National Guard Bureau on May 16, 1978. Following a review of Air National Guard small shop chief positions, the states were directed to add to certain small shop chief position descriptions information reflecting that the incumbent has "substantial supervisory authority", including "schedules leave, appraises performance, recommends promotions, and initiates disciplinary action as needed." (Joint Exh. 1). In view of this change, the National Guard Bureau also directed that the states take the following action:

> States are requested to review duties of incumbents in Type II, Type IIA, and Type III situations and discuss any changes in status based on these instructions with the local labor representative. If any

> doubt exists after review or discussion on incumbent's status under the LMR (labor management relations) definition, then a CU (clarification of existing unit) petition should be filed mutually with the Department of Labor for resolution. (Exh. No. U-1).

Pursuant to the directive of the National Guard Bureau, the Respondent determined the identities of the individuals filling each of 24 affected positions, added the supervisory responsibilities to their position descriptions, and notified the Union. (Tr. 34-35).

There were two periods of discussion on May 30 and June 15, 1978. (Stipulation). The Union objected to the individuals being removed from the bargaining unit. Respondent indicated that if there were objections to specific individuals, these would be reconsidered. (Tr. 32-33). The Union did not challenge any individual positions, but, rather, challenged all positions. (Stipulation). The Union's position was that a WG, as opposed to a WS, could not be a supervisor. (Tr. 41). Under classification standards, an individual cannot be classified with a WS pay grade unless he has three or more subordinates assigned. (Stipulation). No discussions were held on specific names or positions, only on the overall matter. (Stipulation).

In the past the Union, upon being advised of changes in the list of management officials and supervisors, had objected to the designation of certain positions as supervisory. The Union's position was then reviewed by Respondent, and the individual was either reinstated in, or removed from, the bargaining unit. (Tr. 33-34, Resp. Exh. V-1-X-3.)

Since the Union objected to all 24 positions being designated as supervisory and removed from the bargaining unit, instead of merely some, Respondent did not consider filing a CU petition. (Tr. 41). There is no evidence that Complainant offered to file a CU petition, or suggested that a joint CU petition be filed.

Following the lack of resolution, Respondent unilaterally declared each small shop chief a supervisor on June 26, 1978, and requested that the union dues withholding be terminated on July 2, 1978, on the basis that these supervisors were outside the unit for which the labor organization has been accorded exclusive recognition. Twenty-four employees were included. (Joint Exh. 2; Compl. Exh. C-2; Stipulation).

The Union's charge and complaint followed. Subsequently, on July 31, 1978 and August 24, 1978, the Respondent recinded its listing of two individuals as being erroneously included in the listing, leaving the follow 22 positions affected:

116th Tactical Fighter Wing

JOB TITLE	JOB NO.	GRADE	INCUMBENT
Acft Refueling Vch Opr	F6417000	WG-09	Michael F. Griffin
Fabric Worker	F9214000	WG-11	Clarence R. Jackson
Instr Mech	F4492000	WG-12	William D. LaValle
Elect Mech (Flt Sim)	F3415000	WG-14	Leon M. Brady
Acft Electrician	F4538000	WG-12	James D. Garrison

165th Tactical Airlift Group

Pneud Sys Mech	F4535000	WG-12	Donald S. Fandrich
Acft Pnued Sys Mech	F4541000	WG-12	Frank W. Stetson
Fabric Worker	F9214000	WG-11	James E. Newman
Instr Mech	F4492000	WG-12	Jerrell Baker

117th Tactical Control Squadron

Elect Mech (Radio)	F3071000	WG-14	Jack H. Vinall
Elect Mech (Radar)	F3075000	WG-14	George F. Cunningham
Elect Mech (Power)	F3079000	WG-13	Joseph H. Wilharm, Jr.
Elect Mech (Telephone)	F3083000	WG-14	Donald E. Pepper
Elect Mech (Computer)	F3146000	WG-14	Steve Stafford

283rd Combat Communications Squadron

Elect Mech (Power)	F3079000	WG-13	Richard P. Cashett

129th Tactical Control Squadron

Elect Mech (Radio)	F3071000	WG-14	Frankie D. West
Elect Mech (Radar)	F3075000	WG-14	Clyde E. Harper
Pwrd Support Sys Mech	F4249000	WG-12	Harold G. Light
Auto Mech	F4724000	GS-12	James G. Bennett

224th Combat Communications Squadron

Pwrd Support Sys Mech	F4249000	WG-12	William S. Sloan
Auto Mech	F4724000	WG-12	Ernest W. Poppell

202d Electronics Installation Squadron

Auto Mech	F4735000	WG-12	Walter F. Sheffield

Discussion

The assignment of duties is a reserved management right under Section 12(b) of the Order, and job content is excluded from the obligation to bargain under Section 11(b) of the Order. See International Association of Fire Fighters, Local F-111 and Griffin Air Force Base, Rome, New York, 1 FLRC 322, FLRC No. 71A-30 (1973) and American Federation of Government Employees, Local 987, AFL-CIO and Department of the Air Force, Robins Air Force Base, 5 FLRC 441, FLRC No. 76A-139 (1977).

However, it is well established that when an agency unilaterally determines the unit status of employees, it acts at its peril, since an erroneous determination could support a violation of the order. U.S. Marine Corps Air Station, El Toro, A/SLMR No. 560, 4 FLRC 218, FLRC No. 75A-115 (1976). This is so because an erroneous determination would be viewed as tantamount to a unilateral withdrawal of recognition with respect to a part of an exclusively recognized unit. Department of the Navy, U.S. Weapons Station, Seal Beach, California, A/SLMR No. 827, 7 A/SLMR 331 (1977).

The issue for determination, then, is whether Respondent correctly determined that the 22 employees in question were supervisors and, thus, excluded from the existing unit.

Section 2(c) of the Order defines "supervisor" as follows:

> 'Supervisor' means an employee having authority in the interest of an agency, to hire, transfer suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

The purposes and intent of the Order as amended, are clearly stated in the Report and Recommendations of the Federal Labor Relations Council on the amendment of Executive Order 11491, as amended, January 1975.

> The Council agrees with the view expressed in the review that only genuine supervisory positions should be excluded from bargaining units. The Council wishes to note that the definition in the Order was designed to do this and contains a number of qualifications to this end. For example-'in the interest of an agency,' 'responsibly to direct (employees),' 'effectively to recommend,'

> and 'exercise of authority . . . not of a merely routine or clerical nature, but (requiring) the use of independent judgment' - are limitations which were designed to assure that persons determined to be supervisors would possess actual authority as distinct from work leaders, and would be found to be in bonafide conflict of interest situations if not excluded from bargaining units. The Council believes that the continued careful application by the Assistant Secretary of these qualifications and the making of supervisory determinations will aid in identifying genuine supervisory positions.

Any individual who possesses the authority to perform a single function described in Section 2(c), provided he does so in a manner requiring the use of independent judgment, is a supervisory and must be excluded from the unit. United States Naval Weapons Center, China Lake, California, FLRC No. 72A-11 (1973). Supervisory status was intended to be determined on the basis of the authority of the individual, not on the precise number of subordinates. United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120, FLRC No. 72A-4, 1 FLRC 294 (1973). Nor does it matter that such authority is exercised over military personnel. Department of the Air Force, McConnell Air Force Base, Kansas, A/SLMR No. 134, FLRC No. 72A-15 (1973). However, there must be evidence of actual supervisory authority. Position descriptions or job classification standards are insufficient to establish supervisory status within the meaning of the Order. Cf. Department of the Navy, Naval Training Center, San Diego, California, A/SLMR No. 1121 (1978); United States Army and Air Force Exchange Service, Redstone Arsenal Exchange, Redstone Arsenal, Alabama, A/SLMR No. 491, 5 A/SLMR 171 (1975).

Executive Order 11838 amended Executive Order 11491 to eliminate performance evaluation as a sole criterion for supervisory status where the employee performs no other supervisory functions. However, such evaluations may be considered in conjunction with other authority vested in an individual in determining an employee's supervisory status. United States Forest Service, Salmon National Forest, Salmon, Idaho, A/SLMR No. 556, 5 A/SLMR 586 (1975), citing the Report and Recommendations of the Federal Labor Relations Council (January 1975).

Findings and Conclusions by Employees

The parties stipulated that no small shop chief has the authority to hire, transfer, suspend, lay off, recall, promote or discharge other employees. (Stipulation).

116th Tactical Fighter Wing

Aircraft Refueling Vehicle Operator F6417000 WG-09 Michael F. Griffin

The incumbent is responsible to a GS-12 Supply Management Officer and has one WG-8 and one full-time military person reporting to him. He directs and assigns these employees to refuel aircraft and works with them in driving a vehicle and refueling aircraft. He approves their leave, evaluates their performance, and schedules the work hours of the active duty person. He effectively recommended the selection of the active duty airman.

Based on the foregoing, I find that the employee is a supervisor within the meaning of Section 2(c) of the Order.

Fabric Worker F9214000 WG-11 Clarence R. Jackson

The incumbent is responsible to a GS-13 Air Operations Officer and has four employees reporting to him. He approves leave, evaluates their performance, and has, on one occasion, reprimanded an employee, although there was no showing of whether this was a minor or serious matter. It was shown that the incumbent works with each of the other employees up to 50% of the time, and that most of the work is done on a time phase inspection cycle.

The record fails to show that such authority as is exercised by an employee in this classification requires the exercise of independent judgment. There was no showing that such direction as is exercised is other than that of a more experienced employee assisting less experienced employees. Accordingly, I find that an employee in this classification is not a supervisor within the meaning of Section 2(c).

Instrument Mechanic F4492000 WG-12 William D. LaValle

At the time of the alleged unfair labor practice the incumbent was responsible to a WS-11 and had two WG-11s reporting to him. He worked alongside the two WG-11s up to 50% of the time. He reviewed their position descriptions and rated their performance. He reprimanded them for very minor things, but referred serious matters to his supervisor. He did not approve their leave. Two additional personnel were added to the shop in October 1978 and incumbent selected them; however, he was promoted to a WS-8 foreman position at about this same time on October 8.

The record fails to show that such authority as was exercised by an employee in this classification at the time it was declared to be supervisory required the exercise of independent judgment. Accordingly, I find that an employee in this classification was not a supervisor at the time within the meaning of Section 2(c).

Electrician Mech. (Flight Simulation) F3415000 WG-14 Leon M. Brady

The incumbent is responsible to a WS-12 general foreman and has one WG-12 reporting to him. In addition to working with the WG-12 on the flight simulator, the incumbent establishes priorities for work, rates the performance of the WG-12, and effectively recommend the approval of leave, changes in position descriptions, and the hiring of personnel to fill vacancies in his shop.

Based on the foregoing, I find that the employee in this classification is a supervisor within the meaning of Section 2(c) of the Order.

Aircraft Electrician F4538000 WG-12 James D. Garrison

At the time of the alleged unfair labor practice the incumbent was responsible to an aircraft mechanic foreman WS-10 and had one Aircraft Electrician WG-10 reporting to him. He worked side by side on the equipment with the employee for approximately 60-90% of the time with the priority of work being established primarily by maintenance control. Incumbent approved the leave of the WG-10, reviewed his position description on an annual basis, and evaluated his performance.

In October 1978 two employees were added to the shop, and the incumbent effectively recommended them for the position; however, the incumbent was promoted to a WS-7 Aircraft Electrician Foreman position at about this same time.

The record fails to show that at the time the WG-12 position was declared to be supervisory the employee in this classification exercised authority requiring independent judgment as distinct from that routinely exercised by a work leader.

165th Tactical Airlift Group

Pneumatic Systems Mechanic F4535000 WG-12 Donald S. Fandrich

Aircraft Pneumatic Systems Mechanic F4541000 WG-12 Frank W. Stetson

The incumbent of each of these positions is responsible to an Aircraft Mechanic General Foreman WS-12 and has one Pneumatic Systems Mechanic WG-10 reporting to him. Incumbent and the employee work side by side. The quality and quantity of the work is established by workload control and published standards. Incumbent has never had occasion to discipline the WG-10. The incumbent finally started approving the WG-10's leave requests only two weeks before the hearing. The incumbent is

scheduled to prepare the employee's next performance evaluation; however, he has not done so in the past. In the case of the Pneumatic Systems Mechanic, the employee has been detailed to another shop for approximately four months since incumbent was designated a supervisor and still spends a large portion of his time there.

The record fails to show that such authority as is exercised by an employee in these classifications requires the exercise of independent judgment. Accordingly, I find that an employee in these classifications is not a supervisor within the meaning of Section 2(c).

Fabric Worker F9214000 WG-11 James E. Newman

As of the time of the hearing the incumbent was the only person in a shop which is responsible for the inspection and preparation of flotation equipment, such as life rafts and preservers. Two other fabric workers, a WG-11 and WG-9, were under the control of the Maintenance Section, and their leave was finally approved and their performance evaluations performed by a supervisor in that section. Since these employees actually work on flotation equipment, their work is inspected by the incumbent using published directives as a guide. Due to the close relationship of the work, a realignment is planned which may result in these employees coming under the supervision of the incumbent sometime in the near future.

The record demonstrates that at the time this WG-11 position was determined by Respondent to be that of a supervisor, the incumbent did not possess the authority set out in Section 2(c), and the position should not have been removed from the unit.

Instrument Mechanic F4492000 WG-12 Jerrell Baker

The incumbent is responsible to a Foreman WS-10 and has one Instrument Mechanic WG-11 reporting to him. Incumbent approves the leave of the WG-11 and evaluates his performance. He spends 95% of his time working side by side with the highly qualified employee. The priorities, quantity, and quality of the work are largely dictated by Maintenance Control and published directives. While the incumbent sometimes directs and schedules work for the subordinate, this duty is sufficiently routine in nature as to be more in the nature of a work leader rather than a supervisor.

In these circumstances, and noting that the record reflects that the duties and authority of the Instrument Mechanic, WG-12, with respect to his subordinate are routine in nature and do not require the use of independent judgment as his subordinate works within well established guidelines, I find that the employee in this classification was not a supervisor within the meaning of the Order and should not have been removed from the unit.

117th Tactical Control Squadron

Electronic Mechanic (Radio)	F3071000	WG-14	Jack H. Vinall
Electronic Mechanic (Radar)	F3075000	WG-14	George F. Cunningham
Electronic Mechanic (Power)	F3079000	WG-13	Joseph H. Wilharm, Jr.
Electronic Mechanic (Telephone)	F3083000	WG-14	Donald E. Pepper
Electronic Mechanic (Computer)	F3146000	WG-14	Steve Stafford

The incumbents are responsible to a Maintenance Officer, GS-11, who has additional responsibilities for six other employees. Except for the Electronic Mechanic (Computer), who has one WG-12 reporting to him, the other four Small Shop Chiefs each have two employees reporting. The GS-11 has delegated to each of the small shop chiefs full responsibility for their shops. They each attend a weekly supervisors' meeting. They plan for, schedule, and direct their employees in the performance of a substantial amount of non-routine work, approve leave, review position descriptions, evaluate job performance, and can effectively counsel employees and recommend discipline.

I find that each of these employees is a supervisor within the meaning of Section 2(c) of the Order.

2830 Combat Communications Squadron

Electronic Mechanic (Power)	F3079000	WG-13	Richard P. Cashett

Incumbent is responsible to a Supervisory Electronic Technician, GS-11, who has other responsibilities. Incumbent has two WG-11s reporting to him. He spends 60-70% of his time working with the two mechanics and the rest of the time supervising their work. He establishes priorities on non-routine work, approves leave, reviews position descriptions, evaluates performance, and has effectively recommended an applicant to fill a vacancy in the shop.

Based on the foregoing, and the evidence of the exercise of independent judgment, I find that the employee in this classification is a supervisor under Section 2(c) of the Order.

129th Tactical Control Squadron

Electronic Mechanic (Radio)	F3071000	WG-14	Frankie D. West
Electronic Mechanic (Radar)	F3075000	WG-14	Clyde E. Harper
Powered Support Systems Mechanic	F4249000	WG-12	Harold G. Light

The incumbent small shop chiefs report to a Maintenance Officer, GS-11, who has other responsibilites in addition to supervision of these shops. The Power Support Systems Mechanic has four subordinate employees, the Electronic Mechanic (Radio) three, and the Electronic Mechanic Radio two. The GS-11 has delegated to each of the small shop chiefs full responsibility for their shops. He is physically separated from the Power Support Systems Mechanic and visits his shop on a weekly basis, and normally visits the shop of the Electronic Mechanic (Radio) only once or twice a week. Each of the small shop chiefs testified that they spend approximately 80% of their time in supervisory duties. They approve leave, evalutate their employees, and assign and direct their work.

The record shows that these employees exercise independent judgment within the meaning of Section 2(c). Accordingly, I find that these employees are supervisors.

Auto Mechanic F47244000 WG-12 James G. Bennett

The incumbent is responsible to the Detachment Commander, GS-12, for operation of the vehicle maintenance shop and has three subordinate mechanics who are WG-10s. The Detachment Commander visits the shop only once a week and has delegated full responsibility to the incumbent for supervision of the personnel in his shop. The incumbent assigns and directs the mechanics, determines the priority of the work, approves leave, and effectively evaluates their performance and resolves problems.

I find that this employee is a supervisor as defined in the Order.

224th Combat Communications Squadron

Powered Support Systems Mechanic F4249000 WG-12 William S. Sloan

Incumbent is responsible to the Detachment Commander, GS-12, and has one mechanic WG-10 reporting to him. Incumbent works side by side with the other employee approximately 70% of the time. He approves the leave of the subordinate employee and evaluates his performance. The record also shows that he has exercised independent judgment in disciplining the employee.

The record shows that the employee exercises independent judgment in a key area under Section 2(c) of the Order. Accordingly, I conclude that he is a supervisor.

Auto Mechanic F4724000 WG-12 Ernest W. Poppell

Incumbent is responsible to the Detachment Commander, GS-12, for operation of the vehicle maintenace shop and has two subordinate WG-10 mechanics. He assigns priorities, directs the work of these employees, evaluates their performance, approves leave, and has effectively recommended individuals for vacancies in the shop.

I find that the employee is a supervisor as defined in the Order.

202d Electronics Installation Squadron

Automobile Mechanic F4735000 WG-12 Walter F. Sheffield

Incumbent is responsible to the Detachment Commander, GS-12, for operation of the vehicle maintenance shop. He has two WG-10 mechanics reporting to him. Incumbent assigns priorities, responsibly directs the employees in their work, approves leave, evaluates performance, and has authority to adjust their grievances at the first level.

I find that the employee is a supervisor within the meaning of Section 2(c) of the Order.

Conclusion

Seven of the 22 employees, Clarence R. Jackson, William D. LaValle, James D. Garrison, Donald S. Fandrich, Frank W. Stetson, James E. Newman, and Jerrell Baker, were erroneously determined to be supervisors on June 26, 1978. These eight employees remained within the exclusive bargaining unit represented by the Complainant. Respondent's conduct in this respect constituted an improper withdrawal of recognition from Complainant with respect to a part of the exclusively recognized unit in derogation of Respondent's obligations pursuant to Sections 7 and 10 of the Order, to accord appropriate recognition to a labor organization qualified for such recognition.

Although a violation of Section 19(a)(5) of the Order was not alleged in the complaint, such conduct constitutes an independent violation of Section 19(a)(1) in that it interfered with, restrained and coerced employees in the exercise of rights assured by the Order. It has been previously held that the right to form, join, and assist a labor organization as provided for in the Order would be rendered meaningless where, as here, agency management fails to accord appropriate recognition to a labor organization and, with that action, negates the benefits which flow from the selection of an exclusive representative. 1/ United States Department

---

1/ No remedial order is considered necessary with respect to William D. LaValle and James D. Garrison. The record reflects, and the parties agree, that they have subsequently been promoted to supervisory positions outside the exclusive recognized unit.

of Defense, Department of the Navy, Naval Air Reserve Training Unit, Memphis, Tennessee, A/SLMR No. 106, 1 A/SLMR 490 (1971). Army and Air Force Exchange Service, MacDill Air Force Base Exchange, MacDill Air Force Base, Florida, A/SLMR No. 514, 5 A/SLMR 313 (1975), review denied, 3 FLRC 831, FLRC No. 75A-61 (1975).

Complainant alleges that Respondent violated Section 19(a)(6) by its unilateral change in the bargaining unit and revocation of dues withholding. However, it has been previously held that such actions are part and parcel of the failure to continue to accord appropriate recognition and are embraced within violations of Sections 19(a)(5) and 19(a)(1) and do not constitute independent acts by the Respondent violative of Section 19(a)(6). United States Department of Defense, Department of the Navy, Naval Air Reserve Training Unit, Memphis, Tennessee, supra.

Complainant requests that the Respondent be ordered to reimburse the Union, at no expense to the employees, for back dues it would otherwise have received had these members not been removed from dues withholding. The Assistant Secretary rejected such a remedy in United States Department of Defense, Department of the Navy, Naval Air Reserve Training Unit, Memphis, Tennessee, supra. The Assistant Secretary noted that the obligations of Union membership, such as the payment of dues, are still the responsibility of the employee, and held that the reinstitution of dues deduction would satisfactorily remedy the improper conduct.

There is no evidence that Respondent violated Section 19(a)(2), as alleged in the complaint.

Recommendations

Upon the basis of the foregoing findings, conclusions, and the entire record, I recommend that the Authority dismiss that part of the complaint alleging that Respondent violated Section 19(a)(2) and (6) of the Order and adopt the following order concerning that conduct found to be violative of Section 19(a)(1):

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, 29 C.F.R. Section 203.26(b), and Section 2400.2 of the transition rules and regulations, 5 C.F.R. Section 2400.2 (1979), the Authority hereby orders that the Adjutant General, Georgia National Guard, Department of Defense, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing unit employees Clarence R. Jackson, Donald S. Fandrich, Frank W. Stetson, James E. Newman, and

Jerrell Baker by erroneously determining that they are supervisors under Section 2(c) of Executive Order 11491, as amended, refusing to recognize their exclusive representative, Georgia Association of Civilian Technicians, ACT, Inc., and cancelling their dues withholding authorizations executed on behalf of that labor organization.

(b) In any like or related matter interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Accord appropriate recognition to Georgia Association of Civilian Technicians, ACT, Inc., as the exclusive representative of unit employees Clarence R. Jackson, Donald S. Fandrich, Frank W. Stetson, James E. Newman, and Jerrell Baker.

(b) Commencing with the first pay period after the date of this Order deduct regular and periodic dues of the Georgia Association of Civilian Technicians, ACT, Inc. from the pay of Clarence R. Jackson, Donald S. Fandrich, Frank W. Stetson, James E. Newman, and Jerrell Baker, and remit the dues to the above-named labor organization, provided such employees have made voluntary allotments for that purpose in accordance with the existing agreement covering voluntary allotments for payment of dues with Georgia Association of Civilian Technicians, ACT, Inc.

(c) Post at all facilities and installations of the 116th Tactical Fighter Wing and the 165th Tactical Airlift Group installations copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Adjutant General and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Adjutant General shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Authority, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: June 18, 1979
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce unit employees Clarence R. Jackson, Donald S. Fandrich, Frank W. Stetson, James E. Newman, and Jerrell Baker by erroneously determining that they are supervisors under Section 2(c) of Executive Order 11491, as amended, refusing to recognize their exclusive representative, Georgia Association of Civilian Technicians, ACT, Inc., and cancelling their dues withholding authorizations executed on behalf of that labor organization.

WE WILL NOT in any like or related matter interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

_____

(Agency or Activity)

Dated: _____ by: _____

(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Suite 540, 1365 Peachtree Street, NE., Atlanta, Georgia 30309.

2 FLRA No. 94

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Veterans Administration Hospital,
Temple, Texas

Respondent

and

Case No. 6-CA-2

American Federation of Government
Employees, AFL-CIO, Local Union 2109

Complainant

DECISION AND ORDER

On September 6, 1979, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the above-entitled proceeding finding that the Respondent had engaged in certain unfair labor practices in violation of § 19(a)(1) of the Order and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge also found that the Respondent had not engaged in certain other alleged unfair labor practices and recommended that those portions of the complaint be dismissed. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under § 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by § 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in § 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to § 2400.2 of the Authority's rules and regulations and § 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in

the subject case, including the Complainant exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation. */

ORDER

Pursuant to §2400.2 of the rules and regulations of the Federal Labor Relations Authority and §7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Veterans Administration Center, Temple, Texas, shall:

1. Cease and desist from:

(a) Interrogating its employees as to whether they will file grievances against the activity based upon any action taken by management toward the employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purpose and policies of the Order:

(a) Post at its facility at the Olin Teague Veterans Administration Center, Temple, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the chief of the Laboratory Service and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The chief shall take reasonable steps to insure that such notices are not altered, defaced, or covered by other material.

(b) Pursuant to § 203.27 of the Regulations, notify the Federal Labor Relations Authority, in writing 30 days from the date of this order as to what steps have been taken to comply herewith.

*/ In conformity with § 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

IT IS HEREBY FURTHER ORDERED that the portion of the complaint in Case No. 6-CA-2 found not to be violative of the Executive Order be, and it hereby is, dismissed.

Issued, Washington, D.C., February 29, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interrogate our employees as to whether they will file grievances against us based upon any action taken by management toward our employees.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice of compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, whose address is: Downtown Post Office Station, Bryan and Ervay Streets, P.O. Box 2640, Dallas, Texas 75221, and whose telephone number is: (214) 767-4996.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Employment and Training Administration,
Veterans Employment Service,
Department of Labor

Respondent

and

Civil Service Commission
Case No. 110

American Federation of Government Employees,
National Council of Field Labor Lodges,
Local 2513, AFL-CIO

Complainant

DECISION AND ORDER

On August 30, 1979, Hearing Officer Paul E. Weil issued his Recommended Decision and Order in this proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Hearing Officer's Recommended Decision and Order.

The now defunct Civil Service Commission assumed jurisdiction over this case pursuant to section 6(e) of Execuitve Order 11491, as amended, when Complainant filed its complaint in 1978. 1/ The functions of the Civil Service Commission under the Executive Order were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

1/ Section 6(e) provides that:

> If any matters arising under paragraph (a) of this section involve the Department of Labor, the duties of the Assistant Secretary [for Labor-Management Relations] described in paragraphs (a) and (b) of this section shall be performed by a member of the Civil Service Commission designated by the Chairman of the Commission.

Section 6(a)(4) requires the Assistant Secretary to decide unfair labor practice complaints.

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Hearing Officer made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Hearing Officer's Recommended Decision and Order and the entire record in the subject case, and noting that no exceptions were filed, the Authority hereby adopts the Hearing Officer's findings, conclusions and recommendation. 2/

ORDER

IT IS HEREBY ORDERED that the complaint in CSC No. 110 be, and it hereby is, dismissed.

Issued, Washington, D.C., February 29, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

1900 E STREET NW. ● WASHINGTON, D.C. 20424

February 29, 1980

Mr. James M. Sober
Assistant Counsel
National Treasury Employees Union
1730 K Street, NW.
Suite 1101
Washington, D.C. 20006

Re: National Treasury Employees Union and Internal Revenue Service, Case No. 0-NG-46

Dear Mr. Sober:

This refers to your petition for review of the agency head's determination of nonnegotiability in the above-entitled case, filed with the Authority on April 18, 1979.

The dispute, as presented in your appeal, concerns the negotiability of the union's proposals under the provisions of Executive Order 11491, as amended. Executive Order 11491 is, however, no longer in effect, having been superseded by the new Federal Service Labor-Management Relations Statute (92 Stat. 1191), which became effective January 11, 1979, and which governs the resolution of negotiability disputes such as are involved in your appeal. In this regard, neither your petition for review nor the agency head's determination of nonnegotiability addresses the applicability of the Statute to the disputed proposals.

Accordingly, your petition for review of a negotiability dispute under Executive Order 11491 is dismissed as moot without passing upon the merits of your appeal and without prejudice to your submission of the dispute to the Authority in conformance with the provisions of the Statute and the regulations of the Authority issued thereunder. American Federation of Government Employees, AFL-CIO, Local 695 and Department of the Treasury, U.S. Mint, Denver, Colorado, Case No. 0-NG-26, 1 FLRA No. 39 (May 10, 1979), Report No. 6. */

By the Authority.

Sincerely,

Samuel A. Chaitovitz
Executive Director

cc: J. Kurtz
IRS

*/ It is noted that the union has filed another negotiability appeal under the Statute involving the same parties and the identical proposals at issue in the instant case. That appeal (0-NG-85) is currently pending before the Authority.

CORRECTED COPY

2 FLRA No. 93

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

American Federation of Government Employees,
AFL-CIO, Local 2879

(Union)

and

Case No. O-NG-208

Social Security Administration
San Diego, California

(Activity)

DECISION ON NEGOTIABILITY APPEAL

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 et seq.).

The record before the Authority shows that during negotiations for a supplemental agreement between the parties the union requested negotiations on the following matters:

(1) For any promotion within the selecting authority of the District Manager, any best qualified list shall contain the names of no more than three candidates.

(2) A flexitime plan that will be submitted for final approval will be negotiated for each installation within the District. Any plan that is sent back for changes will have the changes renegotiated. Flexible bands will be from 7:00 a.m. to 9:00 a.m., 11:00 a.m. to 1:00 p.m., and 3:30 p.m. to 5:30 p.m. Core times will be from 9:00 a.m. to 11:00 a.m. and 1:00 p.m. to 3:30 p.m. The employees in any installation within the District may opt for "compressed work scheduling" in lieu of, or in addition to, flexitime. "Compressed work scheduling" will provide that employees may work a total of 80 hours in a two-week pay period in other than the normal 8 hour workday.

(3) Any changes proposed by Management will be subject to the negotiation process at the District level, upon request of the Union.

The activity responded in writing to the union's request to negotiate on these matters, stating, generally, that it did not consider the above-mentioned matters negotiable. Thereafter, on behalf of the union, the American Federation of Government Employees (AFGE) filed a petition for review with the Authority.

The activity filed a statement with the Authority asserting, in substance, that because of a unit consolidation at the national level including the union herein and other locals of the AFGE within the Social Security Administration in August 1979, there is no longer a duty to bargain with AFGE Local 2879, which is part of the Council of District Office Locals for San Francisco. In this connection, the activity argues that following the August 1979 unit consolidation, it is not obligated to negotiate local supplemental agreements below the national level of recognition, absent an agreement between the parties to do so. In addition, the activity notes that the union's second proposal concerning flexitime, and its third proposal to negotiate changes at the District level, are subject to national negotiations and a controlling San Francisco Master Agreement, respectively.

In essence, AFGE contends that the activity violated its bargaining obligation by refusing to negotiate on the proposals herein. In this regard, AFGE asserts that AFGE Local 2879 began negotiations prior to the August 1979 unit consolidation as the authorized agent of the Council of District Office Locals and continued to do so after the unit consolidation. It alleges that the activity has engaged in bad faith bargaining with AFGE Local 2879 by refusing to bargain on the matters herein until the time the unit consolidation became effective and then, "as a stratagem to escape bargaining," alleging that such matters were outside its duty to bargain because the level of recognition had changed with the AFGE Locals. In sum, the AFGE contends that the only issue in the subject case is whether the activity has committed an unfair labor practice and/or violated the parties' agreement, and, that the union's redress lies in another forum. We agree.

The union's contentions focus on whether the activity has engaged in bad faith bargaining and the activity's defense is that its obligation to bargain with AFGE Local 2879 has ceased on such matters subsequent to the aforementioned unit consolidation. Thus, the essence of the parties' contentions relate to the bargaining obligation of the parties under the circumstances herein and not to whether the proposals themselves violate law or regulation. Therefore, the proper forum in which to raise these issues is not a negotiability appeal, but would be an unfair labor practice proceeding pursuant to section 7118 of the Statute. See American Federation of Government Employees, Local 1931 and Department of the Navy, Naval Weapons Station, Concord, California, Case No. 0-NG-55, 2 FLRA No. 19 (Dec. 5, 1979), Report No. ____, and National Federation of Federal Employees, Local 1363 and Headquarters, U.S. Army Garrison, Yongsan, Korea, Case No. 0-NG-94, 2 FLRA No. 50 (Dec. 31, 1979), Report No. ____.

Additionally, to the extent that the instant case involves disputes over whether the union's proposal concerning flextime is subject to national negotiation only, and/or whether its proposal to negotiate changes at the District level is controlled by a San Francisco Master Agreement, the proper forum in which to resolve these disputes would be pursuant to whatever procedures the parties themselves have adopted for such purposes through such agreements. See American Federation of Government Employees, AFL-CIO, Local 1931 and Department of the Navy, Naval Weapons Station, Concord, California, Case No. 0-NG-55, 2 FLRA No. 19 (Dec. 5, 1979), Report No. ____, and American Federation of Government Employees, AFL-CIO, Bureau of Prisons, Federal Correctional Institution, Danbury, Connecticut, Case No. 0-NG-43, 2 FLRA No. 56 (Jan. 9, 1980), Report No. ____.

Based on the foregoing, the union's appeal does not present issues that the Authority can appropriately resolve at this time under section 7117 of the Statute and Part 2424 of its rules and regulations. Accordingly, the appeal is dismissed.

Issued, Washington, D.C., February 29, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

CORRECTED COPY

2 FLRA No. 90

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

THE ASSOCIATION OF CIVILIAN TECHNICIANS, INC., NEW YORK COUNCIL

Union

and

FLRC No. 78A-149

DIVISION OF MILITARY AND NAVAL AFFAIRS, STATE OF NEW YORK

Activity

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator Benjamin H. Wolf filed with the Federal Labor Relations Council.1/

According to the arbitrator, the grievance in this case arose when the activity posted a vacancy announcement for the position of Supervisory Personnel Management Specialist. The announcement limited applicants to excepted technician employees with the military grade of officer or warrant officer, thereby precluding all excepted employees who held enlisted grades from applying for the position. The official job description for the position indicated that it was open to excepted employees who are officers, warrant officers or enlisted employees. The dispute ultimately went to arbitration.

1/ The functions of the Federal Labor Relations Council, in matters such as here involved, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 Fed. Reg. 36040), which transfer of functions is implemented by section 2400.5 of the Authority's transition rules and regulations (44 Fed. Reg. 44741). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7135(b)).

The arbitrator set forth the issue before him as follows:

> Did management violate the merit promotion article, Article 14, of Section 6 of the negotiated agreement between the parties in posting Vacancy Announcement 76-62 on August 10, 1976, which limited applicants to the position of Supervisory Personnel Management Specialist, GS-09, to solely those employees who held officer or warrant officer military grades in the National Guard, where the technician job description from the National Guard Bureau for the aforesaid position indicated enlisted personnel were able to apply as well.

In the opinion accompanying his award, the arbitrator determined that since Article 14, Section 6[2/] of the parties' agreement states that qualification standards will be in accordance with those contained in official job descriptions and the job description for the position in question provides that officers, warrant officers and enlisted men are eligible to fill such positions, the activity had violated Article 14, Section 6 by excluding enlisted men.

Accordingly, the arbitrator awarded as follows:

> Management violated the merit promotion article, Article 14, Section 6, of the negotiated agreement between the parties in posting Vacancy Announcement 76-62 on August 10, 1976.
>
> Management is directed to rerun the vacancy announcement and to open competition to all excepted technician employees including enlisted men.

The agency filed a petition for review of the arbitrator's award based upon the exceptions discussed below.[3/] The union filed an opposition to the petition.

In accordance with section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority (44 Fed. Reg. 44741) and section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215), the rules of procedure of the Federal Labor Relations Council, 5 C.F.R. part 2411 (1978), remain operative with respect to the present case except that the word "Authority" is substituted, as appropriate, wherever the word "Council" appears in such rules.

2/ According to the arbitrator, Article 14, Section 6 provides:

> Qualification standards will be in accordance with those contained in official job descriptions and such selective placement factors as may be required.

3/ In its petition, the agency also requested oral argument in this case. This request is denied because the positions of the parties are adequately reflected in the entire record before the Authority.

Under section 2411.32 of the rules as so amended, review of an arbitrator's award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In its first exception, the agency contends that the arbitration award ignores past practice. In support of this exception, the agency asserts that prior to the present grievance management published vacancy announcements which excluded certain military classifications in the same fashion as in the case herein and in many instances the union did not grieve such actions.

This exception does not state a ground upon which the Authority will grant review of an arbitration award under section 2411.32 of the amended rules. That is, the exception does not assert a ground upon which review has been granted in the Federal sector nor does it appear similar to those upon which challenges to labor arbitration awards are sustained by courts in private sector cases. In this regard, the agency cites no private sector cases in which courts have held this exception to be a ground for review of arbitration awards. Accordingly, the agency's first exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules of procedure.

In its second exception, the agency contends that the award violates appropriate regulation. In support of this exception, the agency asserts that "due consideration was not given . . . Technician Personnel Pamphlet (TPP) 911 . . . which concerns the Merit Promotion Program involved herein." The agency also asserts that the result of the award would be to preclude management from considering section 3-8 of TPP 911, entitled "Selective Placement Factors" in publishing vacancy announcements.

The Authority will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that an award violates an appropriate regulation. However, and without deciding whether or not TPP 911 is an "appropriate regulation" within the meaning of section 2411.32 of the amended rules of procedure, the Authority is of the opinion that in this case the agency's petition does not contain a description of facts and circumstances to support its second exception.

The basic thrust of the agency's exception is that "due consideration" was not given to TPP 911. However, it is noted that the arbitrator specifically referred to TPP 911 in the discussion accompanying his award and particularly pointed out the language therein that selective placement factors may be used as a secondary screening factor. Moreover, the agency in its exception does not demonstrate in what manner the arbitrator's award, in which the arbitrator found that in posting the vacancy announcement in this particular case the agency violated the parties' negotiated agreement, violates TPP 911. Nor does the agency demonstrate in what manner the arbitrator's award would preclude it from considering the selective placement factors of section 3-8 of TPP 911 in the future. Therefore, the agency's second exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules of procedure.

In its third exception, the agency asserts that the award violates the parol evidence rule. In support of this exception, the agency contends that the parol evidence rule was violated by the arbitrator in conjunction with the lack of consideration he gave to TPP 911 which clearly sets forth selective placement factors.

This exception does not state a ground upon which the Authority will grant review of an arbitration award under section 2411.32. That is, the exception does not state a ground upon which review has been granted in the Federal sector nor does it appear similar to those upon which challenges to labor arbitration awards are sustained by courts in private sector cases. In this regard, the agency cites no private sector cases in which courts have held this exception to be a ground for review of arbitration awards. Accordingly the agency's third exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules of procedure.

In its fourth exception, the agency contends that the award violates applicable law. The agency states that the National Guard Technician Act of 1968 gives adjutants general the authority to employ and administer technicians and this authority, the agency asserts, includes advertising position vacancies in the manner deemed most appropriate.

The Authority will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that an award violates applicable law. However, the agency's exception in this case is not supported by the facts and circumstances described in the petition. Thus, the agency does not demonstrate in what manner the arbitrator's award directing the agency to rerun the vacancy announcement in accordance with the provisions of the parties' negotiated agreement violates the National Guard Technician Act of 1968. Nor does the agency provide any support for its general assertion that the Act gives an adjutant general "the right to advertise position vacancies in the manner deemed most appropriate." Therefore, this exception provides no basis for acceptance of the agency's petition under section 2411.32 of the amended rules.

In its fifth exception, the agency contends that the award violates Executive Order 11491. The agency asserts that the award violates section 12(a) of the Order "which, by incorporation of appropriate regulation, gives the agency the right and obligation to decide the best course to pursue in announcing a position vacancy" and section 12(b)(5) of the Order which gives the agency the right "to determine the methods, means and personnel by which [Government] operations are to be conducted.4/

4/ Section 12(a) and (b)(5) of E.O. 11491 provide:

Sec. 12 Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--

(a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in

(Continued)

Although the Authority will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition for review, that the award violates the Order, the agency's petition fails to present the necessary facts and circumstances to support its exception. Thus, as to the agency's allegation that the award violates section 12(a) of the Order, it is well established under the Order that an exception to an award asserting that the award violates section 12(a) of the Order does not state a ground upon which review of an arbitration award will be granted. As explained in Rocky Mountain Arsenal and American Federation of Government Employees, Local No. 2197 (Seligson, Arbitrator), 5 FLRC 859 [FLRC No. 77A-53 (Aug. 31, 1977), Report No. 137]:

> [S]ection 12(a) of the Order provides only that the administration of a negotiated agreement is subject to the legal and regulatory requirements cited in that section; it does not extend to the parties to such an agreement any rights or obligations independent of those requirements and therefore does not, in and of itself, provide a ground upon which the Council will grant a petition for review of an arbitrator's award. [Footnote omitted.] Id. at 865 of the Council's decision.

Therefore, that part of the agency's fifth exception alleging that the award violates section 12(a) of the Order provides no basis for acceptance of its petition under the amended rules of procedure.

As to that part of the agency's exception which alleges that the award violates section 12(b)(5) of the Order, again the agency has not presented facts and circumstances to support its exception. The agency has not shown in what way the arbitrator's award, in which he directed the activity to rerun the vacancy announcement in accordance with the parties' agreement, would in any manner infringe upon management's right, after rerunning the announcement, to determine the methods, means and personnel by which the agency's operations are to be conducted. Thus, the agency's fifth exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules of procedure.

The agency also contends that the award should be declared void because the grievance was improperly determined to be arbitrable and therefore the

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(Continued)

> the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level;
>
> (b) management officials of the agency retain the right, in accordance with applicable laws and regulations--
>
> . . . . . .
>
> (5) to determine the methods, means, and personnel by which such operations are to be conducted[.]

arbitrator did not have jurisdiction to decide the dispute. The record indicates that the question of arbitrability in this case was initially submitted to a Regional Administrator of the Department of Labor for decision and that he found the matter arbitrable. There is no indication that the agency appealed the Regional Administrator's decision to the Assistant Secretary of Labor for Labor-Management Relations as provided for under the Executive Order, and, instead, the record indicates that following receipt of the Regional Administrator's decision the parties proceeded to arbitration. In these circumstances there is no basis for the Authority to now question the Regional Administrator's determination that the matter involved herein was arbitrable.

Accordingly, the agency's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the amended rules. The agency's request for a stay of the award is also denied.5/

Issued, Washington, D.C., February 29, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

5/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the instant case was decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision does not prejudge in any manner either the meaning or application of related provisions of the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Order.

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 34 REPORT OF CASE DECISIONS May 20, 1980

UNFAIR LABOR PRACTICE CASES

2 FLRA No. 97 (February 29, 1980)

Internal Revenue Service, Austin Service Center, Assistant Secretary Case No. 63-8897(CA). Upon a complaint filed by the union (NTEU and NTEU Chapter 72) under E.O. 11491, and transfer of the case to the Authority by the Regional Director, the Authority found that the activity violated section 19(a)(1) and (6) of the Order by failing to notify the union of its intent to change the hours of duty of three bargaining unit employees and failing to afford the union an opportunity to negotiate, upon request, concerning the impact and implementation of the change. Accordingly, the Authority issued a remedial order. (Decision and Order attached).

2 FLRA No. 102 (March 7, 1980)

Environmental Protection Agency, Assistant Secretary Case No. 22-09116(CA). Upon a complaint filed by the union (AFGE Local 3331) under E.O. 11491, the ALJ concluded that the agency had violated section 19(a)(1) of the Order when in a memorandum it requested that an employee (the local union treasurer who occasionally represented unit employees) provide his supervisor with a report of his present and anticipated roles in union activities. The ALJ also found that although the agency had a legitimate interest in inquiring into the amount of work time the employee estimated he would spend on union activities, the subject memorandum was too broad and exceeded any valid interest the agency might have had. The ALJ thereupon recommended a remedial order that would, among other things, direct the agency to cease and desist from requesting such reports from employees. The Authority adopted the ALJ's findings and conclusions, but modified his recommended Order to reflect the finding that the agency may, for valid reasons, request an employee to estimate the amount of work time he anticipates spending on union activities. (Decision and Order attached.)

2 FLRA No. 103 (March 7, 1980)

Federal Aviation Science and Technological Association Division, National Association of Government Employees, Assistant Secretary Case No. 72-7821(CO). Upon a complaint filed by three individual employees in the bargaining unit who were not union members, under E.O. 11491, the ALJ found that the union's representation policy as expressed in a union publication (a policy of disparate representation treatment of unit employees based solely on union membership) and the restatement of that policy by the union's regional president violated section 19(b)(1) of the Order. The Authority adopted the ALJ's findings, conclusions, and recommendations and issued a remedial order. (Decision and Order attached.)

2 FLRA No. 104 (March 7, 1980)

Norfolk Naval Shipyard, Portsmouth, Virginia, Assistant Secretary Case No. 22-08539(CA). The ALJ, upon an amended complaint filed by the union (Tidewater Virginia Federal Employees Metal Trades Council) under E.O. 11491, found that the basic issues raised in the complaint (related to environmental differential pay for "dirty work") had previously been raised in arbitration proceedings arising out of a grievance and a submission filed under the parties' negotiated agreement. The ALJ therefore concluded that section 19(d) of the Order barred consideration of the complaint and recommended that it be dismissed. The Authority adopted the ALJ's findings, conclusions, and recommendation and dismissed the complaint. (Decision and Order attached.)

NEGOTIABILITY CASES

2 FLRA No. 96 (February 29, 1980)

American Federation of Government Employees, AFL-CIO, International Council of United States Marshals Service Locals and Department of Justice, United States Marshals Service, Case No. 0-NG-118. The dispute involved the negotiability of a union proposal that all vacancies for which bargaining unit employees are eligible to apply be announced regardless of how the vacancies are filled. The Authority held that the union's proposal established a negotiable procedure under section 7106(b)(2) of the Statute and therefore set aside the activity's allegation that the proposal was not within the duty to bargain. (Decision attached.)

2 FLRA No. 98 (March 7, 1980)

National Labor Relations Board Union, Local 19 and National Labor Relations Board, Region 19, Case No. 0-NG-131. This dispute involved the negotiability of a union proposal that the agency assign certain duties of the Office Manager to the Clerical Assistant only if the Clerical Assistant is duly appointed Acting Office Manager in the absence of the Office Manager. The Authority found that the proposal conflicted with section 7106(a)(2)(B) of the Statute and, accordingly, sustained the activity's allegation that the proposal was not within the duty to bargain. (Decision attached.)

2 FLRA No. 99 (March 7, 1980)

American Federation of Government Employees, AFL-CIO, Local 1760 and Social Security Administration, Bureau of Retirement and Survivors Insurance, Northeastern Program Service Center, Flushing, New York, Case No. 0-NG-168. The activity notified the union of its decision to assign certain temporary employees to the mailroom, to assign 'terminal digits' work to union officials as well as other unit employees, and to audit a random sample of the work of certain employees. The union, without submitting any specific written proposal, asked the activity to bargain regarding the proposed changes. The activity refused, asserting that the decisions were within management's reserved rights and therefore nonnegotiable, but did negotiate as to the implementation and impact of these changes. The union filed a petition for review with the Authority. The Authority determined that the union's petition did not present a proposal sufficiently specific and delimited in form and content as to permit the Authority to render a negotiability decision. Therefore, for the reasons set forth in its decision in the ACT, Alabama case, Case No. 0-NG-27 (Report No. 25), the Authority held that the union's petition did not meet the requirements for review prescribed in section 7117 of the Statute and Part 2424 of the Authority's rules of procedure. Accordingly, the Authority dismissed the union's petition. (Decision attached.)

2 FLRA No. 100 (March 7, 1980)

American Federation of Government Employees, AFL-CIO, Local 3488 and Federal Deposit Insurance Corporation, New York Region, Case No. 0-NG-61. The case essentially involved the continuation of a negotiability dispute which arose in 1977, when the activity notified the union that it intended to assign certain banks to specific field offices within the New York Region for examination purposes, rather than to continue the existing practice of assigning a particular bank examination to one of several field offices on an ad hoc basis, and subsequently

declared that the union's proposals concerning the realignment were nonnegotiable under E.O. 11491. The union did not pursue the matter further for 18 months, during which time the alignment remained and continued in effect. In April 1979, the union submitted to the activity proposals related to the realignment, which were different from those discussed by the parties in 1977, and requested the activity's position as to their negotiability. In response, the activity asserted, in part, that the union's request was untimely; and the union filed the instant petition for review. Under all of the circumstances involved, including the fact that the parties' agreement, which had been negotiated under the Order, had recently expired and that the union had an opportunity to submit and define its proposals at the bargaining table where the applicability of the Statute might now be considered by the parties, the Authority concluded that further processing of the union's appeal would be inappropriate. Accordingly, the Authority dismissed the appeal without prejudice to the parties' consideration of the union's proposals, as clarified, and a timely appeal from any allegation by the agency that such proposals are nonnegotiable under the Statute. (Decision attached.)

Appeal withdrawn:	Case No.	Date
	0-NG-190	March 3, 1980

MISCELLANEOUS CASE

2 FLRA No. 101 (March 7, 1980)

Headquarters, U.S. Army Communications Command, et al., Fort Huachuca, Arizona and American Federation of Government Employees, Local 1662, Case No. 0-MC-1. The union requested that the Authority petition a U.S. court of appeals for enforcement of an arbitration award. The Authority denied the union's request because there was no "order of the Authority" in the case to be enforced under section 7123(b) of the Statute. (Decision attached.)

Attachments (9)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Internal Revenue Service,
Austin Service Center

Respondent

and

Assistant Secretary
Case No. 63-8897(CA)

National Treasury Employees Union
and NTEU Chapter 72

Complainant

DECISION AND ORDER

This matter is before the Authority pursuant to the Order Transferring Case to the Federal Labor Relations Authority of Regional Director Gabriel Perales, Jr. in accordance with section 206.5 of the rules and regulations of the Federal Labor Relations Authority.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts, accompanying exhibits, and the briefs submitted by the Respondent and the Complainant, the Authority finds:

The complaint herein alleges that the Respondent violated section 19(a)(1) and (6) of the Order by changing the hours of duty of three bargaining unit employees without first notifying Complainant, and affording it an opportunity to negotiate concerning the impact and implementation of the change. The Respondent contends that the change of hours of duty for the three bargaining unit employees was insubstantial and did not constitute a change in working conditions. As a result, the Respondent contends that it was not obligated to bargain with the Complainant over the impact and implementation of its action. The Respondent also argues that its actions were merely in conformity with the Civil Service Commission regulations and as a result there was nothing to negotiate with Complainant. The Respondent further argues that if it was obligated to negotiate the impact and implementation of its decision, its failure to do so was de minimis and did not constitute an unfair labor practice.

The undisputed facts, as stipulated by the parties, are as follows:

Austin Service Center in Austin, Texas, is one of the ten service centers in the Internal Revenue Service. National Treasury Employees Union Chapter 72 (NTEU) is, and was at all time pertinent to the complaint, the exclusive representative of the bargaining unit employees in the Austin Service Center.

On May 2, 1978, the Federal Employees Appeals Authority (FEAA) of the United States Civil Service Commission conducted a hearing pursuant to 5 C.F.R. 772.307 at the Austin Service Center in the matter of the adverse action appeal of Richard Cox, a bargaining unit employee. Cox was represented by private counsel. Prior to the hearing, Cox requested that certain employees of the Respondent appear as witnesses in his behalf. In accordance with 5 C.F.R. 772.307(c)(2), the FEAA requested Respondent to make these employees available to appear as witnesses at the hearing. 1/ The FEAA request to Respondent was conveyed by letter dated April 14, 1978, and Respondent received this letter on April 19, 1978. Among those whom Respondent was requested to make available to appear as witnesses were three bargaining unit employees -- Frederick Oberdorf, Mark Turek, and Lorna Boeck -- who worked on the 5:00 p.m. to 1:30 a.m. shift in the Error Correction Section. Because the hearing was scheduled to commence at 8:30 a.m., May 2, 1978, Respondent changed these employees' hours of duty to the 7:30 a.m. to 4:00 p.m. shift for the day of the hearing only.

Employees Oberdorf and Boeck were notified of their hours of duty change at approximately 6:00 p.m., May 1, 1978, the evening before the FEAA hearing. At that time, they were told by their supervisor that if they wished, they could take annual leave for the remaining seven hours of their shift to go home and rest before the hearing. The two employees declined, and remained at work. Boeck went home at 1:30 a.m. on May 2, 1978, upon the conclusion of her normal shift. Oberdorf voluntarily worked overtime until approximately 3:00 a.m., May 2, 1978. Turek, who worked in another unit, also was advised of the change in his hours of duty at approximately 6:00 p.m. on May 1, 1978. He was not given the option of using annual leave that evening, and he worked until 1:30 a.m. on May 2, 1978, his normal quitting time. Oberdorf, Boeck, and Turek reported back to work at 7:30 a.m. on May 2, 1978, as a result of the change in their hours of duty. The FEAA hearing began at 8:30 a.m., as scheduled. Later that morning all three employees testified at the hearing.

1/ In pertinent part, 5 C.F.R. 702.307 provides:

> (2) Both parties are entitled to produce witnesses and to introduce signed sworn statements or letters of interrogatory. The Appeals Authority is not authorized to subpoena witnesses. Any agency that has employees entitled to appeal to the Appeal Authority under this part shall make its employees available to furnish sworn statements or to appear as witnesses at the hearing when requested by the Appeals Authority after consideration of a request by either party to the appeal, unless it is administratively impracticable to comply with the request of the Appeals Authority. . .
>
> Federal employees shall be in an official duty status for all purposes in connection with their provision of sworn statement or their appearance as witnesses and shall be free from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony.

Because of fatigue, Oberdorf failed to complete his shift on May 2, 1978, after the conclusion of his testimony. Using four hours of sick leave, he went home at 11:30 a.m. Boeck also went home at 11:30 a.m. because of fatigue, but she had to accept four hours leave without pay in order to do so. Boeck returned to work later that evening (May 2, 1978), and made up the four hours leave without pay by working from 5:00 p.m. to 9:00 p.m. She also received ten percent additional night differential pay for three hours work that evening from 6:00 p.m. to 9:00 p.m. After Turek testified, he completed his shift and went home at 4:00 p.m. Respondent did not notify Complainant of the change in the three employees' hours of duty. Complainant learned of the change after the FEAA hearing was completed.

FINDINGS AND CONCLUSIONS

The finding is the Respondent's failure to give Complainant advance notice of its intent to change the three bargaining unit employees' hours of duty for the day of the FEAA hearing, and an opportunity to meet and confer with respect to the impact and implementation of the change violates section 19(a)(1) and (6) of the Order. It is clear that the shift change was made in order to assure compliance with 5 C.F.R. 772.307(c)(2), and hence, the basic decision to make the shift change was nonnegotiable. However, it is equally clear that even when an Activity is privileged to take such an action without first bargaining about the basic decision, it is obligated to notify and bargain, upon request, with the exclusive representative of its employees concerning the procedure for implementing the decision and the impact of the decision on the employees. 2/ The Authority can not accept the Respondent's arguments that its action was not a matter affecting working conditions under section 11(a) of the Order because the change was insubstantial and did not effect a change in working conditions, or that, in any event, any violation of the Order which may have occurred was de minimis. In this regard, the Authority finds the change was significant in its effect on the working conditions of bargaining unit employees, noting particularly the fact that these employees were compelled to work two consecutive shifts with only a brief interlude for rest.

Accordingly, the Authority finds that the Respondent violated section 19(a)(1) and (6) of the Order by failing to notify the Complainant of its intent to change the working hours of unit employees and afford the Complainant the opportunity to meet and confer, upon request, with respect to the impact and implementation of the change. 3/

2/ Federal Railroad Administration, 4 A/SLMR 497, A/SLMR No. 418 (1974).

3/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Internal Revenue Service, Austin Service Center shall:

1. Cease and desist from:

(a) Changing the hours of duty of employees without first notifying the National Treasury Employees Union and NTEU Chapter 72, the exclusive representative of its employees, and affording such representative the opportunity to meet and confer to the extent consonant with law and regulations on the impact and implementation of the decision to effectuate such changes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action:

(a) Notify the National Treasury Employees Union and NTEU Chapter 72 of any intended decision to change the hours of duty of employees and upon request, meet and confer to the extent consonant with law and regulations on the impact and implementation of such decision.

(b) Post at its Austin Service Center, in Austin, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Director of the Austin Service Center and shall be posted and maintained by the Director of the Austin Service Center in Austin, Texas, for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., February 29, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We Hereby Notify Employees of the Austin Service Center in Austin, Texas, th

WE WILL NOT change the hours of duty of employees without first notifying th National Treasury Employees Union and NTEU Chapter 72, the exclusive represe tive of our employees, and affording such representative the opportunity to and confer, to the extent consonant with law and regulations, on the impact implementation of the decision to effectuate such a policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerc any employees in the exercise of their rights assured by Executive Order 114 as amended.

WE WILL notify the National Treasury Employees Union and NTEU Chapter 72 of intended decision to change the hours of duty of employees and, upon request meet and confer to the extent consonant with law and regulations, on the imp and implementation of such decision.

_____

Agency or Activity

Dated: _____ By: _____

Signature

This Notice must remain posted for 60 consecutive days from the date of posti and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any its provisions, they may communicate directly with the Regional Director for Federal Labor Relations Authority, whose address is: Downtown Post Office St Bryan and Ervay Streets, P.O. Box 2640, Dallas, Texas 75221, and whose teleph number is: (214) 767-4996.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Environmental Protection Agency

Respondent

and

Assistant Secretary
Case No. 22-09116(CA)

American Federation of Government
Employees, Local 3331, AFL-CIO

Complainant

DECISION AND ORDER

On October 5, 1979, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had committed an unfair labor practice and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Judge's Recommended Decision and Order. Thereafter, Respondent filed exceptions to the Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under § 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by § 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in § 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to § 2400.2 of the Authority's rules and regulations and § 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including Respondent's exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation only to the extent consistent herewith.

Respondent takes exception to the Administrative Law Judge's Recommended Order because it does not include a statement that Respondent may, for valid reasons, request an employee to estimate the amount of work time he anticipates spending on union activities. The Authority finds merit in this exception. Therefore, the Administrative Law Judge's Recommended Order is adopted as modified to include the above-mentioned statement.

In taking exception to the Administrative Law Judge's Recommended Decision, Respondent cites the Federal Labor Relations Council's decision in Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, A/SLMR No. 485, 4 FLRC 586 (FLRC No. 75A-25, 1976), for the proposition that inquiries of a union member at least as broad as those made by Respondent are not coercive or restraining. The Council did not, however, reach the issue of the alleged coercive nature of the inquiries made in the Vandenberg case. The Council held that Executive Order 11491, as amended, protects against actions that infringe upon the exercise of rights created by the Order while the inquiries in the Vandenberg case allegedly coerced employees in the exercise of rights created only by a collective bargaining agreement. */

ORDER

Pursuant to § 2400.2 of the rules and regulations of the Federal Labor Relations Authority and § 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Environmental Protection Agency shall:

1. Cease and desist from:

(a) Requesting its employees to report their present and anticipated roles, as contrasted with the amount of work time to be spent in the roles, assumed on behalf of American Federation of Government Employees, Local 3331, AFL-CIO, or on behalf of any other labor organization.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights assured them by the Executive Order or now available to them under the Civil Service Reform Act.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Order.

(a) Post at its facility copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Envirnomental Protection Agency and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced or covered by other material.

*/ In conformity with § 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

(b) Notify the Federal Labor Relations Authority in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., March 7, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODES

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We Hereby Notify Our Employees That:

WE WILL NOT request employees to report their present and anticipated roles, as contrasted with the amount of work time to be spent in the roles, assumed on behalf of American Federation of Government Employees, Local 3331, AFL-CIO, or on behalf of any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

_____
(Agency or Activity)

Dated: _____ BY: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address is: 1730 K Street, NW., Room 401, Washington, D.C. 20006, and whose telephone number is (202) 653-7213.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
ENVIRONMENTAL PROTECTION AGENCY Respondent	
and	Case No. 22-09116(CA)
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3331, AFL-CIO Complainant	

NORVALD D. SETTLE, Esq.
Deputy Associate General Counsel
U.S. Environmental Protection Agency
401 M Street, SW.
Mail Code A-134
Washington, D.C. 20460

For the Respondent

STUART A. KIRSCH
National Representative
American Federation of Government
Employees, AFL-CIO
8020 New Hampshire Avenue
Langley Park, Maryland 20783

For the Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on July 17, 1978 and an amended complaint filed on October 20, 1978 under Executive Order 11491, as amended, (hereinafter called the Order) by American Federation of Government Employees, Local 3331, AFL-CIO (hereinafter called Complainant and Local 3331 AFGE) against the Environmental Protectic Agency (hereinafter called Respondent and EPA) a Notice of Hearing

on Complaint was issued on May 25, 1979 by the Regional Director, Washington Region, Federal Labor Relations Authority.

Basically the Notice of Hearing on Complaint set for hearing only the allegation set forth in the Complaint that the Activity violated Section 19(a)(1) of the Order "by its actions during a December 5, 1977 meeting with Dr. Droge and by issuing him a memorandum on the same date which required him to provide a 'complete status report of his present and anticipated roles in union activities'."

A hearing was held before the undersigned in Washington, D.C. Both parties were represented at the hearing and were afforded a full opportunity to be heard, to adduce evidence and to examine and cross-examine witnesses. Both parties filed briefs, which have been duly considered by the undersigned.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

Findings of Fact

1. At all times material herein Local 3331 AFGE has been the collective bargaining representative for a unit of Respondent's non-professional employees.

2. On December 5, 1977 Dr. John H. Droge was an economist employed by Respondent and was the Treasurer of Local 3331 AFGE. In this latter capacity Dr. Droge spent some work time representing unit employees.

3. During May 1977 Dr Droge's then supervisor, Mr. Swep Davis, asked Dr. Droge for an estimate of the time he planned to spend on union activities so that Mr. Davis could plan "use of my resources". Dr. Droge told Mr. Davis that he, Dr. Droge, did not feel he was required to supply the requested information, but he did comply with the request and supplied the estimate of time.

4. Subsequent to May 1977 Mr. David Gibbons became Dr. Droge's supervisor and when Dr. Droge left work on Local 3331 AFGE business he left a "buck slip" with Mr. Gibbons' secretary setting forth the number of hours spent on union business.

5. On December 5, 1977 Mr. Gibbons asked Dr. Droge for an estimate of the amount of time Dr. Droge anticipated spending on Local 3331 AFGE activities. Mr. Gibbons explained that he needed this information so that he could plan and even out his staff's workload. Dr. Droge asked Mr. Gibbons to put the request in writing.

6. Later in the morning of December 5, 1977 Dr. Droge received a

memorandum from Mr. Gibbons. The memorandum was entitled "Subject: Union Activities". The memorandum stated:

> "I realize that as a union official you spend some of your work day on Union business. While I support this effort, and have never questioned your involvement in these duties, the branch is also responsible for producing a high quality product on time. By COB Wednesday please give me a complete status report of your present and anticipated roles in union activities. As you know I am also required to keep track of time spent on union activities by participating individuals. To date I have neglected doing this. Therefore, please, in the future indicate to me when you will be out of the office for union activities during working hours. Nothing formal needs to be done, just a note on a route-slip or piece of paper telling me when you will be away and for how long."

7. Later on December 5, 1977 Dr. Droge received another memorandum from Mr. Gibbons expressing concern over Dr. Droge's work output and requiring Dr. Droge to submit a memorandum by close of business Wednesday (December 7, 1977) which sets forth a report on each of Dr. Droge's work assignments. This memorandum was entitled "Ongoing Projects".

8. On December 6, 1977 Dr. Droge delivered a response to the "Ongoing Projects" memorandum indicating disagreement with many of the accusations and stating that he felt these criticisms were due in part to his union activities.

9. On December 7 when Mr. Gibbons asked for the two written responses to the December 5 memoranda. Dr. Droge replied that he did not have them because of certain other union activities.

10. On December 8 Dr. Droge received a memorandum from Mr. Gibbons expressing disappointment that Dr. Droge had not submitted the required information and requesting that the requested information be submitted by memorandum on December 12, setting forth why Dr. Droge had not done his assignments, including other meetings, projects or activities in which he was engaged.

11. On December 12, 1977 Dr. Droge submitted a "Response to your memos of December 5 and 7, 1977" refusing to provide a status report of present and anticipated "roles in union activities" and that if Mr. Gibbons desired a record of Dr. Droge's union activities Mr. Gibbons had to maintain such a record.

12. A meeting was held on December 12, 1977. Present were Dr. Droge,

Mr. Gibbons, Local 3331 AFGE President Harold Dodson, and Associate Deputy Assistant Administrator Erickson. They discussed Dr. Droge's work output and Dr. Droge anticipated that he would be spending relatively little time on union matters.

Conclusions of Law

Although the Respondent had a valid interest in being able to plan work assignments and workload and thus might have been privileged to inquire as to the amount of work time Dr. Droge anticipated he would spend on union activities 1/ it is concluded that, although it may have been merely inartful wording, the Respondent violated Section 19(a)(1) of the Order by its "union activities" memorandum of December 5. Respondent had no valid interest in inquiring into Dr. Droge's present and anticipated role in union activities. Such inquiry was too broad and exceeded any valid interest Respondent might have had in apportioning work assignments. The inquiry into such a privileged area, where there was no valid justification, necessarily would interfere with, restrain and coerce an employee in the exercise of protected rights and therefore violated Section 19(a)(1) of the Order. 2/

Recommendation

Having found that EPA has engaged in conduct which violates Section 19(a)(1) of the Order, I recommend that the Federal Labor Relations Authority adopt the following order.

ORDER

Pursuant to Section 2400.2 of the Rules and Regulations of the Federal Labor Relations Authority and Section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Environmental Protection Agency shall:

1. Cease and desist from:

(a) Requesting status reports of present and anticipated roles of its employees on behalf of American Federation of Government Employees, Local 3331, AFL-CIO or on behalf of any other labor organization.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights assured them by the Executive Order or now available to them under the Civil Service Reform Act.

1/ Department of the Air Force, Vanderberg Air Force Base, A/SLMR No. 485, FLRC No. 75A-25 (November 19, 1976).

2/ Cf. IRS, Detroit Data Center, A/SLMR No. 862.

2. Take the following affirmative action in order to effectuate the purposes and provisions of Executive Order 11491, as amended,

(a) Post at its facility copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such form, it shall be signed and dated by the Director of the Environmental Protection Agency and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(b) Notify the Federal Labor Relations Authority in writing, within thirty (30) days from the date of this Order as to what steps have been taken to comply herewith.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: October 5, 1979
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODES

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT request status reports of present and anticipated roles of employees on behalf of American Federation of Government Employees, Local 3331, AFL-CIO or on behalf of any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

_____
(Agency or Activity)

Dated:_____ By:_____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address is: Room 443, 1730 K Street, N.W., Washington, D.C. 20006.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Federal Aviation Science and Technological Association Division, National Association of Government Employees

Respondent

and

Assistant Secretary
Case No. 72-7821(CO)

Leland L. Spargo, Warner M. Hussong, Edwin L. Reisinger

Complainants

DECISION AND ORDER

On October 1, 1979, Administrative Law Judge Eli Nash, Jr. issued his Recommended Decision and Order in the above-entitled proceeding finding that the Respondent had engaged in the unfair labor practice alleged in the complaint. Thereafter the Respondent and Complainants filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under § 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by § 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in § 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to § 2400.2 of the Authority's rules and regulations and § 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's and Complainants' exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation.

The Respondent and Complainants both filed exceptions to the decision of the Administrative Law Judge. The Authority rejects the Respondent's exceptions which maintain that the Administrative Law Judge has not addressed the issues raised in the complaint. Rather the Authority finds that the Administrative Law Judge determined that the violations alleged by the Complainants are valid. The

Authority denies the Complainants' exceptions pertaining to the Administrative Law Judge's order regarding the geographic area prescribed for the posting of notice by the Respondent union. The Authority finds that the complaint alleged a specific violation of the Order in the Respondent's Western Region only, and not a violation based upon the nationwide publication of the union's policy. Moreover, the Complainants' charge was filed over nine (9) months after the Respondent's publication. */

ORDER

Pursuant to § 2400.2 of the rules and regulations of the Federal Labor Relations Authority and § 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Federal Aviation Science and Technological Association Division, National Association of Government Employees, shall:

1. Cease and desist from:

(a) Affording differing standards of employee representation to employees in units of exclusive recognition solely on the basis of whether or not such employees are members of the Federal Aviation Science and Technological Association Division, National Association of Government Employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by § 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order.

(a) Represent all bargaining unit employees on an equal basis and with the same standard of representation without regard to membership in the Federal Aviation Science and Technological Association Division, National Association of Government Employees.

(b) Post at the local business offices of the Federal Aviation Science and Technological Association Division, National Association of Government Employees, Western Regional Offices, respectively, and all places where notices to members and other employees are customarily posted, the attached notice marked "Appendix," on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed, as indicated, by the President of the Federal Aviation Science and Technological Association Division, National Association of

*/ In conformity with § 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

Government Employees, and they shall be posted and maintained by the him for 60 consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. The President shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Submit the appropriate signed copies of said notice to the Administrator, Federal Aviation Administration, Washington, D.C.; the Administrator, Federal Aviation Administration, Western Region, for posting in conspicuous places, where the respective unit employees are located where they shall be maintained for a period of 60 consecutive days from the date of the posting.

(d) Notify the Authority, in writing, within 30 days from the date of this order, as to the steps taken in compliance herewith.

Issued, Washington, D.C., March 7, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL MEMBERS AND EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODES

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We Hereby Notify Our Members and Other Employees at:

Federal Aviation Administration
Western Region
Los Angeles ARTCC
Palmdale, California

WE WILL NOT afford differing standards of employee representation to employees in exclusively recognized units, solely on the basis of whether or not employees are members of the Federal Aviation Science and Technological Association, National Association of Government Employees.

WE WILL NOT in any like or related manner, interfere with restrain, or coerce employees in the exercise of their rights assured by § 1(a) of Executive Order 11491, as amended.

WE WILL represent all bargaining unit employees on an equal basis and with the same standard of representation without regard to membership in the Federa. Aviation Science and Technological Association Division, National Association of Government Employees.

_____
(Labor Organization)

Dated: _____ By: _____
President, Federal Aviation Science
and Technological Association
Division, National Association of
Government Employees

(Continued)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members or employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, whose address is: World Trade Center, 350 S. Figueroa Street, 10th Floor, Los Angeles, California 90071, and whose telephone number is (213) 688-3805.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of

LELAND L. SPARGO, WARNER M. HUSSONG, EDWIN L. REISINGER
Complainants

and

FEDERAL AVIATION SCIENCE AND TECHNOLOGICAL ASSOCIATION DIVISION, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES
Respondent

Case No. 72-7821(CO)

LAWRENCE A. SUMP
Western Regional Vice-President
Professional Airway Systems Specialists,
Suite 310, 333 Hegenberger Road
Oakland, California 94621
For the Complainants

RONALD E. STEENSLAND, ESQ.
West Coast Counsel, National
Association of Government Employees,
Suite "A", 3300 West Olive Avenue
Burbank, California 91505
For the Respondent

Before: ELI NASH, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on November 7, 1978, under Executive Order 11491, as amended by Professional Airway Systems Specialists (herein called PASS), against Federal Aviation Science and Technological Association Division, National Association of Government Employees, (herein called the Respondent) a Notice of Hearing was issued by the Regional Director, Federal Labor Relations Authority, Los Angeles, California. Although this proceeding was initiated before the Assistant Secretary of Labor for Labor-Management Relations, the instant decision is issued in the name of the

Federal Labor Relations Authority pursuant to transition rules and regulations, Federal Register, Vol. 44, No. 1, January 2, 1979 (5 C.F.R. 2400.2).

The complaint herein alleges in substance that Respondent violated Section 19(b)(1) by establishing a discriminatory policy of representation for non-members and publishing such policy in its publication FEDNEWS. The complaint alleges further that, Respondent's agent Howard Burroughs,President of the Western Region in compliance with Respondent's policy, responded to a request to process grievances for Complainant stating that he could not process their grievances since they were not members. Finally, the Complainant alleges that Respondent's agent Howard Burroughs attempted to coerce Complainants into joining Respondent before their grievance would be processed into the National Headquarters.

A hearing was held in the matter on July 12, 1979, in Palmdale, California. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and enter evidence related to the issues herein, and to file briefs.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following finding of fact, conclusions of law and recommendations.

Facts

The basic facts are simple and undisputed and therefore need not be restated at length. At all times material herein, the three Complainants Leland L. Spargo, Warner M. Hussong and Edwin L. Reisinger were employed by the Federal Aviation Administration, Western Region at the Los Angeles ARTCC, in Palmdale, California. The exclusive representative of Complainant's bargaining unit is the Respondent. At all times material herein, neither of the Complainants was a member of Respondent.

During February 1977, the Respondent published in its newsletter FEDNEWS the following notice:

NAGE Locals must enforce the following conditions upon any complaint they receive to be processed.

These conditions will be adhered to regardless of race, creed, color, age, grade or any other discriminatory condition.

NAGE MEMBERS:

1) Representation on all matters grievances, reclassification matters, unfair labor practice problems, disability claims, [sic] promotion exams, discrimination complaints, civil service appeals, and federal court appeals on job-related problems.

2) You will receive the services of an attorney at no cost to you - the members.

3) Representation by attorneys at no cost to you on base and off base.

4) $10,000 accident and dismemberment insurance on a 24-hour coverage.

5) FEDNEWS mailed to your home monthly.

NON-MEMBERS:

We are obliged to give you local representation only -- but without national attorneys (a fellow employee will represent you).

We will not handle cases before the Civil Service Commission or the courts.

Subsequently, in early February 1978, the Complainants initiated an informal grievance against the Agency involving an interpretation of Respondent's negotiated agreement, Article 40, relating to their right to work regular hours on a scheduled holiday. On February 10, 1978 the grievance was denied by their supervisor and in accordance with Article 56, Section 4 of the Agreement, the Complainants submitted a formal second step grievance to the Sector Manager. A further unfavorable decision on the grievances was rendered by the Sector Manager on March 1, 1978. At this point the Complainants were required under the Agreement to process the grievance through the Respondent's representative in their sector, however, since no representative had been designated for their sector the grievance was mailed to Respondent's Western Region President Howard Burroughs, who had responsibility for processing the grievance from that point.

It is undisputed that the position published in the February 1977 FEDNEWS still existed at the time the grievance herein was filed.

A reply from Mr. Burrough dated March 11, 1978 stated in part:

> As you no [sic] doubt are aware, the cost for arbitration from past experience will run the union approximately $1000 and the FAA the same, now surely you do not expect the present members to have to go it alone while some FAA employees go along for the ride, and not providing their [sic] fair share, by becoming members. If a back pay issue is involved only the people on the union's [sic] member in good standing list will be afforded the opportunity due to the high cost of arbitration, which has been upheld by the courts.
>
> Since you show the determination and the guts to file a grievance thereby standing up for your rights under the contract, why not take one more step and join FASTA so that we can move as one against the R.O.
>
> While some techs. hold allegiance [sic] to PASS [sic] hoping for a pie in the sky while their [sic] dues monies is being used strictly to provide Mr. Johannson with a $34000 salary plus $27000 for his assistant, while not being able to represent anyone throughout the FAA. FASTA needs you and evidently you need FASTA so I'll be glad to foward you a copy of the FASTA newsletter and 3 application forms for you to sign so that I may process your grievance into the national Hdqrs. You [sic] will make enough on one holiday to pay for a half a years dues.

The precise fate of the grievance between March 11 and July is in dispute. The only definitive evidence is that the grievance was placed on an agency prepared agenda for a quarterly meeting between Respondent and the Agency on July 26, 1978 indicating that some positive action was taken on the grievance. The record suggests that this grievance was held along with other grievances involving disposition of the same issue before an arbitrator. In any event the subject matter of the grievance was resolved by the decision of an arbitrator in December, 1978.

Conclusions

With regard to the FEDNEWS notice of February 1977, the Federal Labor Relations Authority in National Treasury Employees Union (NTEU), Chapter 202, et al., 1 FLRA No. 104 (August 30, 1979), cases involving communications to employees which afforded representation by attorneys in certain work-related situations whereas non-union members would receive representation by non-attorneys held the communications:

> Established a policy of disparate treatment among employees in the exclusively recognized units, based solely upon union membership. Thus, the nature of the representation provided by the exclusive representative is based upon neither the merits of the individual situation nor the skills of the individual representative selected to represent the unit employees. Such conduct is inconsistent with [Respondent's] obligation to represent the interests of all employees in the unit without discrimination and without regard to labor organization membership as required by section 10(e) of the Order and improperly interferes with, restrains and coerces non-union employees in the exercise of their rights to refrain from joining [Respondent].

In its brief Respondent argues that Complainants had no occasion to complain of FASTA's policy of denying a lawyer to non-members at the arbitration stage, since the question raised in their grievance was settled in arbitration in another region. Based on the Authority's decision in the NTEU case this argument is misplaced. The Authority's decision makes clear that a policy of disparate treatment based solely upon union membership is inconsistent with a labor organization's obligation to represent all employees without regard to labor organization membership. The FEDNEWS policy, which was in existence at the time the grievances were filed in this matter, on its face, distinguishes representation which will be afforded Respondent's members as opposed to non-members.

In addition the March 11, 1978 letter from Western Regional President Burroughs, which Respondent characterized in its brief as containing some injudicious remarks, restated and implemented Respondent's published policy and does indeed attempt to coerce Complainants into joining Respondent before their grievance was processed. While Respondent would argue that the grievance was processed in a normal fashion, the thrust of the complaint clearly is against the communication which established a policy of disparate treatment among employees in the exclusively recognized units, based soley on union membership.

In these circumstances, where such a policy exists, and where the Complainants were informed that their grievances would not be processed to completion in the same manner as union members because of the existing policy, the question of whether or not Respondent decided to take a different course of action at some later date is immaterial. Accordingly,

it is concluded that Respondent's representation policy as expressed in the FEDNEWS and its restatement in the March 11, 1978 letter to Complainants from President Burroughs violates Section 19(b)(1) of the Order.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b), and Section 2400.2 of the transition rules and regulations, 5 C.F.R. Section 2400.2, Fed. Reg., Vol. 44, No. 1, January 2, 1979 hereby orders that Federal Aviation Science and Technological Association Division, National Association of Government Employees shall:

1. Cease and desist from:

(a) Affording differing standards of employee representation to employees in units of exclusive recognition solely on the basis of whether or not such employees are members of the National Aviation Science and Technological Association Division, National Association of Government Employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by section 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

(a) Represent all bargaining unit employees on an equal basis and with the same standard of representation without regard to membership in the National Aviation Science and Technological Association Division, National Association of Government Employees.

(b) Post at the local business offices of the National Aviation Science and Technological Association Division, National Association of Government Employees, Western Regional Offices, respectively, and at all places where notices to members and other employees are customarily posted, attached notices marked "Appendix A", respectively, on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed, as indicated, by the President of the National Aviation Science and Technological Association Division, National Association of Government Employees and by the presidents of the respective National Aviation Science and Technological Association Division, National Association of Government

Employees locals and they shall be posted and maintained by the local presidents for 60 consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. The respective local presidents shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Submit the appropriate signed copies of said notice to the Administrator, Federal Aviation Administration, Washington, D.C.; the Administrator, Federal Aviation Administrtion, Western Region, for posting in conspicuous places, where the respective unit employees are located where they shall be maintained for a period of 60 consecutive days from the date of the posting.

Notify the Authority, in writing, within 30 days from the date of this Order, as to the steps taken in compliance herewith.

Eli Nash, Jr.
ELI NASH, JR.
Administrative Law Judge

Dated: 1 OCT 1970
Washington, D.C.

APPENDIX A

NOTICE TO ALL MEMBERS AND EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We hereby Notify Our Members and Other Employees at:

Federal Aviation Administration
Airway Facilities Division
and Regional Facilities
Washington, D.C.

WE WILL NOT afford differing standards of employee representation to employees in exclusively recognized units, solely on the basis of whether or not employees are members of the Federal Aviation Science and Technological Association, National Association of Government Employees, or its local chapter.

WE WILL NOT in any like or related manner, interfere with restrain, or coerce employees in the exercise of their rights assured by section 1(a) of Executive Order 11491, as amended.

WE WILL represent all bargaining unit employees on an equal basis and with the same standard of representation without regard to membership in the National Treasury Employees Union, or its local chapter.

_____
(Labor Organization)

Dated: _____ By: _____
President

Dated: _____ By: _____
President, National Aviation Science and Technological Association Division, National Association of Government Employees

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members or employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, whose address is: Room 4041, Federal Building, 300 N. Los Angeles Street, Los Angeles, California 90012.

2 FLRA No. 104

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Norfolk Naval Shipyard,
Portsmouth, Virginia

Respondent

and

Assistant Secretary
Case No. 22-08539(CA)

Tidewater Virginia Federal Employees
Metal Trades Council, AFL-CIO

Complainant

DECISION AND ORDER

On June 11, 1979, Administrative Law Judge Louis Scalzo issued his Recommended Decision in the above-entitled proceeding, finding that the issued raised in the instant complaint had previously been raised in certain arbitration proceedings arising out of a grievance and a submission filed under the negotiated agreement between the Respondent and the Complainant. Thus, he concluded that § 19(d) of the Order barred his consideration of the complaint herein, and he recommended that the complaint be dismissed in its entirety. Thereafter, the Complainant filed timely exceptions to the Administrative Law Judge's Recommended Decision.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under § 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by § 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in § 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to § 2400.2 of the Authority's rules and regulations and § 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation. */

*/ In conformity with § 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Assistant Secretary Case No. 22-08539(CA) be and it hereby is, dismissed.

Issued, Washington, D.C., March 7, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
Suite 700 1111 20th Street, NW.
Washington, DC 20036

In the Matter of

NORFOLK NAVAL SHIPYARD
PORTSMOUTH, VIRGINIA
Respondent

and

TIDEWATER VIRGINIA FEDERAL EMPLOYEES
METAL TRADES COUNCIL, AFL-CIO
Complainant

Case No. 22-08539(CA)

WALTER B. BAGBY, ESQUIRE
Labor Relations Advisor
Naval Civilian Personnel Command
Department of the Navy
Building A-67, Naval Station
Norfolk, Virginia 23511
For the Respondent

ARNOLD H. ABRONS, ESQUIRE
LEONARD B. SACHS, ESQUIRE
Sachs and Abrons
Suite 220
5 Koger Executive Center
Norfolk, Virginia 23502
For the Complainant

Before: LOUIS SCALZO
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

This case arises under Executive Order 11491 as amended (hereinafter referred to as the Order), and regulations of the Department of Labor, Office of the Assistant Secretary for Labor-Management Relations, Title 29 C.F.R. Part 203, as recently adopted and amended by regulations of the Federal Labor Relations Authority and Federal Service Impasses Panel,

Title 5, C.F.R. Part 2400 (Federal Register, Vol. 44, No. 1, Tuesday, January 2, 1979). It was initiated by the filing of a pre-complaint charge on August 23, 1977 by the Tidewater Virginia Federal Metal Trades Council, AFL-CIO, (hereinafter referred to as the Complainant or Council) against the Norfolk Naval Shipyard, Portsmouth, Virginia (hereinafter referred to as Respondent or Shipyard). This was followed by the filing of a complaint on September 27, 1977, charging violations of Sections 19(a)(1), (5) and (6) of the Order.

On March 7, 1978 the Council filed a second amended complaint wherein it was alleged that Respondent violated Sections 19(a)(1) and (6) of the Order by bargaining in bad faith during negotiations leading to execution of a collective bargaining agreement on April 21, 1977; by failing to negotiate with the Complainant prior to initiating a unilateral change in criteria relating to entitlement to "dirty pay," an environmental pay differential authorized by the Federal Personnel Manual and Article 13 of the collective bargaining agreement; and by failing to negotiate with the Complainant prior to initiating a unilateral change in the authority of supervisors to approve entitlement to "dirty pay."

A hearing was held at which both parties were afforded full opportunity to be heard, adduce evidence, and to examine and cross-examine witnesses. Thereafter, the parties filed post-hearing briefs. 1/ Upon the basis of the entire record, including observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendation.

Findings of Fact

(a) Pertinent Contractual and Federal Personnel Manual Provisions

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1/ Following the hearing the depositions of three witnesses were taken. These were filed as part of the record on April 9, 1979. The depositions are admitted and objections to testimony overruled; however objections raised by counsel for Complainant to the admission of a letter dated September 15, 1978, addressed to Mr. Raymond H. Harrison, by Mr. Raymond C. Weissenborn, Chief, Pay Policy Division, Bureau of Policies and Standards, United States Civil Service Commission, are sustained to the extent that references to the letter in the deposition transcript may not be admitted as evidence of Civil Service Commission endorsement of the letter or its contents. This result follows from the fact [Continued]

Article 13 of the agreement sets out the various work categories wherein environmental pay may be earned by those employed by the Respondent. 2/ Part I reflects criteria governing the payment of an environmental differential for work involving "actual exposure." 3/

Section 2, Part I B of Article 13 provides a four percent differential to be paid for "dirty work." 4/ General criteria relating to the payment of the "dirty work" differential are set out in Part I B in the following terms:

> Performing work which subjects the employee to soil of body or clothing:
>
> (1) beyond that normally to be expected in performing duties of the classification; and
>
> (2) where the condition is not adequately alleviated by the mechanical equipment or protective devices being used, or which are readily available, or when such devices are not feasible for use due to health considerations (excessive temperature, asthmatic conditions, etc.); or
>
> (3) when the use of mechanical equipment, or protective devices, or protective clothing results in an unusual degree of discomfort. When conditions are such that protective clothing does not prevent soil of the body and personal clothing, dirty pay is considered appropriate. When the conditions set forth above are satisfied

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1/ [Continued] that the record does not disclose a showing that the letter represents the views of the Civil Service Commission. References to the letter in the transcript are deemed admissible as statements of the Respondent's position regarding legal issues reflected therein.

2/ Joint Exhibit 2 at page 31.

3/ In other work categories set out in Article 13, Section 2, Part II of the agreement, environmental pay is authorized on the basis of a specified "pay status."

4/ Section 2, Part I B also relates to environmental differentials paid for high work; cold work; hot work; working with preheated metals, fibrous glass, and asbestos; exposure in pressure chambers or to a high degree of centrifugal force; and flying.

> the work listed below shall be paid (emphasis added).

The sentence last quoted is immediately followed by definitions of the terms "confined space," and "close proximity," concepts utilized in some of the fifty ensuing categories or "authorized work situations," wherein the four percent "dirty work" pay differential may be earned. 5/

The general language utilized to describe "dirty work" in Article 13, Section 2, Part I B(1), (2) and (3) of the collective bargaining agreement tracks identical language in a prior collective bargaining agreement. 6/ In turn, the record reflects that the operative language set out above is derived from Appendix J of Supplement 532-1 of the Federal Personnel Manual. 7/

For the purposes of FPM Supplement 532-1, Subchapter S8-7 entitled, "Environmental Differentials Paid for Exposure to various Degrees of Hazards, Physical Hardships, and Working Conditions of an Unusually Severe Nature" the term "environmental differential" is defined as:

> [E]nvironmental differential means additional pay authorized as specified in Appendix J for a category of situations involving exposure to a hazard, a physical hardship, or working conditions of an unusually severe nature. (FPM Supplement 532-1, Subchapter S8-7b).

5/ See list of "authorized work situations" in Article 13, Section 2, Part I B. A number of these include more than one specific work activity.

6/ See Joint Exhibit 1. The record also discloses that although minor changes were made in Article 13 in other respects, the language comprising Article 13 in the earlier collective bargaining agreement is, for purposes herein, substantially the same as the current collective bargaining agreement.

7/ General criteria relating to "dirty work," as set out in Part I B(1), (2), and (3), are derived entirely from Appendix J. The last sentence of (3), underlined above, represents language added by the parties.

Unlike a number of other categories identified in Appendix J, "dirty work" is not described through the use of specific examples.

FPM Supplement 532-1, Subchapter S8-7 provides the following guidance with respect to the importance of Appendix J since Appendix J comprises a basis for the payment of all environmental pay. 8/

> (c) Payment for environmental differential. An environmental differential is paid to a wage employee who is exposed to a hazard, physical hardship, or working condition of an unusually severe nature listed under the categories in Appendix J of this subchapter. Exposure to a hazard, physical hardship, or working condition of an unusually severe nature listed in Appendix J is not taken into consideration in the job grading process, and additional pay for exposure to these conditions is provided only through the environmental differentials authorized by this section. . . .
>
> . . . . .
>
> (d) Authorization for pay for environmental differential.
>
> . . . . .
>
> Some of the environmental differentials Listed in Appendix J are payable whenever the criteria in the category definition are met. Others are payable only if protective facilities, devices, or clothing have not practically eliminated the hazard, physical hardship, or working condition of an unusually severe nature. Consistent with Section S8-7g(3) below, determinations in this regard may be made through negotiations at the local level.
>
> Categories for which payment is made when the conditions given in the definition are

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8/ References to the Federal Personnel Manual reflect clarifying revisions made to Section S8-7d and S8-7g (3) of FPM Supplement 532-1 during negotiations leading to the current collective bargaining agreement under consideration in this case, and prior to the effective date of the current collective bargaining agreement. (Joint Exhibit 4).

met are those in which there is no reference to practical elimination of the condition through protective measures. Categories which are subject to practical elimination contain language to that effect in the definition.

. . . . .

(e) Establishment of environmental differential. . . . Environmental differentials are authorized only when the exposure is under the circumstances described in the category listed in Appendix J . . . . When examples are listed under the categories in Appendix J, these examples are illustrative only and are not intended to be exclusive of other exposures which may be encountered under the circumstances which describe the listed category.

. . . . .

(g) Determining local situations when environmental differentials are payable. (1) Appendix J defines the categories of exposure for which the hazard, physical hardships, or working conditions are of such an unusual nature as to warrant environmental differentials, and gives examples of situations which are illustrative of the nature and degree of the particular hazard, physical hardship or working condition involved in performing the category. The examples of the situations are not all inclusive but are intended to be illustrative only. (2) Each installation or activity must evaluate its situations against the guidelines in Appendix J to determine whether the local situation is covered by one or more of the defined categories.

(a) When the local situation is determined to be covered by one or more of the defined categories (even though not covered by a specific illustrative example),

the authorized environmental differential is paid for the appropriate category.

. . . . .

(3) Nothing in this section shall preclude negotiations through the collective bargaining process for:

(a) Determining the coverage of additional local situations under appropriate categories in Appendix J and application of Appendix J categories to local work situations. For example, local negotiations may be used to determine whether a local work situation is covered under an approved category, even though the work situation may not be described under a specific illustrative example.

(b) Positions of the Parties

The Council takes the position that the Federal Personnel Manual authorizes collective bargaining concerning specific work situations wherein "dirty pay" may be authorized, and that since the parties, have agreed to such specific work situations, further reference to the general criteria set out in the contract and in Appendix J is unwarranted. It is argued that in such cases the Shipyard should not be permitted to avoid the payment of "dirty pay" by showing that the work involved is excluded by reason of failure of the work to meet the general criteria, and that bargaining unit members should be entitled to "dirty pay" by merely establishing that they have performed in any of the authorized "dirty pay" work situations set out in the collective bargaining agreement.

It is alleged that the Shipyard followed such an interpretation prior to execution of the current collective bargaining agreement, that during negotiations leading to the current agreement the Council understood that the practice would continue, that the Council entered into the present agreement with this understanding, that the Shipyard negotiated in bad faith concerning this issue, and that after execution of the current collective bargaining agreement, the Shipyard changed the past practice with respect to the determination of entitlement to "dirty pay" without first negotiating this issue with the Council.

The Shipyard denies these allegations and argues that the amended complaint is barred by Section 19(d) of the Order because it involves issues raised by the Council under a negotiated grievance procedure; that the practice of compensating bargaining unit employees for "dirty pay" without regard to the general criteria is violative of Appendix J of FPM Supplement 532-1, and is therefore prohibited by virtue of Section 12(a) of the Order; that the amended complaint should not be entertained because it involves essentially differing interpretations of the collective bargaining agreement as distinguished from alleged actions which would constitute clear unilateral breaches of the agreement; and that Section 13(a) of the Order provides that the negotiated grievance procedure shall be the exclusive procedure available to the parties for resolving such disputes; that during negotiations there was full disclosure and negotiation of a Shipyard proposal to modify the past practice; and that the Council agreed to the Shipyard proposal relating to strict application of the general criteria.

The Shipyard also argues that the last sentence of Article 13, Section 2, Part I B(3) is controlling; that the sentence, "[w]hen the conditions [general criteria] set forth are satisfied the work [authorized work situations] listed below shall be paid," clearly has the effect of bringing the general criteria into play in every claim for "dirty pay." It is argued that although such pay may be approved if it falls within a specifically identified "dirty pay" work situation, such work situation must otherwise meet the provisions of the general criteria set out in Section 2, Part I B(1), (2) and (3), and identical language in Appendix J of FPM Supplement 532-1.

The Shipyard asserts that although some categories of environmental pay described in the collective bargaining agreement and Appendix J are payable without reference to general criteria, "dirty work" is not one of them. 9/ Reference here is made to the fact that what is known as "dirty work" changes with alterations made in the work environment and that the collective bargaining agreement provides for such changes with respect to this category.

9/ Illustrations of this would be categories listed in Appendix J without qualifying language or general criteria.

(c) Practice Prior to Execution of Current Collective Bargaining Agreement

Prior to the initiation of negotiations which led to the current collective bargaining agreement, management reviewed the implementation of Article 13 under the prior collective bargaining agreement, and made a determination that the "dirty pay" provisions of the agreement then in effect were not being followed. A questionnaire executed by line managers disclosed "widespread misuse." (Tr. Vol. III, 69-70). It was established that the Shipyard was frequently paying without regard to the general criteria set out in the agreement and Appendix J. (Tr. Vol IV, 19).

Under the prior agreement a first line supervisor or foreman made the determination as to whether "dirty pay" should be authorized. As a result determinations were not uniform. 10/ Both the Council and the Shipyard expressed the desire to clear up ambiguous terms in Article 13. (Tr. Vol. II, 259-260, 274-275). Counsel representing the Claimant acknowledged such lack of uniformity in his opening statement wherein he stated, "[t]here may have been an abuse of this system in the sense that supervisory people then used this as a method of rewarding people or paying people that should not have come under the (sic) either the criteria set up in the general guidelines or the authorized work situation. . . ." (Tr. Vol. I, 13).

The uneven nature of the practice under the prior collective bargaining agreement was described by officers of the Council. It was brought out that in some cases work in an authorized "dirty pay" work situation did not result in payment of the differential. (Tr. Vol. I, 53-54). Some managers insisted on applying the general criteria under the prior contract. (Tr. Vol. IV, 59-60). Grievances were filed frequently to test "dirty pay" determinations.

10/ Both the prior and current collective bargaining agreement contain language reflecting that the "immediate supervisor and/or the next level supervisor will make a determination and so advise the employee." (Article 13, Section 3, Joint Exhibits 1 and 2).

Higher level Shipyard managers responsible for the administration of the "dirty pay" provisions under the prior collective bargaining agreement determined that action to resolve perceived contract administration problems should be deferred until the initiation of contract negotiations. This deferral was based upon a reluctance to change a practice affecting working conditions without first raising the issue during formal contract negotiations scheduled to commence prior to expiration of the collective bargaining agreement then in effect. (Tr. Vol. III, 70; Vol. IV, 11-12, 20-21).

(d) Negotiations Leading to Current Collective Bargaining Agreement

Negotiations leading to the current collective bargaining agreement extended over an eighteen-month period and included long and drawn out bargaining over the "dirty pay" segment of Article 13. The Union attempted to expand Article 13 by increasing the number of authorized work situations which could be used as a basis for "dirty pay." The Shipyard sought a reduction in the number of listed authorized work situations.

Witnesses called to testify on behalf of the Council admitted that the general criteria set out in Section 2, Part I B(1), (2) and (3), were discussed during negotiations, that the Shipyard insisted that "dirty pay" was being authorized in violation of the contract and that the practice did not comply with the agreement. (Tr. Vol. I, 71-73; Vol. II, 29-30, 261-262, 264-266; Dep. 102). Evidence clearly disclosed that the Council wished to change the contract by drafting contractual provisions which would have had the effect of deleting the general criteria relating to "dirty pay." (Tr. Vol. II, 53). However, when the Council submitted a proposal without the general criteria early in the negotiations, the Shipyard rejected it and insisted on retention of the general criteria as being a prerequisite to the authorization of "dirty pay." (Tr. Vol. III, 11-12, 31-32; Vol. IV, 42-43).

There was extended discussion of various work situations in the light of whether they did in fact meet the general criteria, as well as other general introductory terms preceding the listing of "dirty pay" authorized work situations. Throughout the negotiations the Shipyard insisted that the general criteria should be applicable before any listed authorized work situations were classified as "dirty work."

At numerous points in the record it was made clear that the last sentence of Article 13, Section 2, Part I B(3) was included by the parties in the current collective bargaining agreement specifically to signify this position. From the inception of negotiations the Shipyard's stance on this issue did not change.

In the final stages of negotiations, when impasse seemed imminent, the parties agreed to withdraw their respective demands and retain, in large measure, the language of the prior contract, including the general criteria relating to "dirty pay." 11/ During a final negotiating session leading to agreement, representatives of the Shipyard specifically reiterated that the agreement was being made with the understanding that the general criteria had to be met before a listed authorized work situation qualified for "dirty pay." (Tr. Vol. III, 34-36; Dep. 34-35).

The Council agreed to the inclusion of the general criteria in the contract on the basis outlined. (Tr. Vol. III, 93, Vol. IV, 69-71; Dep. 54-55). Authorized work situations were included with the understanding that if they did not in fact meet the general criteria at the work site, "dirty pay" would not be authorized. (Tr. Vol. III, 78). The record disclosed specific indication that there was acceptance by the parties that certain authorized work situations listed in the "dirty pay" provisions of Article 13, would not constitute a basis for compensation without a showing of compliance with the general criteria. (Dep. 91-92). In fact, Richard F. Lake, a former President of the Council and a key Council negotiator testified that it was his understanding that the general criteria had to be met. (Tr. Vol. I, 87; 89-91). Bernard W. White, the current Union President, who was serving as Vice-President of the Union at the time he participated in the contract negotiations testified that it was his understanding that the general criteria had to be met before any authorized work situation listed under the "dirty pay" segment of the contract could be authorized. (Tr. Vol. II, 41-44).

Testimony supplied by Council witnesses to the effect that "dirty pay" would be authorized by the Shipyard without reference to the general criteria was effectively contradicted and is not considered credible in the light of consideration of all evidence relating to this element.

11/ Article 13, Section 2, Part I B was amended to add definitions of, "confined space," and "close proximity." Like the general criteria outlined, these terms were utilized for the purpose of ascertaining whether work fell within listed authorized work situations identified as "dirty work."

(e) Practice Following Execution of Current Collective Bargaining Agreement

Following execution of the current collective bargaining agreement the number of grievances relating to the interpretation of the "dirty pay" provisions of Article 13 began to increase. Although "dirty pay" continued to be authorized, this form of environmental pay was more frequently denied on the ground that work activity did not meet the general criteria.

It was established that Shipyard managers were provided with orientation sessions after the current agreement became effective, and that at these sessions managers were instructed to authorize "dirty pay" only if it could be shown that the general criteria were being met. It was explained that the contract had not been administered properly in the past and that the general criteria would be adhered to in the future. (Tr. Vol. IV, 16). The practice of authorizing "dirty pay" at the first level of supervision also changed. The decisions of first level supervisors were made reviewable by a general foreman. (Tr. Vol. II, 60-61). 12/ The practice with respect to first line supervisory approval of "dirty pay" did not, as alleged, change in a way which precluded first line supervisors from authorizing "dirty pay," in the first instance. The change implemented by the Shipyard, and discussed at length with the Council during negotiations, subjected the decisions of first line supervisors to review. (Tr. Vol. IV, 17, 51-52).

(f) Grievances Filed Under Current Collective Bargaining Agreement

As noted a number of grievances were filed under the current collective bargaining agreement to test the Shipyard's interpretation of the "dirty pay" provisions.

A grievance was filed by the Council's Chief Steward for the Shipyard's Shop 71 on behalf of a group of sandblasters. At least fifty employees were represented in this consolidated grievance. The grievance was denied at the several steps of the grievance procedure. The Council then referred the grievance to arbitration under the provisions of Article 34 of the collective bargaining agreement. Under the provisions of this Article only the Employer or the Council may take a matter to binding arbitration.

12/ See footnote 10 supra. Both practices are contemplated by the collective bargaining agreement. This fact was acknowledged by Counsel representing the Complainant. (Tr. Vol. II, 16-17).

The Council argued that the performance of sandblasting work in dry docks by Shop 71 employees fell within authorized work situation 2(a) of Article 13, Section 2, Part I B, and that such a showing was sufficient to qualify for "dirty pay." The Shipyard took the position that the general criteria had to be met in the first instance. A key issue related to the intent of the parties in adopting the "dirty pay" provisions of Article 13, and the impact of the parties' use of Appendix J language to define "dirty work" in the collective bargaining agreement. In an April 4, 1978, award the arbitrator held:

> To summarize, the conclusions of the arbitrator are: (1) that the listing of Shop 71 employees performing sandblasting under authorized work situations in the Negotiated Agreement is not, of itself, decisive of the question whether payment of the differential should be made; payment in such situations depends upon satisfying the criteria of the Civil Service Commission's definition which are incorporated verbatim in the first paragraphs of Article 13B of the Negotiated Agreement. . . . (Respondent's Exhibit 2 at 21-22).

A contrary result was realized as a result of an arbitration award dated June 11, 1978 relating to a single grievance filed by a welder relying upon authorized work situation 44 under Article 13, Section 2, Part I B of the agreement. Again, the issue was taken to arbitration by the Council after denial of the grievance at the fourth step of the grievance procedure. The Shipyard denial was based on the application of the general criteria set out in Article 13, Section 2, Part I B (1), (2) and (3). During litigation relating to this grievance the issue of unilateral change was successfully raised by the Council. The arbitrator held that in view of the fact that the Shipyard had interpreted identical language in the prior contract as requiring payment in this specific work situation, the Shipyard could not deny "dirty pay" in the absence of a showing that the Shipyard had, during negotiations advised the Council that this specific work activity would no longer comprise a basis for the "dirty pay" differential. (Complainant Exhibit 5).

In order to resolve the contractual dispute as it related to the boilermaker classification, the parties herein arranged to seek a contractual interpretation through

the arbitration clause of the contract. (Respondent Exhibit 3). 13/ This did not involve an actual claim for "dirty pay," but was instead, an issue submitted to arbitration by the parties under the negotiated grievance procedure to resolve a dispute over when and under what circumstances the "dirty work" differential would be payable to boilermakers. In a decision dated October 23, 1978, the arbitrator stated the position of the Union in the following terms:

> The basic contention of the Union appears to be that after consummation of the current (1977) agreement, the management of the Shipyard decided unilaterally to deny environmental pay to boilermakers who, under the 1968 shop agreement and the 1973 collectively bargained agreement, had been receiving that pay and that such action on the part of the management constitutes a violation of established past practice and the provisions of the current agreement.

The Shipyard urged as a defense that the general criteria set out in Article 13, Section 2, Part I B(1), (2) and (3) must be met before any authorized work situations listed under the "dirty work" provisions of the contract could be deemed a basis for dirty pay. The arbitrator agreed with the Shipyard position. It was held that the Council was bound by Appendix J under the provisions of of Section 12(a) of the Order; that the agreement itself includes the exact terminology of Appendix J; that during negotiations leading to Article 13, the Shipyard made it clear that it believed Appendix J was applicable and further that the Shipyard intended to administer the contract in the future by strict compliance with, and application of, the general criteria; that the criteria subsequently were incorporated into the contract without any apparent protest by the Council; and that if, as the Council asserts, the Shipyard made a unilateral change in the method of payment of compensation for "dirty work" and thus violated an established past practice and the terms of the current agreement, then that issue more appropriately should have been raised during the negotiations of the current agreement rather than through arbitration.

Conclusions of Law

A threshold issue posed in this case relates to the Respondent's contention that the amended complaint is barred by Section 19(d) of the Order. Section 19(d) provides in part:

13/ At least fifteen "dirty pay" authorized work situations were involved.

> Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures. (emphasis added).

The language of Section 19(d) was based on the recommendation of the Federal Labor Relations Council in its 1971 Report and Recommendations to the President on the Amendment of Executive Order 11491, wherein it was stated:

> We propose . . . that when an issue may be processed under either a grievance procedure or the unfair labor practice procedure, it be made optional with the aggrieved party whether to seek redress under the grievance procedure or under the unfair labor practice procedure. The selection of one procedure would be binding; the aggrieved party would not be permitted, simultaneously or sequentially, to pursue the issue under the other procedure. Labor Management Relations in the Federal Service (1975), at 57-58.

Cases interpreting Section 19(d) clearly indicate that issues posed in a grievance proceeding relied upon as a basis for invoking Section 19(d), need not be identical to those raised in the unfair labor practice proceeding. In agreement with an Acting Regional Administrator's dismissal of a complaint, the Assistant Secretary adopted the following language in U.S. Geological Survey, Gulf of Mexico, OCS Operations and Local 3457, AFGE, Case No. 64-4091(CA), (December 22, 1978):

> . . . Section 19(d) clearly applies to whether basic issues are raised, not whether specific theories are raised and the issues in (the) grievance and the instant complaint are identical. . . . If your argument that the issue in the grievance was that Respondent violated 9-4 of the agreement whereas the issue in the instant complaint was that Respondent violated Article 2-1 of the agreement by unilaterally establishing a policy affecting working conditions without affording the union an opportunity to negotiate were to be accepted,

> virtually any grievance could be raised under the negotiated procedure to determine whether or not the contract had been violated, and under the complaint procedure to determine whether or not the Order had been violated. In my view, Section 19(d) prevents this double "bite of the apple." Moreover, it is noted that the issue of unilaterally establishing a policy without negotiating with the union could have been raised during the grievance procedure. Your failure to do so and/or to pursue your grievance to arbitration does not preclude 19(d) from barring the instant complaint. 14/

The record discloses that in this case basic issues raised in the amended complaint were raised in grievance proceedings initiated in the first instance by the Council on behalf of sandblasters and boilermakers in the bargaining unit. (Respondent Exhibits 2 and 3). 15/

The basic issues raised in the amended complaint related to whether the Shipyard bargained in bad faith during negotiations leading to execution of the current collective bargaining agreement; whether the Shipyard failed to negotiate with the Complainant prior to initiating a unilateral change in criteria relating to entitlement to "dirty pay," and whether the Shipyard failed to negotiate with the Complainant prior to initiating a change in the authority of supervisors to approve entitlement to "dirty pay."

14/ See Department of the Navy, Pearl Harbor Naval Shipyard, Assistant Secretary Case No. 73-587(CA), request for review denied, FLRC No. 75-A-57 (September 18, 1975); and the Administrative Law Judge's recommended decision adopted by the Assistant Secretary in Equal Employment Opportunity Commission, 6 A/SLMR 485, A/SLMR No. 707.

15/ These grievances were filed by the Council in its institutional capacity as the exclusive bargaining unit, and therefore may be distinguished from the grievance filed individually by a welder. The fact that the latter was not filed by the Council precludes consideration of this grievance as a basis for barring the complaint under Section 19(d). Department of the Treasury, Internal Revenue Service, Fresno Service Center, A/SLMR No. 983 (February 6, 1978).

The gravamen of the amended complaint and the grievance filed by on behalf of boilermakers covered by the agreement, related to the basic issues of whether or not entitlement to "dirty pay" should be conditioned upon a showing that "authorized work situations" listed under the "dirty work" provisions of the contract must also meet the general criteria in the collective bargaining agreement; whether the Shipyard was justified in changing the practice employed in some cases, of authorizing entitlement to "dirty pay" without first requiring a showing of adherence to the general criteria; and whether the Shipyard made a unilateral change in the method of payment of compensation for "dirty work." 16/ Both the boilermaker grievance and the amended complaint pose the issue of whether the parties fully explored questions concerning the applicability of the general criteria during contract negotiations; and most importantly, the issue of whether the Shipyard's intention to administer the contract in strict compliance with the criteria was negotiated with the Council. These basic issues were also raised, although in a less distinct manner, in the consolidated grievance filed on behalf of all sandblasters. (Respondent's Exhibit 2).

Since the basic issues raised in the boilermaker and sandblaster grievances were essentially the same as those raised in this forum, Section 19(d) precludes further processing of the complaint. Department of Transportation, Federal Aviation Administration, A/SLMR No. 1073 (July 5, 1978).

It must also be noted that substantive reasons exist for the dismissal of the complaint in this case. Under the rules and regulations of the Assistant Secretary (29 C.F.R. §203.15), "[a] complainant in asserting a violation of the order shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." This burden has not been met.

The Council's view of the negotiating process amounts to an assertion that the general criteria (Article 13, Section 2, Part I B(1), (2) and (3)), were included in the

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16/ The boilermaker grievance specifically raised the issue of whether the Shipyard's action constituted "a violation of established past practice and the provisions of the current agreement." (Respondent's Exhibit 3 at 6).

current collective bargaining agreement by the parties with a verbal understanding that these provisions would have no legal effect whatsoever. There is no basis in the record for concluding that the parties made such a verbal agreement. The record discloses that the Council was, during negotiations, repeatedly apprised and put on notice concerning the intended changes in practice alleged in the amended complaint, and the reasons for the changes. The evidence indicates that there was a full disclosure by the Shipyard that the criteria would be applied across the board in work situations involving "dirty pay." The Council agreed to the applicability of the criteria in this specific context, only after being provided with unlimited opportunity to negotiate further or pursue the issue to impasse.

In view of the applicability of Section 19(d) of the Order, and in view of the substantive reasons underlying dismissal of the amended complaint, it is unnecessary to determine whether the provisions of Section 12(a) or 13(a) of the Order would inure to the benefit of the Shipyard.

RECOMMENDATION

Having found that the amended complaint is barred by Section 19(d) of the Order, and further that Respondent has not engaged in conduct prohibited by Sections 19(a)(1) and (6) of the Order, it is recommended that the amended complaint herein be dismissed in its entirety.

LOUIS SCALZO
Administrative Law Judge

Dated: June 11, 1979
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, INTERNATIONAL COUNCIL OF UNITED
STATES MARSHALS SERVICE LOCALS

(Union)

and

Case No. 0-NG-118

DEPARTMENT OF JUSTICE, UNITED STATES
MARSHALS SERVICE

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

Union Proposal

Article XXXIV, Section 31 - Merit Promotion

The Employer will announce all vacancies for which bargaining unit employees are eligible to apply regardless of how the vacancies are to be filled.

Question Here Before the Authority

The question is whether the union's proposal violates section 7106(a) of the Federal Service Labor-Management Relations Statute (the Statute) or establishes a negotiable procedure, under section 7106(b)(2), which management officials will observe in filling vacancies. 1/

Opinion

Conclusion: The union's proposal establishes a negotiable procedure under section 7106(b)(2) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the

1/ Section 7106 of the Statute provides, in relevant part, as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(Continued)

agency's allegation that the union's proposal is not within the duty to bargain is set aside. 2/

Reasons: The language of the union's proposal would require the activity to announce all vacancies for which bargaining unit employees are eligible to apply. The agency contends, however, that the proposal would not only require management to inform the union of vacant positions but also to accept and consider applications from bargaining unit employees as a precondition to the exercise of its right to make selections, even where management has decided not to fill positions through merit promotion but rather from "any other appropriate source" pursuant to its reserved right under section 7106(a)(2)(C) of the Statute (supra note 1). The union asserts, on the other hand, that its proposal "merely requires that the agency announce vacancies" and, as such, is a procedure within the meaning of section 7106(b)(2) which management will observe in exercising its reserved rights under section 7106(a) and (b)(1) of the Statute rather than an interference with any such rights.

In light of its plain language and intended meaning, the proposal merely requires management to announce vacancies for which bargaining unit employees are eligible to apply, but does not require management to consider or select

(Continued)

(2) in accordance with applicable laws--

(A) to hire, assign, lay off, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take disciplinary action against such employees;

. . . . .

(C) with respect to filling positions, to make selections for appointments from --

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

. . . . .

(2) procedures which management officials of the agency will observe in exercising any authority under this section; . . .

2/ In so deciding that the subject proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

eligible applicants from within the bargaining unit in filling vacancies. 3/ Rather, under the union's interpretation of its own proposal, which is adopted for purposes of this decision, "[t]his proposal is based solely on the union's concern that management inform bargaining unit employees of the manner in which . . . vacancies are to be filled." Further, the agency has failed to demonstrate that such a proposal is inconsistent with Chapter 335 of the Federal Personnel Manual or with management's right to fill first-level supervisory positions.

For the foregoing reasons, the proposal at issue establishes a negotiable procedure under section 7106(b)(2) of the Statute and, accordingly, the agency's allegation that such proposal is not within the duty to bargain is set aside.

Issued, Washington, D.C., February 29, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ In this regard, see National Treasury Employees Union and Internal Revenue Service, Case No. 0-NG-109, 2 FLRA No. 33 (Dec. 21, 1979), Report No. , wherein the Authority concluded that a proposal which would require management in the first instance to "announce" a certain number of vacant positions as upward mobility positions established only a procedural requirement which was within the duty to bargain under section 7106(b)(2) of the Statute and did not conflict with management's rights under section 7106(a) of the Statute. See also American Federation of Government Employees, AFL-CIO, Local 331 and Veterans Administration Hospital, Perry Point, Maryland, Case No. 0-NG-17, 2 FLRA No. 59 (Jan. 17, 1980), Report No. .

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

National Labor Relations Board Union,
Local 19

(Union)

and

Case No. O-NG-131

National Labor Relations Board,
Region 19

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 et seq.).

Union Proposal

. . . . . .

2. Until such time as the Office of the General Counsel and the National Labor Relations Board Union agree to exclude the Clerical Assistant from the Clerical Unit or an appropriate "petition" is filed with the Federal Labor Relations Authority, it is agreed that assignments of work to the Clerical Assistant will be limited to clerical duties and routine administrative detail incident to the Office Manager's exercise of his or her responsibilities unless the Clerical Assistant is duly appointed the Acting Office Manager in the absence of the Office Manager.

3. The Clerical Assistant will not, unless duly designated as Acting Office Manager, be required to perform or participate in the following responsibilities of the Office Manager.

(a) Determine the presence and absence of employees in connection with their arrival and departure;

(b) Ascertain the reasons for, or prescribe the appropriate action to be taken in connection with, the late arrival or early departure of clerical employees (which is not to say that the Clerical Assistant may not be assigned to perform the routine administrative and clerical function of recording time and attendance);

(c) The conduct of pre-hire interviews of prospective employees or views of qualifications for hire solicited;

(d) The conduct of corrective, disciplinary and/or appraisal interviews of employees or comments on employee work performance solicited;

(e) Make assignments of work of a mandatory nature as opposed to routine work coordination distribution of work;

(f) The formulation or conduct of labor relations.

4. If in connection with the foregoing a question should arise regarding the appropriateness of duties assigned the Clerical Assistant, the parties will discuss the assignment before it is implemented.

Question Here Before the Authority

The question is whether the union's proposal, that the agency assign certain duties to the Clerical Assistant to the Office Manager, only if the Clerical Assistant is duly appointed Acting Office Manager in the absence of the Office Manager, would violate the Statute, as alleged by the agency.

Opinion

Conclusion: The proposal conflicts with section 7106(a)(2)(B) of the Statute.1/ Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that the disputed proposal is not within the duty to bargain is sustained.

Reasons: The record indicates that the union's proposal would prohibit the assignment of certain duties and work to the Clerical Assistant to the Office Manager, except in the absence of the Office Manager. That is, the proposal expressly would condition management's assigning of such duties and work to the Clerical Assistant upon the absence of the Office Manager. The agency retains the right under section 7106(a)(2)(B) of the Statute to assign work to positions

1/ Section 7106(a)(2)(B) of the Statute (92 Stat. 1198) provides, in relevant part, as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any agency--

. . . . . .

(2) in accordance with applicable laws--

(B) to assign work, ...

or employees.2/ The disputed proposal, however, would establish a condition (the absence of the Office Manager) upon management's ability to assign the work involved. The proposal thereby would eliminate the discretion inherent in management's right to assign work, i.e., which position or employee the work will be assigned to, and when it will be assigned.3/ Thus, contrary to the union's contentions the disputed proposal would not be limited to establishing the essentially procedural requirement that when the Clerical Assistant to the Office Manager is assigned to perform Office Manager duties, that individual will be designated as Acting Office Manager. Rather, it would establish a condition on management's right to assign certain duties and work to the Clerical Assistant to the Office Manager in violation of section 7106(a)(2)(B) of the Statute.

Based on the foregoing, the disputed proposal would violate section 7106(a)(2)(B) of the Statute. Accordingly, the agency's allegation that the disputed proposal is not within the duty to bargain is sustained.4/

Issued, Washington, D.C., March 7, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ See American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, Case No. O-NG-40, 2 FLRA No. 77, (Jan. 31, 1980), at 20 of the decision.

3/ Id. at 28 of the decision.

4/ Since the disputed proposal violates section 7106(a)(2)(B) of the Statute, it is unnecessary to consider the agency's additional contention that the proposal conflicts with a controlling national agreement between the parties.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1760

(Union)

and

Case No. 0-NG-168

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF RETIREMENT AND SURVIVORS
INSURANCE, NORTHEASTERN PROGRAM SERVICE
CENTER, FLUSHING, NEW YORK

(Activity)

DECISION ON NEGOTIABILITY APPEAL

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

The union is the exclusive representative of a unit of employees at the activity. The union and the activity are parties to a multi-Center collective bargaining agreement. During the term of that agreement, the activity notified the union of its decision to assign certain temporary employees to the mailroom, to assign "terminal digits" work to union officials as well as to the other unit employees, and to audit a random sample of the work of certain employees. The union thereafter requested an opportunity to meet and confer with regard to the foregoing proposed changes. The activity refused to negotiate with regard to the foregoing decisions, which were asserted to be within management's reserved rights and therefore nonnegotiable, but did meet and confer with the union concerning the procedures for implementing such decisions and the arrangements for employees adversely affected thereby. The union then filed the instant negotiability appeal with the Authority.

In its statement of position, the agency noted, among other things, that the union had generally failed to submit written proposals to the activity during the course of mid-term bargaining between the parties and therefore had failed to set forth any specific proposals in its petition for review filed with the Authority. In this latter regard, the agency further stated that the Authority cannot render a negotiability determination "unless it knows exactly what the union's proposal is," and that the union's appeal is therefore defective under the Authority's rules and should be dismissed on that basis. In response, the union did not dispute the lack of written proposals but asserted that the activity "was fully cognizant of the union's proposals" and had refused to provide written proposals to the union or to reduce any mid-term agreements to writing.

In Association of Civilian Technicians, Alabama ACT and State of Alabama National Guard, Case No. 0-NG-27, 2 FLRA No. 39 (Dec. 28, 1979), Report No. , the Authority decided, with respect to a question substantially identical to that presented here, that a petition which did not present a proposal sufficiently specific and delimited in form and content as to permit the Authority to render a negotiability decision failed to meet the conditions for review prescribed in section 7117 of the Statute and § 2424.1 of the Authority's rules of procedure. For the reasons fully set forth in that decision, the Authority finds that the instant petition does not meet such conditions for review and must therefore be denied.

In conclusion, the instant negotiability appeal does not meet the conditions for review under section 7117 of the Statute and Part 2424 of the Authority's rules and regulations. Accordingly, the appeal is denied.

Issued, Washington, D.C., March 7, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3488

(Union)

and

Case No. 0-NG-61

FEDERAL DEPOSIT INSURANCE CORPORATION,
NEW YORK REGION

(Activity)

DECISION ON NEGOTIABILITY APPEAL

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

The basic facts, as set forth in the record, are as follows: The American Federation of Government Employees, AFL-CIO, Local 3488 (the union) is the exclusive representative of a unit of bank examiners employed by the Federal Deposit Insurance Corporation, New York Region (the activity). The union and the activity were parties to a three-year agreement with an expiration date of December 21, 1979.

In February 1977, the activity announced its intention of formally assigning certain banks to specific field offices within the New York Region for examination purposes, rather than to continue the existing practice of assigning a particular bank examination to one of several field offices on an ad hoc basis depending upon available staff and schedule priorities. The union filed a grievance under the parties' agreement challenging the proposed realignment of the banks to specific field offices. The parties thereafter met to discuss the impact of the proposed realignment on the bank examiners, and the union also submitted comments with respect thereto. After reviewing these comments, the activity notified the union of its intention to proceed with the realignment as originally proposed. The realignment was implemented on June 5, 1977. A few weeks later, the union requested negotiations with regard to the realignment and submitted several proposals. When the parties met on September 20, 1977, the activity asserted that the union's proposals were nonnegotiable under sections 11(b) and 12(b) of Executive Order 11491, as amended, which was in effect at that time. */ The union did not pursue the matter further for over 18 months, during which time the realignment remained and continues in effect.

*/ The Statute became effective on January 11, 1979.

By letter dated April 12, 1979, the union requested the activity's position in writing with regard to the negotiability of proposals relating to the realignment which the union alleged had been submitted in 1977. In response, the activity asserted, in part, that the union's request was untimely inasmuch as "the discussion of these matters ended on September 20, 1977. . . ." The activity further asserted that the proposals set forth in the union's letter differed from those which the union presented and the parties discussed in 1977. The union then filed the instant negotiability appeal with the Authority on May 8, 1979. In its statement of position, the activity contends, among other things, that the union's appeal was not timely filed, that the union was unreasonably dilatory in waiting over 18 months to pursue this matter, and that it would be inequitable to permit the union to maintain the present appeal. The activity also reasserts that "[t]he [u]nion's petition does not accurately set forth the text of the proposals that were actually made to the [activity] on June 25, 1977," but that "[t]here is a distinct difference between the proposals actually submitted and the [u]nion's version of them." In this latter regard, the union in its reply acknowledges that "the language [of the proposals] is not verbatim," but argues that "the issues are identical." The union further argues that its petition for review was timely filed under the Statute. For the reasons stated below, the Authority concludes that the union's appeal must be dismissed.

This case involves essentially the continuation of a negotiability dispute which arose under and related to the provisions of the Order, some 16 months before the Statute became effective. As noted above, when the instant dispute arose in 1977 as a result of the activity's stated intention to assign certain banks to specific field offices for examination purposes, the Order governed the resolution of negotiability issues. In this connection, when the parties met to discuss the union's proposals with respect to the activity's realignment, the activity declared that such proposals were nonnegotiable under the exceptions to management's obligation to bargain contained in sections 11(b) and 12(b) of the Order. Although procedures were available to the union to resolve the negotiability dispute under the Order, such procedures were never invoked. Instead, the union waited for over 18 months before attempting to reactivate the foregoing dispute by requesting the activity's written allegation as to the negotiability of the proposals which had been discussed between the parties in 1977. Even then, it is undisputed that the proposals so submitted to the activity by the union in April 1979 were different from those discussed by the parties in 1977. Moreover, as previously noted, the record indicates that the parties' agreement which had been negotiated under the Order in 1976 just expired on December 21, 1979. Thus, the union now has an opportunity to submit and define its proposals at the bargaining table where the applicability of the Statute, rather than the Order, may likewise be considered by the parties. Such submissions and discussions may lead to bilateral resolution of any continuing dispute by the parties without the need for intervention by the Authority.

Under all of the foregoing circumstances, it is concluded that further processing of the union's appeal in the instant case would be inappropriate. Accordingly, the union's appeal is hereby dismissed, without prejudice to the parties' consideration of the union's proposals, as clarified, and a timely appeal from any allegation by the agency that such proposals are nonnegotiable under the Statute.

Issued, Washington, D.C., March 7, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhite, Member

FEDERAL LABOR RELATIONS AUTHORITY

2 FLRA No. 101

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HEADQUARTERS, U.S. ARMY COMMUNICATIONS
COMMAND, ET AL., FORT HUACHUCA,
ARIZONA

Activity

and

Case No. 0-MC-1

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL 1662

Union

DECISION

This matter is before the Authority on a request by the union that the Authority petition a United States court of appeals for enforcement of the award of Arbitrator Robert M. Leventhal to which no exception was filed with the Authority.

According to the record before the Authority, the parties stipulated and submitted the following issue to arbitration:

> Are boilers inspected and maintained by boiler operators with sufficient frequency to insure safe operation and the safety of said personnel?

The arbitrator concluded on the basis of the parties' negotiated agreement that Army Regulation (AR) 420-49, prescribing policy for boiler plant operations, controlled the resolution of this dispute. After reviewing the standards set forth in AR 420-49, the arbitrator determined that the activity had not properly applied those standards when it reduced the frequency of operational visits to inspect the boilers at the activity. Accordingly, as his award, the arbitrator held:

1. The Employer did not follow appropriate procedures when it revised its boiler maintenance and inspection function.

2. Revisions to its present maintenance and inspection schedules are to be effectuated as set forth in the appended opinion.

In the appended opinion the arbitrator stated that the activity could not reduce the frequency of operational visits to inspect the boilers below that number recommended in AR 420-49 until it had identified each boiler where a reduction in visits was sought, set forth the frequency of visits deemed

reasonable and the reasons therefor, and received advance approval from appropriate authorities. Subsequently, the activity requested and received the approval of the Commander, U.S. Army Communications Command, for a reduction of the operational visits to specified boiler facilities.

Thereafter, the union requested that the Authority petition a United States court of appeals pursuant to section 7123(b) of the Federal Service Labor-Management Relations Statute (5 U.S.C.§7123(b))[1/] for enforcement of the arbitration award in this case. The union asserted that the activity's request to the Commander of the U.S. Army Communications Command for a reduction in the operational visits to the boiler facilities had not been in compliance with the procedures set forth in the arbitration award and that "[t]he Command's refusal to follow the arbitrator's award . . . allows a highly dangerous working condition to exist." As previously indicated, neither party to the arbitration had filed an exception to the award with the Authority.

The union asserts that an arbitration award to which exceptions have not been filed under 5 U.S.C. §7122[2/] becomes an "order" of the Authority for purposes of seeking enforcement under 5 U.S.C. §7123. In support of its assertion, the union cites a portion of the legislative history of the Statute in which a "final decision of the Authority" under an earlier version of section 7122 (i.e., under the version of section 7122 as reported out of the House Post Office and Civil Service Committee) is described as "an arbitration award which has been reviewed by the Authority or for which the time period for

---

1/ 5 U.S.C. § 7123(b) provides:

> The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

2/ 5 U.S.C. §7122 provides:

> (a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient--
>
> (1) because it is contrary to any law, rule, or regulation; or
> (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;
>
> the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.
>
> (b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date of such award, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

filing [exceptions] has run."3/ Thus, the union argues that the arbitrator's award in this case must be regarded as an "order" of the Authority with which the activity assertedly has failed to comply.

In response the agency claims that there is no legislative basis for the Authority to petition a United States court of appeals for enforcement of the arbitrator's award. It asserts that the Authority has never been asked to review this matter and has never entered any order under the Statute in this case. The agency argues that under section 7123(b), enforcement may be sought by the Authority only in those cases where an "order" of the Authority has been entered, which has not here occurred. The agency also claims that the union's request is inappropriate because the activity has complied with the award.

For the following reasons, the union's request is denied. The Authority finds no statutory basis for it to petition a United States court of appeals pursuant to section 7123(b) of the Statute for enforcement of an arbitration award to which no exception has been filed with the Authority. In such a case there has been no Authority issuance and therefore no "order of the Authority" which the Authority may seek to enforce under 5 U.S.C. §7123(b). As to the legislative history cited by the union, the Authority notes that the description of "final decision" to which the union refers is in a portion of the House Committee Report relating to the provisions of section 7122 (Exceptions to Arbitral Awards) of the bill reported out of the House Post Office and Civil Service Committee:

> A final decision of the Authority under section 7122 (an arbitration award which has been reviewed by the Authority or for which the time period for filing [exceptions] has run) is subject to the judicial review provisions of section 7123, as added by the bill.4/ [Footnote added.]

The Authority does not find this legislative history to be controlling in determining whether there is a statutory basis for the Authority to petition a United States court of appeals in the circumstances of this case. In this regard the Authority notes that while the union cites a portion of the House Report describing the provisions of section 7122 of the bill pertaining to Authority review of an arbitration award, the portion of the House Report describing section 7123, in which the court enforcement provisions of the bill are contained, refers only to "the award by an arbitrator (which has been reviewed by the Authority in accordance with section 7122, as added by the bill)."5/ Thus, the House Report on the specific section of the bill here involved makes no reference to arbitration awards for which the time period for filing an exception has run. Instead, it limits such reference to awards which have been reviewed by the Authority, that is, awards to which exceptions have been filed and a decision thereon has been issued by the Authority. Moreover, nothing elsewhere in the legislative history suggests that without such an Authority issuance, there can be an Authority "order" subject to the enforcement provisions of 5 U.S.C. §7123(b).

3/ H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 56 (1978).

4/ Supra note 3.

5/ H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 57 (1978).

Therefore, the Authority finds that the legislative history of the Statute relied upon by the union fails to support the union's assertion that an arbitration award to which no exception has been filed becomes an "order" of the Authority within the meaning of 5 U.S.C. §7123(b). On the contrary, the legislative history of section 7123 of the Statute supports the conclusion that an arbitration award to which no exception has been filed does not constitute an "order of the Authority" under section 7123(b) upon which enforcement action may be predicated before a United States court of appeals.

The Authority further notes that it appears from the record that the parties are primarily disputing whether the activity has complied with the arbitrator's award. There are ready means available under the Statute for resolving this type of dispute. If a question of clarification or interpretation of the arbitrator's award arises in connection with compliance therewith, the parties may jointly request a clarification or interpretation of the award from the arbitrator or the parties may jointly submit the question of compliance to arbitration for resolution. In addition, where appropriate, the unfair labor practice procedures under section 7116 of the Statute may be used when there is a dispute concerning an alleged failure of a party to abide by a final and binding arbitration award.6/ Indeed, the foregoing proceedings are particularly equipped to resolve compliance disputes such as here involved since those disputes frequently require credibility and other factual determinations dependent upon the taking of testimony in such hearings.

Accordingly, because there is no "order of the Authority" in this case to be enforced under section 7123(b) of the Statute, the union's request that the Authority petition a United States court of appeals for enforcement of the arbitrator's award is denied.

Issued, Washington, D.C., March 7, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

6/ Judicial review and enforcement of orders issued by the Authority in such proceedings may then be sought under section 7123(a) and (b) of the Statute.

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 35 REPORT OF CASE DECISIONS June 11, 1980

UNFAIR LABOR PRACTICE CASES

2 FLRA No. 105 (March 7, 1980)

Department of Energy, Assistant Secretary Case No. 22-09034(CA). Upon a complaint filed by the union (NTEU) under E.O. 11491, the ALJ found that the agency had not violated section 19(a)(1), (2), (5), or (6) of the Order when it refused to accept new dues withholding authorizations executed after the effective date of the statutory reorganization which created the Respondent and merged therein employees from several agencies, including those here involved (formerly employed by the Federal Energy Administration). The Authority, while agreeing with the ALJ's conclusion that there was no basis to support the section 19(a)(2) and (6) allegations, found that the Respondent's decision not to accept the dues withholding authorizations in question was violative of section 19(a)(1) and (5) of the Order. The Authority thereupon issued a remedial order. (Decision and Order attached.)

2 FLRA No. 106 (March 14, 1980)

Veterans Administration Regional Office, Denver, Colorado, Assistant Secretary Case No. 61-4255(CA). Upon a complaint filed by the union (AFGE Local 1557) under E.O. 11491, the ALJ found that the activity had violated section 19(a)(1) and (2) of the Order when it reprimanded two union stewards for disseminating information to various colleges and universities, veterans' service organizations and Members of Congress concerning a proposed reduction in the number of Veterans Representatives on various campuses. (The activity had claimed that the information was privileged, that the stewards distorted and misstated its substance to others, and that the dissemination constituted unauthorized use of agency information and violated agency regulations.) The Authority adopted the ALJ's findings, conclusions, and recommendation and issued a remedial order. (Decision and Order attached.)

2 FLRA No. 110 (March 14, 1980)

Veterans Administration Hospital, Lexington, Kentucky, Assistant Secretary Case No. 41-6178(CA). Upon a complaint filed by the union (NAGE Local R5-185) under E.O. 11491, the ALJ concluded that the activity violated section 19(a)(1) of the Order when, in filling the vacant position of Chief of Police, applicants were questioned concerning their union membership and activities. The ALJ also concluded, in view of the facts and circumstances involved demonstrating pervasive union animus, that in selecting the only applicant who was not a member of the union the activity violated section 19(a)(2) of the Order. The Authority adopted the ALJ's findings, conclusions, and recommendations and issued an appropriate remedial order. (Decision and Order attached.)

NEGOTIABILITY CASES

2 FLRA No. 107 (March 14, 1980)

Professional Air Traffic Controllers Organization, AFL-CIO and Department of Transportation, Federal Aviation Administration, Case No. O-NG-209. The union sought to negotiate over proposed changes in an activity regulation. The Authority found that the union's petition did not present a proposal sufficiently specific and delimited in form and content as to permit the Authority to render a negotiability decision. Therefore, based upon its decision in the Alabama ACT case, Case No. O-NG-27, 2 FLRA No. 39 (Report No. 25), the Authority held that the union's petition did not meet the requirements for review prescribed in section 7117 of the Statute and section 2424.1 of the Authority's rules of procedure. Accordingly, the Authority dismissed the union's petition. (Decision letter attached.)

2 FLRA No. 108 (March 14, 1980)

Tidewater Virginia Federal Employees Metal Trades Council and Norfolk Naval Shipyard, Portsmouth, Virginia, Case No. O-NG-256. The union proposed generally to negotiate on an activity directive from its shop superintendents to its foremen concerning the monitoring of employees' productivity. The Authority held that the union's petition did not present a proposal sufficiently delimited in form and content as to permit the Authority to render a negotiability decision. Accordingly, based upon its decision in the Alabama ACT case, Case No. O-NG-27, 2 FLRA No. 39 (Report No. 25), the Authority

dismissed the union's appeal for failing to meet the conditions for review prescribed in section 7117 of the Statute and section 2424.1 of the Authority's rules of procedure. Additionally, the Authority noted that insofar as it appeared that the essence of the union's allegations related to an alleged unilateral change in working conditions and a refusal to bargain on its impact, the proper forum in which to raise such issues was an unfair labor practice proceeding and not a negotiability appeal. (Decision letter attached.)

2 FLRA No. 109 (March 14, 1980)

American Federation of Government Employees, AFL-CIO, Local 15 and Department of the Treasury, Internal Revenue Service, North Atlantic Region, Case No. 0-NG-137. The dispute involved the negotiability of a union proposal concerning an IRS regulation that would require all employees to wear and visibly display identification cards and badges in a particular manner. The Authority held the union's proposal violated management's right to determine the internal security practices of the agency under section 7106(a)(1) of the Statute. Accordingly, the Authority sustained the activity's allegation that the disputed proposal was not within the duty to bargain. (Decision attached.)

Appeals withdrawn:	Case No.	Date
	0-NG-213	March 10, 1980
	0-NG-218	March 10, 1980
	0-NG-246	March 10, 1980
	0-NG-259	March 10, 1980

Attachments (6)

2 FLRA No. 105

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Department of Energy

Respondent

and

Assistant Secretary
Case No. 22-09034(CA)

National Treasury Employees Union

Complainant

DECISION AND ORDER

On May 1, 1979, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions to the Administrative Law Judge's Recommended Decision and Order and the Respondent filed an answering brief to the Complainant's exceptions.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040) which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial

error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the case, including the Complainant's exceptions and the Respondent's answering brief, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation only to the extent consistent herewith. 1/

In this case the National Treasury Employees Union (NTEU) was the certified exclusive representative of a nationwide unit of all Federal Energy Administration (FEA) employees. The FEA and NTEU had a negotiated agreement providing for, among other things, the withholding of dues through voluntary authorization. Effective October 1, 1977, the Department of Energy (DOE) was created, merging employees from several agencies, including the FEA. The negotiated agreement between FEA and NTEU expired by its terms on the October 1, 1977, effective date of the reorganization. Thereafter, DOE declined to accept any new dues withholding authorizations from employees in the NTEU unit, although continuing to honor authorizations which predate October 1, 1977. Subsequently, pursuant to a petition filed by DOE, the Assistant Secretary determined on October 13, 1978, that DOE was not the successor employer for the NTEU exclusive unit. 2/ At issue in the instant case is DOE's refusal to process new dues withholding authorizations between October 1, 1977, and the October 13, 1978, determination that DOE was not a successor.

Contrary to the Administrative Law Judge, the Authority concludes that the Respondent's decision not to accept dues withholding authorization requests executed after October 1, 1977, the date of the statutory reorganization which created the Respondent, was violative of section 19(a)(1) and (5) of Executive Order 11491, as amended. 3/ In Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, 3 FLRC 787, FLRC No. 74A-22 (1975), the Federal Labor Relations Council held:

> (U)ntil any . . . issues raised by the reorganization are decided (e.g., questions concerning representation, unit questions, or the

1/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

2/ U.S. Department of Energy, 8 A/SLMR 1149, A/SLMR No. 1136 (1978).

3/ In agreement with the Administrative Law Judge, we conclude that there is no basis, in the circumstances of this case, to support the 19(a)(2) and (6) allegations.

like), the gaining employer is . . . enjoined, in order to assure stability of labor relations and the well-being of its employees, to maintain recognition and to adhere to the terms of the prior agreement, including dues withholding, to the maximum extent possible. (Footnote omitted.)

In the Authority's view, the holding of the Council in DSA is dispositive of the issues herein. 4/ The Respondent, as the gaining employer of the former FEA employees who were represented exclusively by the Complainant, was required to adhere to the terms of the prior agreement, including dues withholding, between the FEA and the Complainant to the maximum extent possible during the pendency of the RA petition. Such adherence goes to both the continuation of existing dues withholding authorizations and the acceptance of new authorizations which would be processed under the terms of the prior agreement. Therefore, as the prior dues withholding agreement between the FEA and the Complainant included the procedure for executing voluntary dues withholding authorizations, the Respondent was required during the pendency of the RA petition herein to accept new requests made by employees who would be within the NTEU unit. Rather than violating its neutrality as contested by the Respondent, continuing to honor the prior agreement in circumstances like those herein would have been consistent with the obligation to maintain existing recognitions during the pendency of representation petitions filed to resolve issues raised by a reorganization.

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of Energy shall:

1. Cease and desist from:

(a) Refusing to accept and honor dues withholding requests validly and lawfully executed pursuant to a collective bargaining agreement, on behalf of the National Treasury Employees Union, or any other labor organization, during the pendency of an RA petition.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action:

(a) Post at Department of Energy installations nationwide copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by

4/ See also Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, 4 FLRC 484, FLRC No. 74A-52 (1976).

the Secretary of Energy, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicious places, including all places where notices to employees are customarily posted. The Secretary shall take reasonable steps to insure that notices are not altered, defaced, or covered by any material.

(b) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., March 7, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to accept and honor dues withholding requests validly and lawfully executed pursuant to a collective bargaining agreement, on behalf of the National Treasury Employees Union, or any other labor organization, during the pendency of an RA petition.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

_____
(Agency or Activity)

Dated:_____ BY:_____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, whose address is: 1730 K Street, NW, Room 401, Washington, D.C., 20006; and whose telephone number is: (202) 653-7213.

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
DEPARTMENT OF ENERGY Respondent	
and	Case No. 22-09034(CA)
NATIONAL TREASURY EMPLOYEES UNION Complainant	

JAMES R. LAWRENCE, ESQUIRE
Assistant Counsel
National Treasury Employees Union
1730 K Street, NW., Suite 1101
Washington, DC 20006
On Brief: William F. White, Esquire
Assistant Counsel
National Treasury Employees Union
For the Complainant

PAGE NEWTON, ESQUIRE
Department of Energy
Room 6219
20 Massachusetts Avenue, NW.
Washington, D.C. 20545
On Brief: Ronald W. Knisley, Esquire
Chief, Employee/Labor Management Relations
Department of Energy
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This is a proceeding under Executive Order 11491, as amended (hereinafter also referred to as the "Order"). Although the Notice of Hearing was issued by a Regional Administrator of the Labor-Management Services Administration, United States Department of Labor and proceeding, in part, were conducted before the Assistant Secretary of Labor for Labor-Management Relations; however, the parties were informed at the hearing that all

further proceedings in this matter, including the decision herein, would be under the Authority pursuant to transition rules and regulations, Federal Register, Vol. 44, No. 1, January 2, 1979 (5 C.F.R. Section 2400.2).

This case involves a single narrow issue, namely, whether the Department of Energy (hereinafter also referred to as Respondent) violated the Order by refusing to accept new dues deduction authorizations executed after the effective date (October 1, 1977) of the statutory reorganization which created Respondent where: a) the contract with the agency (Federal Energy Administration) which provided for dues deduction authorizations to Complainant, National Treasury Employees Union, had expired, by its terms, on September 30, 1977; b) the Federal Energy Administration ceased to exist as of October 1, 1977, when it became a part of Respondent; c) representation petitions were submitted on or about October 17, 1977, and were filed by the Assistant Secretary on November 1, 1977 (Jt. Exh. D); and d) the Assistant Secretary determined that the reorganization, effective October 1, 1977, created a new organizational entity and resulted in a material alteration on the unit represented by Complainant (as well as the unit represented by Local 2195 American Federation of Government Employees) and its disappearance as a reocgnizable appropriate unit and that the reorganization rendered Complainant's exclusively recognized unit inappropriate for the purpose of exclusive recognition under the Order (U.S. Department of Energy, A/SLMR No. 1136 (1978)). Respondent honored dues authorizations executed prior to October 1, 1977, by FEA employees.

This matter was initiated by a charge dated March 29, 1978 (Jt. Exh. B) and filed on March 31, 1978, and a complaint filed on May 17, 1978 (Asst. Sec. Exh. 1), each alleging violations of Sections 19(a)(1), (2), (5) and (6) of the Order. Notice of Hearing issued on September 15, 1978, for a hearing on November 7, 1978 (Asst. Sec. Exh. 1); Orders Rescheduling Hearing issued on October 31, 1978 (Asst. Sec. Exh. 2) and December 5, 1978 (Asst. Sec. Exh. 3) which first rescheduled the hearing for November 30, 1978, and subsequently for January 24, 1979, at 10:00 a.m.; and on January 19, 1979, an Order changing the time for commencement of the hearing, from 10:00 a.m. to 9:00 a.m. issued, pursuant to which a hearing was duly held before the undersigned on January 24, 1979, commencing at 9:00 a.m., in Washington, D.C. Respondent's Motion to Dismiss, although received as part of the record, has not, in view of the decision on the merits, been separately considered.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, and to present oral argument at the conclusion of the testimony. At the close of the hearing, February 28, 1979, was fixed as the date for the filing of briefs, which time was, on motion of Complainant, for good cause shown, and with consent of Respondent, subsequently extended to March 30, 1979, and each party has timely filed a

comprehensive and helpful brief which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings, conclusions and order.

Findings

Except for one disputed issue of fact (whether there was notice of the intended decision to refuse to accept dues deduction authorizations executed after the effective date of the statutory reorganization, October 1, 1977, and whether Complainant was afforded an opportunity to bargain which is discussed hereinafter) there is no dispute as to the facts, indeed, for the most part the parties have stipulated as to the facts and as to evidence not stipulated the parties are in agreement. The agreed material facts are as follows:

1. The National Treasury Employees Union (NTEU) was certified as the exclusive representative of a nationwide bargaining unit of Federal Energy Administration (FEA) Employees on April 19, 1976.

2. On May 3, 1977, FEA and NTEU entered into a National Interim Agreement (Jt. Exh. A). Aticle XIV, Duration, provided, in part, as follows:

> "The provisions of this interim agreement will be effective from the date of signing until the effective date of the Department of Energy reorganization or September 30, 1977, whichever comes sooner. . . ."
> (Jt. Exh. A)

The Preamble of the National Interim Agreement stated, in part, as follows:

> "In recognition of the impact of the purposed Federal Energy Reorganization upon present FEA-NTEU master agreement negotiations, the Federal Energy Administration (FEA) and the National Treasury Employees Union (NTEU) hereby enter into an interim agreement. . . ."
> (Jt. Exh. A)

3. Article VII of the FEA-NTEU National Interim Agreement provided for dues withholding by FEA. Article III specifically refers to "voluntary cash dues payment by a member" as well as to voluntary written authorizations for payment of dues by payroll deductions.

4. Pursuant to the Department of Energy Organization Act, P.L. 95-91, FEA was abolished as of September 30, 1977. Title III, Section 301 of that Act required the transfer of all FEA employees to Respondent.

5. On October 18, 1977, Respondent, Complainant and the American Federation of Government Employees prepared a joint letter to accompany

representation petitions "submitted jointly by the Department of Energy and affected unions" in which they stipulated as follows:

> "We jointly stipulate that as of October 1, 1977, a good faith doubt exists as to the representational status of the four bargaining units referenced in the enclosed petitions." (Jt. Exh. D).

The petitions, Case Nos. 22-08582(RA) through 22-08584(RA), were filed on November 1, 1977.

6. FEA had processed Form 1187 dues deduction authorizations received before its abolishment, as of September 30, 1977, and Respondent continued to honor dues deduction authorizations executed by FEA employees prior to the date FEA ceased to exist, i.e., authorizations executed before October 1, 1977.

7. By letter dated October 31, 1977, Complainant submitted to Respondent eight Form 1187 authorizations executed after October 1, 1977 (two were executed on October 14, 1977; one on October 19, 1977, and five were executed on October 25, 1977) (Union Exh. 1). Respondent received Complainant's letter of October 31, 1977, on November 2, 1977, and on November 3, 1977, returned the dues deduction authorizations unprocessed stating:

> "The attached requests for dues withholdings are being returned unprocessed. The interim agreement providing for dues withholding expires on October 1, 1977, and these 1187s are dated after October 1, 1977. We will continue to honor existing dues withholdings." (Union Exh. 1).

8. On October 13, 1978, the Assistant Secretary issued his decision on the representation petitions (Case Nos. 22-08582(RA) through 22-08584(RA)), U.S. Department of Energy, A/SLMR No. 1136 (1978), in which he found that the reorganization resulted in a material alteration in the scope and character of, inter alia, the unit represented by Complainant NTEU and its disappearance as a recognizable appropriate unit and that "the reorganization rendered", inter alia, Complainant's exclusively recognized unit "inappropriate for the purpose of exclusive recognition under the Order." (Emphasis supplied).

The sole disputed issue of fact is whether Respondent gave Complainant notice of its decision, not to accept dues deduction authorizations executed after October 1, 1977, and afforded Complainant an opportunity to bargain. If Respondent acted unilaterally and/or refused to bargain, either before or after it rejected the authorizations on November 3, 1977, resolution of the disputed factual issue would be necessary if Respondent were obligated to recognize and bargain with Complainant, to resolve the 19(a)(1), (2), (5)

and (6) violations alleged in this regard; but, in my view, it is immaterial whether Respondent gave Complainant notice and an opportunity to bargain prior to implementation of its decision, or, indeed, whether Respondent refused to bargain, inasmuch as any violation in this regard is dependent on Complainant being entitled to exclusive recognition in an appropriate unit at the time of the alleged violation and the Assistant Secretary in U.S. Department of Energy, supra, has already determined that "the reorganization rendered" Complainant's exclusively recognized unit "inappropriate for the purpose of exclusive recognition under the Order", A/SLMR No. 1136. Respondent was not, therefore, under any obligation after October 1, 1977, the date Respondent became an operating agency, to accord Complainant recognition. Accordingly, such conduct, even if established, could not constitute a violation of the Order. This was very plainly stated by the Assistant Secretary, in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 615, 6 A/SLMR 104 (1976), as follows:

> "Accordingly, as. . .Respondent was neither a co-employer nor a successor employer, I conclude that at all times relevant herein it was under no obligation to accord the Complainant recognition. . . Consequently, the Respondent's conduct herein cannot be deemed violative of. . .the Order."
> (6 A/SLMR at 108).

Nevertheless, as Complainant takes a very different view of the law, I deem it expedient to resolve the factual dispute in the event that such resolution should be deemed material to resolution of the issues involved.

Mr. Ronald Knisley, Chief, Employee Labor-Management Relations Branch, Office of Personnel of Respondent, credibly testified, from his memory, from his calendar and from notes which he took during each meeting, that he met with Mr. Robert Tobias, General Counsel of Complainant, and two other people, on September 27, 1977; that the subject of dues withholding was brought up; that he stated that "we were going to honor all present dues withholding that were in effect as of September 30, 1977, and that they would not honor any new dues withholding after that date." (Tr. 29). Mr. Knisley testified further that his calendar showed that the next meeting with Complainant was on October 21, 1977, at 10:00 a.m., that Mr. Tobias was present; and that, from his memory and from notes he had taken, he specifically recalled that "we again brought up the subject of dues withholding and I mentioned that we were not going to honor any new dues withholdings." (Tr. 29). Mr. Knisley testified that on neither September 27 nor October 21 was there any discussion of the rationale for not accepting dues withholdings after September 30, 1977, and that Mr. Tobias had not made any objections. Mr. Knisley testified that the next meeting with Complainant was on November 30, 1977, at 1:00 p.m.; that present were Mr. Tobias, Mr. Hockenberry and Mr. Allen Hersh, all representing Complainant;

that one of the items covered was dues withholding and that Mr. Tobias stated that he had several 1187s which had been rejected and he would like to have an explanation why Respondent had rejected them; that he (Mr. Knisley) had explained the reasons in detail; that Mr. Tobias made a couple of suggestions which Respondent rejected; that Mr. Tobias said "well, it looks like you have some good reasons", or words to that effect; and that this was the last meeting on the subject before the unfair labor practice charge was filed. (Tr. 29-30).

Mr. Tobias did not specifically remember the meetings of September 27 or October 21, 1977, but did not question that meetings occurred on those dates; but he testified that he recalled no discussion of dues withholding and strongly denied that there had been any statement by Mr. Knisley that new dues withholding authorizations would not be accepted after October 1, 1977, that "I can assure you that if that issue had been raised, it would have been met and there would have been a wrestling match over it." (Tr. 40). However, Mr. Tobias testified that Mr. Knisley's testimony concerning the November 30, 1977, discussion was accurate; that they did attempt "an informal resolution" and that he (Mr. Tobias) had suggested that they agree that anyone on the roster of FEA as of September 30 would be the people for whom new 1187s would be processed; that Mr. Knisley refused to make any accommodation whatever. I do not find Mr. Tobias' disclaimer convincing. The only matter of immediate concern to Complainant on September 27, 1977, was that its existing dues withholding authorizations be continued and as to those, Mr. Knisley stated they would be honored. As to new authorizations, this would be of significance only if, and when, Complainant had such authorizations. Two new authorizations were signed on October 14 and another on October 19, but five were signed on October 25, 1977, all of which strongly suggests that, after Mr. Knisley told Mr. Tobias, first on September 27 and again on October 21, that new authorizations would not be accepted after October 1, 1977, Complainant actively solicited new authorizations in order to make its demand. In addition, Respondent gave the same notice during the same weeks as each meeting with Complainant to the unions which had dues withholding agreements in the contracts with the Federal Power Commission and the Energy Research and Development Administration. Accordingly, I fully credit Mr. Knisley's testimony that he advised Complainant on September 27 and, again, on October 21, 1977, that new dues deduction authorizations would not be accepted after October 1, 1977. Respondent rejected 8 dues authorizations executed after October 1, 1977, on November 3, 1977, and on November 30, 1977, the parties discussed the matter and did attempt an informal resolution. The record does not show that there was any request to bargain on this matter other than the discussion had on November 30, 1977. Complainant filed its charge (dated March 29, 1978) on March 31, 1978 (Jt. Exh. B), and Respondent replied by letter dated April 28, 1978 (Jt. Exh. C).

Conclusions

Respondent notified Complainant on September 27, 1977, and, again, on October 21, 1977, that it would not accept any new dues deduction authorizations submitted after October 1, 1977; on November 3, 1977,

Respondent rejected eight dues deduction authorizations executed after October 1, 1977; on November 30, 1977, the parties, at Complainant's request, discussed the matter and attempted, without success, to reach an informal resolution; and no further request to negotiate was made by Complainant. The complaint does not allege that Respondent refused to bargain in good faith on November 30, 1977, nor does the record indicate more than that the parties attempted to reach an "informal resolution" and that Respondent declined to make any accommodation whatever. While it may be doubted that any basis has been shown on the record to support the allegation that Respondent refused to bargain in violation of section 19(a)(6) of the Order, even if it were assumed, contrary to the record and findings hereinabove, that Respondent had acted unilaterally and had refused to bargain, any such violation of the Order is dependent on Complainant being entitled to exclusive recognition at the time of the alleged violation and the Assistant Secretary has already determined that "the reorganization rendered" Complainant's exclusively recognized unit "inappropriate for the purpose of exclusive recognition under the Order", Department of Energy, A/SLMR No. 1136 (1978). Consequently, Respondent's conduct cannot be deemed violative of the Order. Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 615, 6 A/SLMR 104 (1976).

The contract between Complainant and the Federal Energy Administration which had included a dues deduction provision, had expired by its terms on September 30, 1977. If this were all that was involved, it is clear that the decision of the Council in Internal Revenue Service, Ogden Service Center, et al. and Internal Revenue Service, Brookhaven Service Center, FLRC Nos. 77A-40 and 77A-92 (March 17, 1978), Report No. 147, March 23, 1978, would control and that:

> ". . .existing personnel policies and practices and matters affecting working conditions, whether or not they are included in a negotiated agreement, continue as established upon the expiration of a negotiated agreement, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of that agreement or unless otherwise modified in a manner consistent with the Order."

Although the Council specifically noted that its decision applied to dues withholding, the Council stated,

> "As with other personnel policies and practices and matters affecting working conditions, dues withholding provisions in expired negotiated agreements continue in effect and cannot be unilaterally changed except as consistent with the bargaining obligation under section 11(a) of the Order. . . ." (n. 13)

Of course, this case involves not only the expiration of the NTEU - FEA agreement, but more important: a) the statutory reorganization of FEA, and other agencies, into the Department of Energy; and b) the determination by the Assistant Secretary that the reorganization resulted in a material alteration of the scope and character of, inter alia, the unit represented by Complainant and its disappearance as a recognizable appropriate unit and that "the reorganization", inter alia, rendered Complainant's exclusively recognized unit "inappropriate for the purpose of exclusive recognition under the Order."

Because this case involves a reorganization, not merely the expiration of a negotiated agreement, it is governed by the Council's decision in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, FLRC No. 74A-22, 3 FLRC 789 (1975). At the outset, it must be noted that the Council defined "successor" as follows:

> "In our view, an agency or employing entity is a 'successor,' i.e., stands in the stead, of another agency or employing entity for purposes of according exclusive recognition under 10(a) when: (1) the recognized unit is transferred substantially intact to the gaining employer, (2) the appropriateness of the unit remains unimpaired in the gaining employer; and (3) a question concerning representation is not timely raised as to the representative status of the incumbent labor organization."
> (3 FLRC at 802).

Thus, if Respondent had been a "successor" it would have assumed the same duty as FEA to grant recognition to Complainant under Section 10(a) of the Order, but, of course, it has been determined that Respondent was not the "successor"; that the reorganization resulted in a material alteration in the scope and character of the unit represented by Complainant and its disappearance as a recognizable appropriate unit and that the reorganization rendered Complainant's exclusively recognized unit inappropriate for the purpose of exclusive recognition under the Order. Because a determination was made that Respondent was not a "successor", Respondent owed no duty to recognize or to bargain with Complainant. This, also, was plainly stated by the Council as follows:

> "If as a result of a reorganization a determination is made that the gaining employer is not a 'successor,' then of course such employer owes no duty to bargain with the labor organization which previously represented the affected employees. . . ."
> (3 FLRC at 803-804, n. 19).

It is recognized that the Council stated,

> ". . .Moreover, until the question of 'successorship' is resolved or until other issues raised by the reorganization are decided (e.g., questions concerning representation, unit questions, or the like), the gaining employer is likewise enjoined, in order to assure stability of labor relations and the well-being of its employees, to maintain recognition and to adhere to the terms of the prior agreement, including dues withholding, to the maximum extent possible." (Emphasis supplied). (Noting, however, in n. 19 that "If as a result of a reorganization a determination is made that the gaining employer is not a 'successor,' then of course such employer owes no duty to bargain with the labor organization which previously represented the affected employees. . . .)" (3 FLRC at 803 and n. 19 pp. 803-804).

Obviously, the phrase "to the maximum extent possible" implies something less than absolute adherence to terms of a prior dues withholding agreement. Respondent points first to the Regulations of the Civil Service Commission, specifically made applicable by Section 21 of the Order 1/, which provides, in relevant part, as follows:

> "(c) Except as provided in paragraph (d) of this section, an agency shall discontinue paying an allotment when the allotter. . .transfers between agencies, moves or is reassigned. . .within the agency outside the unit for which the labor organization has been accorded exclusive recognition. . .or when the dues withholding agreement between the agency and the labor organization is terminated, suspended, or ceases to be applicable to the allotter.
>
> "(d) An agency may permit an employee, transferring in from another agency, or transferring within the same agency, to continue on a temporary basis to make an allotment for dues to a labor organization under the following conditions:

1/ Indeed, Section 21 not only provides that "Such an allotment is subject to the regulation of the Civil Service Commission" but, further states:

> "Such an allotment terminates when--
> (1) the dues withholding agreement between the agency and the labor organization is terminated or ceases to be applicable to the employee;"

> (1) The transfer of the employee is in connection with a transfer of function or reorganization; and
> (2) The employee was in a unit of recognition, which unit was transferred in whole or part to another agency with, or different organizational group within the same agency.
> (3) A substantial question of successorship exists. . . ; and
> (4) The continuation of dues allotment is on a temporary basis until such time as the recognition status of the unit is clarified."
> (5 C.F.R. Section 550.322(c) and (d))

The Regulations clearly speak in terms of "to continue on a temporary basis to make an allotment" and "the continuation of dues alltoment" which Respondent asserts assumes an existing allotment at the time of the transfer and makes no provision for a new allotment after a transfer has occurred. I am aware that, in n. 22, the Council referred to a CSC interpretation that 550.322(d) should be given ". . .a liberal interpretation in their application. Such interpretation allows the continued administration of existing dues withholding agreements pending the resolution of representation and successorship issues incident to agency reorganization." (3 FLRC at 806, n. 22). It is assumed that, under rationale of the Council, as set forth in Headquarters, United States Army Aviation Systems Command (AVSCOM), FLRC No. 72A-30, 1 FLRC 473 (1973) and Defense Supply Agency, supra, Respondent would have been protected from 19(a)(3) or 19(a)(6) violations had it allowed the continued administration of the FEA-NTEU dues withholding agreement pending resolution of the representation and successorship issues. Department of the Army, U.S. Army Electronics Command Fort Monmouth, New Jersey, A/SLMR No. 617, 6 A/SLMR 111 (1976). Respondent did not do so for various reasons, including its conclusion that the purpose and intent of the Council's decisions in AVSCOM and Defense Supply Agency was that an agency, when faced with a reorganization which creates a good faith doubt of the prior units of exclusive representation, must maintain the status quo by honoring existing dues allotments but must, at the same time, maintain strict neutrality and must not accept new authorizations when it could not possibly determine whether the employees were, after the reorganization, working in any particular union's prior unit of recognition. Of course, the correctness of Respondent's inability to so determine has been fully confirmed by the decision of the Assistant Secretary in Department of Energy, A/SLMR No. 1136 (1978). I find Respondent's position persuasive; but even if Respondent had, without justification, refused to accept new dues deduction authorizations, the risk assumed was that it would be determined to be the "successor" to FEA. In fact, the Assistant Secretary determined that Respondent was not the "successor" and that the reorganization rendered Complainant's exclusively recognized unit inappropriate for the purpose of exclusive recognition under the Order, Department of Energy, supra, and Respondent's conduct could not, in any event, be deemed violative of the Order. Defense Supply Agency, Supplemental Decision and Order, A/SLMR No. 615, 6 A/SLMR 105, 108 (1976).

Stated otherwise, although the Council stated in Aberdeen, supra, that the gaining employer is "enjoined" to maintain recognition and to adhere to the terms of the prior agreement, including dues withholding, until the question of "successorship" is resolved, an agency which does not do so, nevertheless, may be held to have violated the Order only if it is determined to be the "successor". Where, as here, it has been determined that Respondent was not the "successor" and, indeed, that Complainant's exclusively recognized unit was inappropriate for the purpose of exclusive recognition under the Order, Respondent's failure, or refusal, to maintain recognition, and to adhere to the terms of the prior agreement, may not constitute a violation of the Order for the reason that Respondent owed no duty to recognize, or to bargain with, Complainant.

For the foregoing reasons, I find that Respondent did not violate Sections 19(a)(1), (2), (5) or (6) of the Order and, accordingly, the complaint herein is dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: 1 MAY 1979
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Veterans Administration Regional Office,
Denver, Colorado

Respondent

and

Assistant Secretary
Case No. 61-4255(CA)

American Federation of Government Employees,
AFL-CIO, Local 1557

Complainant

DECISION AND ORDER

On September 25, 1979, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding finding that the Veterans Administration Regional Office, Denver, Colorado, had engaged in the unfair labor practice alleged in the complaint. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under § 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by § 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in § 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to § 2400.2 of the Authority's rules and regulations and § 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation. */

*/ In conformity with § 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

ORDER

Pursuant to § 2400.2 of the rules and regulations of the Federal Labor Relations Authority and § 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby dismisses the allegations in this matter that the Veterans Administration, Denver Regional Office violated § 19(a)(4) of Executive Order 11491, as amended, and orders that the Veterans Administration, Denver Regional Office shall:

1. Cease and desist from:

(a) Reprimanding or otherwise discriminating in regard to hire, tenure, promotion or other conditions of employment William Bleau, Mark Hilgefort and other employees for engaging in conduct which is protected by Executive Order 11491, as amended on behalf of American Federation of Government Employees, AFL-CIO, Local 1557 or other labor organizations.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Executive Order:

(a) Rescind and remove from the personnel files of American Federation of Government Employees, AFL-CIO, Local 1557 Shop Stewards William Bleau and Mark Hilgefort the September 27 reprimands issued to them.

(b) Post at its facilities in Denver, Colorado, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Denver Regional Office and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Regional Office of the VA shall take all reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

Issued, Washington, D.C., March 14, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT reprimand or otherwise discriminate in regard to hire, tenure, promotion or other conditions of employment William Bleau, Mark Hilgefort and other employees for engaging in conduct which is protected by Executive Order 11491, as amended, on behalf of American Federation of Government Employees, AFL-CIO, Local 1557 or other labor organizations.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind and remove from the personnel files of American Federation of Government Employees, AFL-CIO, Local 1557 Shop Stewards William Bleau and Mark Hilgefort the September 27 reprimands issued to them.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address is: City Center Square, 1100 Main Street, Suite 680, Kansas City, Missouri 64105, and whose telephone number is: (816) 374-2199.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
VETERANS ADMINISTRATION REGIONAL OFFICE, DENVER, COLORADO Respondent	
and	Case No. 61-4255(CA)
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1557 Complainant	

Douglas Doane, Esq.
District Counsel's Office
Veterans Administration Regional Office
Denver Federal Center
Denver, Colorado 80225

For the Respondent

Kenneth Bull
National Representative
American Federation of Government Employees
5001 South Washington
Englewood, Colorado 80110

For the Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on May 9, 1979 by the Regional Director for the Federal Labor Relations Authority, Kansas City Region, a hearing was held before the undersigned in Denver, Colorado.

This proceeding was initiated under Executive Order 11491, as amended (herein called the Order). It was based on a complaint filed

on November 21, 1978 and an amended complaint filed on January 10, 1979 by American Federation of Government Employees Local 1557, AFL-CIO (herein called Complainant or Local 1557 AFGE) against the Veterans Administration, Denver Regional Office, (herein called Respondent and Activity). The said amended Complaint alleges that Respondent violated Sections 19(a)(1), (2) and (4) of the Order by reprimanding two Union Stewards, Mr. William Bleau and Mr. Mark Hilgefort, for attempting to represent employees who were members of the bargaining unit represented by Local 1557 AFGE.

Both parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence and to examine as well as cross-examine witnesses. Thereafter briefs were filed which have been duly considered by the undersigned.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all the testimony and evidence adduced at the hearing, I make the following recommended Findings of Fact, Conclusions of Law and Order.

Findings of Fact

1. At all times material herein Local 1557 AFGE, a labor organization, has been the collective bargaining representative for a unit of Respondent's professional and non-professional employees including Veterans Representatives (Vet Reps).

2. On September 22, 1978 Robert Ziegenhein, Veterans Service Officer for the Activity, telephonically notified Local 1557 AFGE Steward Mark Hilgefort that he, Ziegenhein, was going to have a conference telephone with all Vet Reps. 1/ Mr. Zeigenhein called Steward Hilgefort to advise Hilgefort, as Union Steward, that the Vet Reps would be advised of a proposed precise schedule for reduction of the number of Vet Reps on the various campuses, 2/ that there would be no reduction-in-force (RIF) of VA employees, and that if any one wished to transfer into Respondent's Regional Office, he should so advise the Regional Office.

1/ Vet Reps are VA employees working on various Colorado college and university campuses.

2/ The number of Vet Reps were to be ultimately reduced from 11 to 3.

3. Mr. Ziegenhein conversation with Steward Hilgefort was short and involved Mr. Ziegenhein informing Steward Hilgefort of the impending conference call and of the proposed changes.

4. A few minutes (2 to 5 minutes) after hanging up the telephone, Steward Hilgefort, as a Vet Rep, received a telephone call as part of the conference call between Mr. Ziegenhein and all the Vet Reps.

5. Mr. Ziegenhein advised the Vet Reps of all the information set forth in Paragraph 2 above including the proposed changes.

6. Mr. Ziegenhein did not advise Steward Hilgefort or any the Vet Reps, in either telephone call described above, that the information concerning the proposed schedule for reducing the number of Vet Reps was confidential or should not be communicated to outside parties.

7. Mr. Ziegenhein and the other supervisors of Vet Reps used conference telephone calls regularly to advise Vet Reps of various relevant information and the Vet Reps routinely passed much of this information on to non-VA officials on the various college and university campuses.

8. After the conference call Steward Hilgefort contacted Mr. William Bleau, at that time a Local 1557 AFGE Steward in the Veterans Services Division, and advised Steward Bleau of the content of the two telephone conversations.

9. As a result of the conversation between Stewards Hilgefort and Bleau, Steward Bleau prepared a letter demanding to negotiate the proposed changes in working conditions of the Vet Reps. The letter dated September 22, 1978 was signed by both Stewards Hilgefort and Bleau in their capacity as Union Stewards, was sent to Mr. Ziegenhein, and copies were sent to the various colleges and universities serviced by the Vet Reps, to the Vet Reps, to various Veterans' Service Organizations and to various Congressmen. Of the above, only the Vet Reps are employees of Respondent and in the unit represented by Complainant.

10. The September 22 letter described above written on behalf of Local 1557 AFGE first asked the Respondent to negotiate concerning the notification to the Vet Reps that the Activity's intention to bring the Vet Reps into the Regional Office. The letter listed some 10 items for the Activity's consideration concerning the impact on employees. The letter then listed two

questions concerning "impact" and then went on to state, ".. Call it what you may, but the end result of all these changes will undoubtedly be the subsequent loss of personnel -- and that spells RIF." Finally the letter posed some additional questions which although "out of the scope of the Executive Order -- should be considered by you since they will arise anyway." Finally the letter requested that Respondent respond to the demand to negotiate no later than October 15, 1979.

11. Written reprimands dated September 27 were given by Mr. Ziegenhein to both Stewards Bleau and Hilgefort because the September 22 letter allegedly contained misstatements of facts in correct conclusions about a reduction in force, questions about the VA's responsibility to Colorado institutions about which no final agency decision had been made, because it was unauthorized use of agency information, was disseminated to the public and because these actions violated VA Regulations 812(A)(3)(4)(5) and 815(B).

12. The relevant portions of VA Regulations 812 and 815 state as follows:

812(§0.735-12). OUTSIDE EMPLOYMENT ACTIVITY OR COMPENSATION

(A) An employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of his Government employment. Incompatible activities include but are not limited to those which:

(1) ...

(2) ...

(3) Bring discredit upon, are disadvantageous to, embarrass, or cause or may cause unfavorable and reasonable (sic) criticism of the Federal Government or the VA;

(4) Conflict with the interests of the VA or the Federal Government or can possibly be construed by the public to be official acts of the VA;

(5) Involve the use of information obtained as a result of employment in the VA, to the

detriment of the VA or those served by it;

815(§0.735-15). DISCLOSURE OR MISUSE OF INFORMATION

(A) ...

(B) An employee shall not, except as specifically authorized, disclose any official information which represents a matter of confidence or trust or any other official information of such character that its disclosure or use would be contrary to the best interest of the Government, the VA, or the veterans being served by VA. (Apr. 15, 1966).

13. An article in the "Stars and Stripes" of September 22, 1978 describes a pending reduction in the number Vet Reps.

Conclusions of Law

The Order affords employees the right, without interference, to effective representation by the labor organization of their choice. Accordingly, the labor organization must be free to take all steps and actions that it deems necessary to effectively represent the employees, except those steps and actions specifically forbidden by the Order. To conclude otherwise would make the right to be represented by a union completely illusory and meaningless. One of the classical methods for labor organizations to effectively represent employees is to seek aid, support and information from outside, yet interested, parties. The Order does not limit such a resort to such outside assistance except insofar as Sections 19(b)(4) forbids strikes and work stoppages. In fact the Assistant Secretary of Labor specifically recognized the right of a labor organization and employees to engage in informational picketing directed at the general public, including organized labor, so long as such picketing does not interfer with the operation of the affected Government agency. The Assistant Secretary held such informational picketing is not forbidden by Sections 19(b)(4) of the Order and therefore was permitted. Tidewater Virginia Federal Employees, MTC, A/SLMR No. 867; review denied by the FLRA, 77A-93, Report No. 139, cf. Internal Revenue Service, A/SLMR No. 783. The appeal by Local 1557 AFGE to the colleges, universities and veterans groups is analogous to informational picketing and thus is not proscribed by the Order.

Respondent, however, contends that it is not limiting the

right of Local 1557 AFGE to appeal and communicate with outside parties, but rather it is disciplining two employees for engaging in such conduct, which is forbidden by Respondent. This contention must be rejected. Section 1 of the Order grants each employee the right to join and assist a labor organization. If the employees are to have the right to join and assist a labor organization and to be effectively represented by such a labor organization, the employees must be free from interference to manage the labor organization and to engage in all conduct which is permissible for the labor organization. It would seem strange, in effect, to require that for labor organizations to engage in protected activities it must use non-employees. Such a result would totally frustrate the employees' rights to effective representation which they themselves could control. Thus in the instant case the two employees in question were not acting as employees, but rather were acting in their capacity as Union Stewards and thus should not have been reprimanded.

Having concluded that employee-union officials, when acting in their union representative capacity, must be free to engage in any activity the union is privileged to engage in, it must be further concluded that this does not give employees license, because they may also be union officials, to engage in any conduct they wish, and be insulated from discipline. Rather it is concluded, in the circumstances here present, that the employees are protected when engaging in reasonable conduct as union representatives because they were engaging in union conduct which was protected by the Order. Cf. Tidewater Virginia Federal Employees, MTC, supra.

It is contended by Respondent that the information disseminated was somehow privileged and distorted or misstated. Again, these contentions must be rejected as grounds for permitting the reprimanding of these two employees. Union Steward Bleau first received the information in his capacity as Union Steward and was never advised in anyway that the information was privileged and should not be communicated to persons outside the agency. Further the record established that much information normally communicated by conference call is routinely relayed by the Vet Reps to the interested colleges, universities and veterans organizations. Thus without a clear indication from Respondent that information was not to be communicated to the outside 3/ and because the information, neither historically

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3/ I need not reach the question whether the mere fact an agency states certain information is privileged, an employee-union official, always may be reprimanded for communicating it to the outside.

nor on its face, so sensitive that it was clear it should not be communicated to the outside 4/, the two Union Stewards were free to communicate it to the outside organizations.

With respect to the contention that the September 22 letter distorted and misstated the situation, Respondent relies almost exclusively on the use of the phrase, "RIF" when in fact no actual "RIF" was contemplated and that this was made quite clear. The letter itself stated that even though no one would be fired there would be an ultimate reduction in the number of employees and that was in effect a "RIF". Although this might be an inartful and somewhat inaccurate use of "RIF", it can hardly be said to be such a distortion or misstatement of fact to justify losing the protection of the Order. As part of collective bargaining the parties must be free to communicate and talk between themselves, and with the public, without the fear that if they use a word or phrase improperly they are subject to discipline. To reach a contrary conclusion would be to reduce negotiation and communication to some stylized dance that would have an effect contrary to the policy visioned in the Order. Cf. U.S. Small Business Administration, Central Office, A/SLMR No. 631. Similarly the mere fact that the September 22 letter might have been critical and even uncomplimentary towards Respondent does not justify removing the protection of the Order. In such situations, if there is to be meaningful negotiations and bargaining, the Respondent cannot be so sensitive to criticism by the Union. Making uncomplimentary and critical comments about management, after all, is one of a labor organization's techniques for gaining support. 5/ Finally an argument might be made that Section 1(a) of the Order only protects a union officials communications with "officials of the executive branch, the

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4/ Thus Federal Aviation Administration, A/SLMR No. 796 is not applicable. In that case the information communicated to the public was obtained from the "Reading Binder" which was recognized as being available only to authorized personnel and not to the general public and further was not communicated to the union official in this capacity as union official. Similarly in Veterans Administration, A/SLMR No. 1131, 1 FLRA No. 17 and 1 FLRA No. 72, the privileged information involved was specific patient care information which are matters that have historically been most confidential in nature.

5/ It is concluded that American Arbitrator Association, Inc., 233 NLRB No. 12, which deals with the private sector, is inapposite.

Congress or other appropriate authority ..." and not with the public. Such an interpretation must be rejected as an unreasonable and overly restrictive interpretation. Rather it is clear that Section 1(a) is meant to protect union communications to the executive branch, the Congress and appropriate authority even in situations where the information is privileged or of such a nature that communication to the general public would not be permitted.

It is thus concluded that Respondent violated Section 19(a)(2) and (1) of the Order because its reprimand of Stewards Bleau and Hilgefort for engaging in protected activity constituted unlawful discrimination and interference. 6/

The record, however, fails to establish that the reprimands had anything to do with filing an unfair labor practice complaint or the giving testimony under the Order and, thus, it is concluded Respondent did not violate Section 19(a)(4) of the Order.

Having found that Respondent did not violate Section 19(a)(4) of the Order but has engaged in other conduct which is violative of the Sections 19(a)(1) and (4) Order, I recommend that the Federal Labor Relations Authority issue the following order pursuant to Section 2400.2 of the Authority's Rules and Regulations (44 FR No. 147, July 30, 1979) and Section 7135(b) of the Federal Service Labor Management Relations Statute (92 Stat. 1215):

ORDER

Pursuant to Section 2400.2 of the Transition Rules and Regulations of the Federal Labor Relations Authority and Section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby dismisses the allegations in this matter that the Veterans Administration, Denver Regional Office violated Section 19(a)(4) of Executive Order 11491, as amended and order that the Veterans Administration, Denver Regional Office shall:

1. Cease and Desist from:

(a) Reprimanding or otherwise discriminating in regards

6/ Thus the Respondent violated the Order when it applied its own Regulations, eventhough lawful when applied to employees acting or employees, in such a way as to improperly interfere with protected activity and discriminate against employees.

to hire, tenure, promotion or other conditions of employment William Bleau, Mark Hilgefort and other employees for engaging in conduct which is protected by Executive Order 11491, as amended on behalf of American Federation of Government Employees, AFL-CIO, Local 1557 or other labor organizations.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Executive Order:

(a) Rescind and remove from the personnel files of American Federation of Government Employees, AFL-CIO, Local 1557 Shop Stewards William Bleau and Mark Hilgefort the September 27 reprimands issued to them.

(b) Post at its facilities in Denver, Colorado copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Denver Regional Office and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all where notices to employees are customarily posted. The Regional Office of the VA shall take all reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: September 25, 1979
Washington, D.C.

APPENDIX

N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT reprimand or otherwise discrimate in regard to hire, tenure, promotion or other conditions of employment William Bleau, Mark Hilgefort and other employees for engaging in conduct which is protected by Executive Order 11491, as amended, on behalf of American Federation of Government Employees, AFL-CIO, Local 1557 or other labor organizations.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind and remove from the personnel files of American Federation of Government Employees, AFL-CIO, Local 1557 Shop Stewards William Bleau and Mark Hilgefort the September 27 reprimands issued to them.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address is: City Center Square, 1100 Main Street, Suite 680, Kansas City, Missouri 64105, and whose telephone number is: (816) 374-2199.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Veterans Administration Hospital
Lexington, Kentucky

Respondent

and

Assistant Secretary
Case No. 41-6178(CA)

Local R5-185, National Association
of Government Employees

Complainant

DECISION AND ORDER

On August 23, 1979, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Respondent filed exceptions.

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040) which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in this case, including the Respondent's exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendations. */ In adopting the conclusion that the Respondent violated section 19(a)(2) by discriminating against job applicants because of their union activity, the

*/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

Authority finds it unnecessary to rely upon the fact that the employee who was selected was fourth in the merit promotion ratings.

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Veterans Administration Hospital, Lexington, Kentucky, shall:

1. Cease and desist from:

(a) Referring, in the course of any interviews for promotion, to any applicant's or other employee's membership in the National Association of Government Employees or any Local thereof, including Local R5-185 or Local R5-160.

(b) Encouraging or discouraging membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing any employee in the exercise of the rights assured by Executive Order 11491, as amended, or in any like or related manner encouraging or discouraging membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment, in violation of Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) Withdraw, cancel and rescind the selection for, and promotion to the position of, supervisory police officer, commonly known as Chief of Police, of Mr. Burl Cornelius.

(b) Re-post and re-advertise the position of supervisory police officer, GS-0830, under appropriate established procedures, insuring, however, that: i) eligibility and/or qualifications are not made more restrictive than those set forth in the March, 1978, Placement Notice No. 17; and ii) Mr. Burl Cornelius be given no credit for supervisory experience gained in the position of supervisory police officer from March, 1978.

(c) Post at its facilities at its Lexington, Kentucky, Medical Center, and specifically at both the Leestown Drive facility and the Cooper Drive facility, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Hospital Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted at both the Leestown Drive and Cooper Drive facilities. The Hospital Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., March 14, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE UNITED STATES CODE,

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We hereby notify our employees that:

WE WILL NOT refer, in the course of any interview for promotion, to any applicant's or other employee's membership in the National Association of Government Employees, or to any activity on behalf of the National Association of Government Employees or any Local thereof, including Local R5-185 or Local R5-160.

WE WILL NOT encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employee in the exercise of the rights assured by Executive Order 11491, as amended, or in any like or related manner encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment in violation of Executive Order 11491, as amended.

WE WILL withdraw, cancel and rescind the selection for, and promotion to, the position of supervisory police officer, commonly known as Chief of Police, of Mr. Burl Cornelius.

WE WILL re-post and re-advertise the position of supervisory police officer, GS-0830, under appropriate established procedures and WE WILL INSURE that: i) eligibility and/or qualifications are not made more restrictive than those set

forth in the March, 1978, Placement Notice No. 17; and ii) Mr. Burl Cornelius receives no credit for supervisory experience gained in the position of supervisory police officer from March, 1978.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If any employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, whose address is: 1776 Peachtree Street, N.W., Suite 501, North Wing, Atlanta, Georgia 30309; and whose telephone number is: (404) 881-2324.

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of VETERANS ADMINISTRATION HOSPITAL, LEXINGTON, KENTUCKY Respondent and LOCAL R5-185, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES Complainant	Case No. 41-6178(CA)

JAMES W. PRESSLER, JR. ESQUIRE
Assistant General Counsel
EDWARD J. GILDEA, ESQUIRE
Assistant General Counsel
National Association of Government
Employees
2139 Wisconsin Avenue, NW.
Washington, D.C. 20007
For the Complainant

JAMES KLEIN, ESQUIRE
General Counsel's Office
Veterans Administration
810 Vermont Avenue, NW.
Washington, D.C. 20420
On Brief: Charles M. Johnson, Esquire
Assistant General Counsel
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is a proceeding under Executive Order 11491, as amended (hereinafter also referred to as the "Order"). Although the Notice of Hearing was issued by a Regional

Administrator of the Labor-Management Services Administration, United States Department of Labor, all proceedings after January 1, 1979, have been conducted before the Federal Labor Relations Authority, and this decision is issued in the name of the Authority, pursuant to transition rules and regulations, Federal Register, Vol. 44, No. 1, January 2, 1979 (5 C.F.R. Section 2400.2).

Complainant filed a charge on June 29, 1978, and a complaint on August 28, 1978 (Ass't Sec. Exh. 1) 1/ alleging violations of Sections 19(a)(1) and (2) of the Order and on November 29, 1978, Complainant filed an amended complaint (Ass't Sec. Exh. 2) identical in all respects to the original complaint except that the name of party filing the complaint was changed from Local RO5-160 National Association of

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1/ The Exhibits in this case have not been received by this Office. The transcript was received by this Office on May 9, 1979, and the reporting company, Hoover Reporting Co., Inc., represents that the Exhibit files were mailed later, under separate cover, on, or about May 11, 1979; however, the Exhibits were not received by our docket section, nor by the undersigned, and all efforts to locate the exhibits have, to date, been unproductive. While the absence of the exhibits, received into evidence, is greatly regretted, said exhibits are not necessary for decision of any issue involved herein, inasmuch as the testimony of the witnesses provides, fully, the basis for decision of all issues. Moreover, the content of each exhibit is adequately set forth on the record, in the testimony, or, in particular as to the ratings of employees, in notes of the undersigned made at the hearing from the exhibits, as such exhibits pertain to the issue involved. Accordingly, I deem it unnecessary under the circumstances to delay decision pending either: a) further search for the exhibits; or b) an effort to reconstitute the exhibits by obtaining substitute copies for the missing original exhibits. As noted, the transcript is fully adequate for deicison of all matters herein. It is appropriate to list the exhibits received together with a description of each:

Ass't Sec. Exh.	1	-	Complaint
	2	-	Amended Complaint
	3	-	Notice of Hearing 12/4/78
	4	-	Order Rescheduling Hearing 2/9/79
	5	-	Order Further Rescheduling Hearing 3/16/79
Complainant's Exh.	1	-	Routing Slip

[Cont'd on next page]

Government Employees to Local R5-185 National Association of Government Employees. Notice of Hearing issued on December 4, 1978 (Ass't Sec. Exh. 3) for a hearing on February 15, 1979; on February 9, 1979, a Notice Rescheduling the Hearing for March 20, 1979 was issued (Ass't Sec. Exh. 4) and on March 16, 1979, a Further Order Rescheduling the Hearing for April 24, 1979, was issued (Ass't Sec. Exh. 5), pursuant to which a hearing was duly held on April 24, 1979, in Lexington, Kentucky, before the undersigned.

All parties were represented at the hearing by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, and to present oral argument at the conclusion of the testimony. At the close of the hearing, June 22, 1979, was fixed as the date for the filing of briefs, which time was, at the request of Complainant, for good cause shown, and with the consent of Respondent, subsequently extended to June 29, 1979, and each party has timely filed a brief which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings, conclusion and recommended decision.

Discussion and Findings

Complainant was certified as the exclusive representative of all police officers employed by the Veterans Administration Hospital, Lexington, Kentucky, on July 8, 1976; the parties' negotiated agreement was signed January 3, 1977, and was approved by the Hospital Director and became effective February 11, 1977 (See, Veterans Administration, Veterans Administration Hospital, Lexington, Kentucky, A/SLMR No. 105 (1978)).

1/ [Cont'd]

Respondent's Exh.	1	-	Form 171 - Larry Wallace
	2	-	VA Merit Promotion Plan
	3	-	Rating Sheet - Wallace R. Baldwin
	4	-	Rating Sheet - Burl Cornelius
	5	-	Rating Sheet - Larry F. Wallace
	6	-	Rating Sheet - Albert Brown
	7	-	Rating Sheet - Kelley Richards
	8	-	Rating Sheet - Stanley Clem
	9	-	Letter from Jackie Dixon re Kelley Richards
	10	-	Vacancy announcement, Central Office approval of selection of Mr. Cornelius, etc. (4 pages)

This case concerns the selection of a new Chief of Police. The opening arose upon the departure of Chief Jackie Dixon for a position with a Veterans Administration facility in Las Vegas, Nevada. Respondent's police officers in Lexington, Kentucky, work at two facilities: one is located at Leestown Drive and the other is located at Cooper Drive, adjacent to the University. The police officers at each facility constitute a section, or division; each section is substantially equal in size; the Cooper Drive section consisted of nine police officers plus an Assistant Chief, Mr. James Hoskins, and the Leestown Drive section consisted of ten police officers plus the Chief of Police, Mr. Jackie Dixon; and police officers, except for a reorientation shift at the other facility, are regularly assigned to one facility. Although Chief Dixon was in charge of both sections, he rarely visited Cooper Drive and a decided split between the sections developed during his tenure as Chief.

The Security Service is part of the Engineering Service at the Lexington Medical Center. The position to be filled upon Chief Dixon's departure was that of supervisory police officer, GS-0830-6/7/8, Engineering Service. This was the top supervisory position in the Security Service and the position was, and is, referred to as Chief of Police. The selecting official was the Chief, Engineering Service, Mr. Donald E. Fulton. The vacancy was announced at the level of GS-6,7, or 8. Seven individuals were referred to Mr. Fulton for interviews. On one list were James Hoskins, Assistant Chief, and Mr. Shirley Morris, a Fire Inspector, who were the top candidates for the position of Chief if it were to be filled at the GS-7 or 8 level. Each of these individuals was serving at the GS-6 level. Subsequently, Respondent amended the vacancy announcement to limit the position to GS-6 and, accordingly, the non-selection of Messrs. Hoskins and Morris is not before me and will not be further considered. 2/

2/ Both Mr. Hoskins and Mr. Morris would have been eligible to bid for the position even though each was already at the GS-6 level and the selection of either would have meant, immediately, only a lateral promotion. While each may have indicated his desire to be considered at the GS-7 or 8 level, in view of the announcement (GS-6,7 or 8) it seems questionable that either could, properly, be "non-selected" after the fact with no opportunity to request selection at the GS-6 level (Mr. Carpenter testified "I don't believe . . . he was asked . . ." (Tr. 157)). Nevertheless, neither Mr. Hoskins nor Mr. Morris was a member of the bargaining unit; Mr. Hoskins was conceded to have been a

The other list consisted of five highly qualified candidates from the bargaining unit. Each was, of course, a police officer and each was a GS-5. 3/ The total rating for these five "highly qualified" applicants were as follows:

Stanley Clem	71.64
Larry Wallace	70.54
Albert Brown	67.57
Burl Cornelius	60.29
Kelley Richards	60.20
(Baldwin 54.14)	

Except for Mr. Cornelius, who was selected for the position of Chief, each was a member of the Union. Indeed, Mr. Wallace was past president and Mr. Richards was past Chief Steward, of the Union. Although the record shows some disagreement as to the manner and extent of Mr. Fulton's inquiry about Union activity, there is no dispute that Mr. Fulton referred to union activity in his interview with each highly qualified applicant. Respondent concedes that Mr. Fulton ". . . asked each individual whether they could disengage themselves from their past union activities so that they could occupy the management position if they were selected." (Res. Brief, p. 4).

2/ [Cont'd] supervisor and Mr. Morris, as a Fire Inspector, may also have been a supervisor; and there is no evidence that their "non-selection" constituted a violation of the Order. Consequently, although Respondent's amendment of the job description, after selection of Mr. Cornelius, may, arguably, have been consistent with Respondent's desire to insure selection of Mr. Cornelius, I find the record insufficient to warrant such inference, and, accordingly, I have drawn no inference from the "non-selection" of Messrs. Hoskins and Morris.

3/ The great majority of all police officers applied for the position. Personnel ranked and rated each applicant and, so far as the record shows, all were found qualified. The top five qualified applicants were rated highly qualified and were referred to Mr. Fulton for an interview. So far as the record shows, rating factors were uniformly applied and the record is devoid of any evidence that any factor was unfairly or discriminatorily applied to exclude any applicant from the highly qualified designation, notwithstanding that Wallace R. Baldwin Jr., the present president of Local R5-185, while rated qualified, was not among the five highest rated qualified applicants, denominated "highly qualified".

Mr. Fulton's interjection of past union activity in his questioning of each applicant did, indeed, cause each union member to believe that his union membership or activity did prejudice his chance for selection for the position of Chief. Any reference to prior union membership or activity of an applicant in an interview for a promotion is, at the very least, highly suspicious, and, where such reference is completely extraneous to the subject of the interview, without more, constitutes a violation of Section 19(a)(1) of the Order. Pennsylvania Army National Guard and Association of Civilian Technicians, 1 FLRA No. 60 (1979). Not only do I find and conclude that Mr. Fulton's reference to the prior union membership and union activity of each applicant was completely extraneous to the subject of the interview, but I find Respondent's purported justification, namely, that "promotion to the supervisory position in question would remove the individual from the bargaining unit, thus, precluding future participation in union activities." (Res. Brief, p. 4), wholly unconvincing. Not only do I conclude that Mr. Fulton's reference to prior union membership and activity, without more, violated Section 19(a)(1) of the Order; but, as set forth hereinafter, the record, in addition, shows a pervasive background of union animus which, if there were any doubt as to the intent and purpose of Mr. Fulton's reference to prior union membership and activity (and I entertain no such doubt), is firmly laid to rest by such other evidence.

Mr. Kelley Richards testified that he was a personal friend of Chief Dixon; that two to three months, possibly even earlier, before Dixon's departure, Dixon told him he had a job in Las Vegas and would be leaving and told Mr. Richards that as long as he (Richards) was active in the union if there were any promotions given out, he (Richards) wouldn't get one; that he (Richards) had got a superior performance before the Union got in but as long as he (Richards) remained a Union member he would never get another; that he (Dixon) knew what he was talking about because he (Dixon) talked to people everyday. Richards took Mr. Dixon's last statement to mean staff meetings that Dixon attended, although he stated that Mr. Dixon did not mention staff meetings. Mr. Richards testified that later, in his office, Mr. Dixon advised him and Burl Cornelius to drop out of the union because he was going to leave and his job was going to be open and if we wanted to have a chance for his job we'd have to drop out of the union. Mr. Richards stated that Mr. Cornelius was then a member of the union and that the following day Mr. Cornelius did drop out of the union. Although Mr. Cornelius denied that Dixon ever said how he felt about the

Union, in view of the overwhelming weight of the testimony showing Mr. Dixon's frequently expressed dislike of the Union, including Mr. Fulton's admission that Dixon blamed problems on the Union, I do not credit his denial. In like manner, I do not credit Mr. Cornelius' testimony that he did not recall a conversation in which Dixon said that membership in the union would be a negative factor in promotion and, instead fully credit Mr. Richards' testimony that Chief Dixon did advise Mr. Cornelius and Mr. Richards to drop out of the Union because he was going to leave and his job was going to be open and that if they wanted to have a chance for his job they would have to drop out of the Union.

The record is clear that Mr. Cornelius was, at some point, a member of the Union and that, at some point, he withdrew from the Union. Mr. Cornelius testified that he submitted his "paper work approximately November of 1977" but that March and September were "the two dates that you can get out of the Union". Mr. Cornelius also testified that he joined the Union "as soon as it came in" about February, 1977. Actually, the Union was certified July 8, 1976, although the agreement, signed on January 3, 1977, was approved by the Hospital Director and became effective February 11, 1977. It is apparent that neither Mr. Cornelius nor the other witnesses, including Mr. Richards, were wholly correct in their frame of reference to such matters as when the Union "came in" and when Mr. Cornelius withdrew from the Union. Unfortunately, Complainant supplied no written documentation nor was the date of Mr. Dixon's conversation with Messrs. Richards and Cornelius fixed with any certainty. Consequently, while I have fully credited Mr. Richards' testimony that Chief Dixon made the statements attributed to him, I cannot, on the basis of the very inadequate record as to the date of Mr. Cornelius' withdrawal from the Union conclude that Mr. Cornelius withdrew from the union because of Chief Dixon's advice to do so, notwithstanding that such inference would be wholly consistent with the credited testimony.

Mr. Richards' testimony concerning Chief Dixon's statements to him was fully supported by the testimony of Mr. Larry F. Wallace that Mr. Dixon has strongly stated in the presence of most officers that the only way anyone was ever going to be selected to a supervisor's position in the police section was by being a non-member of the Union; that if you belonged to its union you were never going any place; that this was common conversation by Chief Dixon at the office. I found Mr. Wallace to be a wholly credible witnesses. Mr. Albert D. Brown testified that he had heard that Richards and Cornelius had been advised that if they didn't drop out

of the union they wouldn't get anything. Standing alone, this rank hearsay would have no probative value but in light of other direct testimony does further support the general dissemination among the police officers of the view that union membership was detrimental to advancement.

As the record shows that Chief Dixon made the foregoing statements while serving as Chief of Police, and in the course of his duties as a supervisor for Respondent, Respondent is responsible for the actions of its supervisor. Moreover, Mr. Fulton, Chief of the Engineering Section, admitted that Chief Dixon stated to him that various problems were attributable to the union.

Mr. Richards testified that, some 4 to 6 weeks prior to the job interviews for the position of Chief, which were conducted in April or May, 1978, Mr. Cornelius had been involved in an arrest of a VA employee which had grown out of a traffic violation; that he, as Chief Steward, had been called to Mr. Fulton's office; that there had been a threat, as a result of Mr. Cornelius' action, to "pull everbody's arrest authority"; that, as Chief Steward, he had pointed out the requirements of the regulations and the procedures which would have to be followed before such action could be taken; and that Mr. Cornelius, although not a member of the Union, had given him a written statement of the incident and asked Mr. Richards to represent him in case management took any action against him. Mr. Fulton at first denied any knowledge of the arrest incident but later recalled the incident which he dismissed as having involved pushing by the employee. Mr. Fulton denied any meeting with Mr. Richards. Mr. Cornelius denied that he ever contacted Mr. Richards; denied that he gave him any statement; but admitted that there had, at least, been some comments by Chief Dixon and by Mr. Fulton concerning procedures when an employee is arrested and in particular contacting their supervisors, since, in the incident in question, the employee had been listed as AWOL from duty. It is apparent that, contrary to Mr. Fulton's testimony, there had been more than passing attention to the arrest incident. Indeed, under the circumstances, I find Mr. Cornelius' denial of his having contacted Mr. Richards unworthy of belief and, for like reasons, I do not credit Mr. Fulton's denial of any meeting with Mr. Richards over the incident and fully credit Mr. Richards' testimony.

Mr. Richards further testified that only two or three weeks before the job interviews, Mr. Cornelius had been written up for reporting to work late. Mr. Cornelius was not asked about this assertion, nor was Mr. Fulton; however, as there was no denial I must assume that the assertion was correct.

Mr. Richards testified that Mr. Fulton began by talking about his activity in the Union; that Mr. Fulton kept bringing up the arrest incident; that he told him (Richards) that because he (Richards) was a union steward he fully understood the regulations and that he (Fulton) could make the selection on his own; that he (Fulton) didn't believe the Union would let him (Richards) go because he had done too good a job representing the Union. Although Mr. Fulton denied that he made any such comments to Mr. Richards, I do not credit his denials and specifically credit Mr. Richards' version of the interview.

Chief Dixon had made repeated statements that Union membership and Union activity would bar promotion and when Mr. Fulton inserted into each interview a question relating to the employee's prior Union membership and activity an unavoidable consequence of such inquiry was that it appeared to confirm Chief Dixon's statements. The selection of Mr. Cornelius, the only non-union applicant, completed the scenario Chief Dixon had proclaimed. Indeed, Mr. Richards further testified that Mr. Dixon had called him from Las Vegas and told him that he had "recommended Burl because he's not a Union member" and further repeated that "I told you and I told Burl to get out of the Union, that the Chief would be a non-union member".

I am aware that Mr. Frederick testified that Mr. Fulton had highly recommended him for an equivalent position at Marion, Illinois. Mr. Brown testified that there was a big difference in the attitude of management after the Union. However, the record does not show when the Marion, Illinois, recommendation occurred and, as virtually opposite interferences might be warranted depending on whether such recommendation occurred after the advent of the Union at Lexington or before, the inadequacy of the record permits no interference whatever. The record does show that: a) Mr. Cornelius told Mr. Richards, after Mr. Cornelius' interview but prior to Mr. Richards' interview, that he had inherited certain responsibilities and both his statement and his "inspection" tour with Mr. Richards strongly imply the selection of Mr. Cornelius before the interviews had been completed; and b) Mr. Cornelius told Mr. Richards, "we got to get rid of this damn union. . . That's one of my jobs I got to do", which further implies selection of Mr. Cornelius before the interviews had been completed as well as implicit instructions that he get rid of the union. While I have no reason to doubt that Mr. Cornelius made such statements, and, from the prevalent anti-union statements made by Chief Dixon, it might be entirely proper to infer management approval of Mr. Cornelius' statement; nevertheless, because it is unnecessary to do so,

I draw no inference from such statements except to note that this is consistent with perpetuation of Chief Dixon's anti-union statements with the tacit approval of management.

Conclusions

Standing alone, selection of the only non-union applicant for the job would not prove discrimination in violation of 19(a)(2) of the Order, notwithstanding that Mr. Fulton's reference to union membership and activity constituted a violation of Section 19(a)(1), Pennsylvania Army National Guard, supra. Absent union animus, selection of any one of the applicants interviewed, each of whom had been rated highly qualified, might have been beyond reproach vis-a-vis Section 19(a)(2). Each was rated highly qualified; each had considerable experience in police work; and each had supervisory experience, although Mr. Brown, who had 23 years experience in police work, had served as a supervisor only in an acting capacity, in the absence of Lieutenant or Sergeant, or as senior officer. However, in view of the pervasive union animus exhibited by Chief Dixon, including his statement that his successor as Chief would not be a union member and Mr. Fulton's reference to union membership and union activity in his interview of each applicant, I conclude that in selecting Mr. Cornelius, the only non-union applicant, Respondent violated Section 19(a)(2) of the Order and that its actions were designed and intended to discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment. First, Chief Dixon had strongly stated in the presence of most officers that the only way anyone was going to be selected for a supervisor's position in the police section was by being a non-member of the union. This was not an isolated remark and having been made by a supervisor on repeated occasions in the course of his duties, Respondent is responsible for the anti-union conduct of its supervisor.

Second, Chief Dixon had advised Messrs. Richards and Cornelius to withdraw from the union if they wanted to have any chance for his job and Mr. Cornelius did withdraw from the union, although it is possible that he had begun the "paperwork" prior to Chief Dixon's specific advice when Chief Dixon told Mr. Cornelius, in Mr. Richards' presence, that he was going to leave and that his job would be coming open.

Third, Mr. Cornelius was fourth in overall ratings.

Fourth, Mr. Cornelius, only four to six weeks before his selection, had been involved in an arrest incident of a VA employee which had begun with a traffic ticket and ended in an arrest for disorderly conduct. The propriety of the arrest was secondary. In weighing the qualifications of applicants for the position of Chief of Police, the failure of Mr. Fulton to give any consideration to the manner in which an applicant handled a traffic violation which escalated to an arrest for disorderly conduct is strange. Contrary to Mr. Fulton's testimony, the record is clear that this incident, whether as to the arrest procedures, as stated by Mr. Cornelius, or the broader question of arrest authority of all VA police officer, as stated by Mr. Richards, was the subject of more than passing attention. Nevertheless, with no explanation, Mr. Fulton gave no consideration to the incident in his evaluation of the applicant.

Fifth, only a few weeks prior to his selection, Mr. Cornelius had been written up for reporting late. Again, Mr. Fulton gave no indication that he considered Mr. Cornelius' attendance record in his evaluation of the applicants.

Sixth, Mr. Fulton interjected into each interview prior union memberhsip and activity of the applicant.

Seventh, Mr. Fulton admitted that Chief Dixon had stated to him on several occasion that their problems were attributable to the union.

Eighth, Mr. Dixon told Mr. Richards he had recommended Mr. Cornelius because he was not a union member and reminded him that he (Dixon) had told him (Richards) that the Chief would not be a union member.

Chief Dixon had told Mr. Richards, on one occasion when he told him that he would never be promoted as long as he was active in the union, that he knew what he was talking about because he talked to people every day. By this statement, Chief Dixon implied that his comments reflected management policy. Mr. Fulton's reference to union membership and union activity in each interview; his selection of Mr. Cornelius, the only non-union bargaining unit applicant, without explanation of two current matters which might, or might not, have adversely impacted on the selection of Mr. Cornelius, namely, the arrest incident and Mr. Cornelius' attendance record; his summary rejection, by contrast, of

Mr. Clem's supervisory experience as not recent and Mr. Richards' supervisory experience as having been in construction; his initial denial at the hearing of knowledge of the arrest incident and his subsequent dismissal of the matter in his testimony as having been of no consequence, having involved pushing which he learned from the report of the incident, whereas the record shows that the incident had been a major subject of discussion involving other officials of Respondent and a repeated reference in his interview with Mr. Richards, all imply tacit approval and perpetuation of the anti-union statements of Chief Dixon and demonstrate a consistent pattern and design intended to discriminatorily exclude selection of union members as Chief. I conclude that Respondent by such conduct did discriminate against applicants because of union membership and union activity in violation of Section 19(a)(2) of the Order. Cf. International Association of Machinists, Tool and Die Makers Lodge No. 35 v. National Labor Relations Board, 311 U.S. 72(1944); H.J. Heinz Co. v. National Labor Relations Board, 311 U.S. 514 (1941); National Labor Relations Board v. Link-Belt Co., 311 U.S. 584 (1941); National Labor Relations Board v. LaSalle Steel Co., 178 F. 2d 822 (7th Cir. 1949), cert. denied, 339 U.S. 963 (1950); NLRB v. Schill Steel Products, Inc., 480 F. 2d 586 (5th Cir. 1973); North Electric Mfg. Co., 84 NLRB 136, 24 LRRM 1221 (1949).

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, Section 203.26(b) of the Regulations, 29 C.F.R. Section 203.26(b), and Section 2400.2 of the transition rules and regulations, 5 C.F.R. Section 2400.2, Fed. Reg., Vol. 44, No. 1, January 2, 1979, the Authority hereby orders that the Veterans Administration Hospital, Lexington, Kentucky, shall:

1. Cease and desist from:

(a) Referring, in the course of any interviews for promotion, to any applicant's or other employee's membership in the National Association of Government Employees, to any activity on behalf of the National Association of Government Employees or any Local thereof, including Local R5-185 or Local R5-160.

(b) Encouraging or discouraging membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing an employee in the exercise of the rights assured by Executive Order 11491, as amended, or in any like or related manner encouraging or discouraging membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment in violation of Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) Withdraw, cancel and rescind the selection for, and promotion to the position of, supervisory police officer, commonly known as Chief of Police, of Mr. Burl Cornelius.

(b) Re-post and re-advertise the position of supervisory police officer, GS-0830, under appropriate established procedures, insuring, however that: i) eligibility and/or qualifications are not made more restrictive than those set forth in the March, 1978, Placement Notice No. 17; and ii) that Mr. Burl Cornelius be given no credit for supervisory experience gained in the position of supervisory police officer from March, 1978.

(c) Post at its facilities at its Lexington, Kentucky, Medical Center, and specifically at both the Leestown Drive facility and the Cooper Drive facility, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Hospital Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted at both the Leestown Drive and Cooper Drive facilities. The Hospital Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: 23 AUG 1979
Washington, DC

APPENDIX

N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

CHAPTER 71 of TITLE 5 of the UNITED STATES CODE,

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We hereby notify our employees that:

WE WILL NOT refer, in the course of any interview for promotion, to any applicant's or other employee's membership in the National Association of Government Employees, or to any activity on behalf of the National Association of Government Employees or any Local thereof, including Local R5-185 or Local R5-160

WE WILL NOT encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employee in the exercise of the rights assured by Executive Order 11491, as amended, or in any like or related manner encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment in violation of Executive Order 11491, as amended.

WE WILL withdraw, cancel and rescind the selection for, and promotion to, the position of supervisory police officer, commonly known as Chief of Police, of Mr. Burl Cornelius.

WE WILL re-post and re-advertise the position of supervisory police officer, GS-0830, under appropriate established procedures and WE WILL INSURE that: i) eligibility and/or qualifications are not made more restrictive than those set

forth in the March, 1978, Placement Notice No. 17; and ii) that Mr. Burl Cornelius receives no credit for supervisory experience gained in the position of supervisory police officer from March, 1978.

_____
Agency or Activity

Dated_____ By _____
Hospital Director

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other materials.

If any employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, whose address is: Suite 540, 1365 Peachtree Street, N.E., Atlanta, Georgia 30309.

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, NW.
Washington, D.C. 20036

Case No. 41-6178(CA)

Today, August 23, 1979, copies of a RECOMMENDED DECISION AND ORDER were sent to the following:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

James W. Pressler, Jr. Esquire
Assistant General Counsel
Edward J. Gildea, Esquire
Assistant General Counsel
National Association of Government
Employees
2139 Wisconsin Avenue, NW.
Washington, D.C. 20007
#612669

James Klein, Esquire
General Counsel's Office
Veterans Administration
810 Vermont Avenue, NW.
Washington, D.C. 20420
#612670

Mr. Alan Whitney
Executive Vice President
National Association of Government
Employees
2139 Wisconsin Avenue, NW.
Washington, D.C. 20007
#612671

REGULAR MAIL

Assistant Director, LMR
Office of Personnel Management
1900 E Street, NW.
Washington, D.C.

FLRA
1900 E Street, NW.
Room 7469
Washington, D.C. 20424

1 cy. ea. Regional Director

2 FLRA No. 107

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

March 14, 1980

Mr. Dennis M. Reardon
Director of Operations
Professional Air Traffic Controllers
Organization, AFL-CIO
444 North Capitol Street, N.W., Suite 820
Washington, D.C. 20001

Re: Professional Air Traffic Controllers Organization, AFL-CIO and Department of Transportation, Federal Aviation Administration, Case No. 0-NG-209

Dear Mr. Reardon:

This refers to the union's petition for review in the above-entitled case. As presented therein, the Professional Air Traffic Controllers Organization, AFL-CIO, proposed generally "to negotiate [the activity's] proposed changes to [the activity's regulation]." For the reasons set forth below, the union's appeal must be dismissed.

Under established Authority precedent, Association of Civilian Technicians, Alabama ACT and State of Alabama National Guard, Case No. 0-NG-27, 2 FLRA No. 39 (Dec. 28, 1979), Report No. ___, a petition for review of a negotiability issue which does not present a proposal sufficiently specific and delimited in form and content as to permit the Authority to render a negotiability decision thereon does not meet the conditions for review set forth in section 7117 of the Statute (92 Stat. 1205 et seq. (1978)) and section 2424.1 of the Authority's regulations.

In all material respects, the instant appeal is substantially identical to the case cited. Therefore, for the reasons fully set forth in that decision, the instant appeal similarly does not meet the conditions for review prescribed in section 7117 of the Statute and section 2424.1 of the Authority's regulations. Accordingly, and apart

from other considerations,1/ the appeal is hereby dismissed.

For the Authority.

Sincerely,

Samuel A. Chaitovitz
Executive Director

cc: Hon. N. E. Goldschmidt
R. S. Smith
Transportation

1/ Among other things, to the extent that the instant case arises out of a dispute over the meaning of provisions contained in the parties' agreement, the proper forum in which to resolve such questions is not a negotiability appeal but, instead, would be pursuant to whatever procedures the parties themselves have adopted for such purpose through such agreement. E.g., American Federation of Government Employees, AFL-CIO, Local 1931 and Department of the Navy, Naval Weapons Station, Concord, California, Case No. 0-NG-55, 2 FLRA No. 19 (Dec. 5, 1979), Report No. ____.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

March 14, 1980

Mr. Louis S. Nardozi
Chairman, Conference Committee
Tidewater Virginia Federal Employees
Metal Trades Council
P. O. Box 1155
Portsmouth, Virginia 23704

Re: Tidewater Virginia Federal Employees Metal Trades Council and Norfolk Naval Shipyard, Portsmouth, Virginia, Case No. 0-NG-256

Dear Mr. Nardozi:

This refers to the union's petition for review in the above-entitled case. As presented therein, the Tidewater Virginia Federal Employees Metal Trades Council proposed generally to negotiate the activity's directive from its shop superintendents to its foremen concerning the monitoring of employee productivity. For the reasons set forth below, the union's appeal must be dismissed.

Under established Authority precedent, Association of Civilian Technicians, Alabama ACT and State of Alabama National Guard, Case No. 0-NG-27, 2 FLRA No. 39 (Dec. 28, 1979), Report No. 25, a petition for review of a negotiability issue which does not present a proposal sufficiently specific and delimited in form and content as to permit the Authority to render a negotiability decision thereon does not meet the conditions for review set forth in section 7117 of the Statute (92 Stat. 1205 et seq. (1978)) and section 2424.1 of the Authority's regulations.

In all material respects, the instant appeal is substantially identical to the case cited. Therefore, for the reasons fully set forth in that decision, the instant appeal similarly does not meet the conditions for review prescribed in section 7117 of the Statute and section 2424.1 of the Authority's regulations. Accordingly, and apart from other considerations, the appeal is hereby dismissed.

Additionally, insofar as it appears that the essence of the union's allegations relates to an alleged unilateral change in working conditions and a refusal to bargain on its impact, the proper forum in which to raise these issues is not a negotiability appeal, but rather would be an unfair labor practice proceeding pursuant to section 7118 of the Statute. In this regard, resolution of the instant dispute is

dependent upon the resolution of factual issues related to the parties' conduct. Such factual determinations can best be accomplished through use of the investigatory and formal hearing procedures set forth in part 2423 of the Authority's rules and regulations which govern unfair labor practice proceedings (45 F.R. 3506 et seq. (1980)).

For the Authority.

Sincerely,

Samuel A. Chaitovitz
Executive Director

cc: A. James
Navy

D. H. Green
DOD

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 15

(Union)

and

Case No. 0-NG-137

DEPARTMENT OF THE TREASURY, INTERNAL
REVENUE SERVICE, NORTH ATLANTIC REGION

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

On or about February 20, 1979, the activity notified the union that, effective June 30, 1979, the Internal Revenue Service (IRS or the agency) intended to implement Manual Supplement 1(16) G-40, entitled "Service-wide Implementation of IRS Identification Card/Badge," which would require all employees to wear and visibly display Identification Card/Badges above the waist, either by clipping them to an item of clothing or fastening them to a chain worn around the neck. The union's proposal set forth below was submitted in response to such notification.

Union Proposal

All Identification Cards be done away with for the Appeals Branch offices in Boston, Buffalo, New Haven and Long Island.

Alternatively, credentials be issued to all "covered employees," with instructions to carry them and produce them, if challenged.

Alternatively, Identification Cards be issued in such offices, with instructions to carry them and produce them, if challenged.

Question Here Before the Authority

The question is whether the union's proposal is within the duty to bargain under section 7106(b)(2) of the Statute or is outside the duty to bargain under section 7106(a)(1), as alleged by the agency. */

Conclusion: The union's proposal violates management's right to determine the internal security practices of the agency under section 7106(a)(1) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that the disputed proposal is not within the duty to bargain is sustained.

Reasons: The agency contends that the union's proposal infringes on management's right under section 7106(a)(1) of the Statute to determine the internal security practices of the agency. More specifically, the agency asserts that the union's proposal does not relate to the procedures (as described in section 7106(b)(2) of the Statute) for implementing management's decision to require all employees to wear Identification Card/Badges, but instead goes to the substance of management's decision itself. In this regard, the agency argues that the union's proposal, by its express terms, would require that all Identification Card/Badges "be done away with" or, alternatively, that credentials or ID cards be issued to the employees with instructions that the employees carry them and present them only if challenged, and that such proposal therefore goes to the heart of management's decision to require all employees to wear clearly visible Identification Card/Badges. In its petition for review, the union "agrees that [internal] security practices fall within the purview of [m]anagement," but contends that "the methods that [m]anagement uses to IMPLEMENT its security program . . . are the proper

*/ Section 7106 of the Statute provides, in pertinent part, as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency[.]

. . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

. . . . .

(2) procedures which management officials of the agency will observe in exercising any authority under this section[.]

concern of the [u]nion." That is, the union asserts that its proposal sets forth "procedures" concerning how the identification cards or credentials will be carried and, as such, is fully negotiable.

Based upon the positions of the parties as set forth above, there is no dispute that management has the right to determine the internal security practices of the agency. In the instant case, the regulation entitled "Service-wide Implementation of IRS Identification Card/Badge" clearly concerns the internal security practices of the agency. That is, the regulation directly relates to and is part of the agency's plan to prevent disruption, disclosure or property destruction at its facilities, and more specifically to protect the privacy of taxpayers by guarding against the unauthorized disclosure of tax information. Moreover, for the reasons set forth below, the union's right under section 7106(b)(2) of the Statute to negotiate procedures which management will observe in exercising its right under section 7106(a)(1) to determine the agency's internal security practices does not encompass the specific proposal in the instant case.

The first sentence of the disputed proposal would expressly require that "[a]ll Identification Cards be done away with," and therefore would clearly conflict with management's decision to establish an internal security practice requiring all employees to wear and visibly display Identification Card/Badges. A proposal which has the effect of negating or reversing management's decision itself does not involve merely a procedure which management will observe in exercising the reserved right in question but constitutes an improper attempt to negotiate with respect to the decision itself.

Similarly, the union's alternative proposal that credentials or identification cards be issued to employees with instructions "to carry them and produce them, if challenged," would effectively negate management's decision to establish an internal security practice requiring all employees to wear and visibly display Identification Card/Badges at all times. That is, such proposal would conflict with management's determination that the visible display of Identification Card/Badges is an essential component of the agency's internal security practices and therefore would interfere with the reserved management right under section 7106(a)(1) of the Statute "to determine the . . . internal security practices of the agency." Accordingly, the agency's allegation that the disputed proposal is not within the duty to bargain must be sustained.

Issued, Washington, D.C., March 14, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 36 REPORT OF CASE DECISIONS June 13, 1980

REPRESENTATION CASE

2 FLRA No. 111 (March 14, 1980)

Army and Air Force Exchange Service, Dallas, Texas, A/SLMR No. 1163, Case No. 0-AS-11. The union (NAGE) filed a representation petition under E.O. 11491, seeking to consolidate 13 separate bargaining units consisting of all the nonprofessional employees exclusively represented by certain of the union's constituent locals at elements of the activity. The Assistant Secretary found that the proposed consolidated unit satisfied the criteria in section 10(b) of the Order and therefore concluded that the unit was appropriate. The activity filed a petition for review and request for a stay, alleging that the Assistant Secretary's decision raised a number of major policy issues. The Authority held that the activity's petition for review did not meet the requirements of section 2400.2 of the Authority's transition rules and regulations (which incorporated by reference section 2411.12 of the rules of the Federal Labor Relations Council); that is, the decision of the Assistant Secretary did not present any major policy issues and the activity neither alleged, nor did it otherwise appear that the decision was arbitrary and capricious. Accordingly, the Authority denied the activity's petition for review and its request for a stay. (Decision letter attached.)

UNFAIR LABOR PRACTICE CASES

2 FLRA No. 117 (March 21, 1980)

Veterans Administration, Veterans Administration Center Laboratory Service, Temple, Texas, Assistant Secretary Case No. 63-8479(CA). Upon a complaint filed by Valerie E. Graves, AFGE Local 2109 under E.O. 11491, the ALJ found that the activity violated section 19(a)(1) of the Order by refusing to permit the Complainant to attend negotiations as a duly appointed member of the union's negotiating committee; and by imposing certain restrictions on her activities (some of which

related to union matters and her position as a union officer) not uniformly required of other employees. The Authority adopted the findings, conclusions, and recommendation of the ALJ and issued a remedial order. (Decision and Order attached.)

2 FLRA No. 118 (March 21, 1980)

Directorate of Supply Operations, Defense Logistics Agency, Headquarters, Defense Logistics Agency, Assistant Secretary Case No. 22-08768(CA). The individual Complainant (Louis J. Derdevanis) alleged, in substance, that the activity violated section 19(a)(1) and (2) of E.O. 11491 by failing to promote him to a particular position because of his union activities; and, in addition, that an activity official, at a meeting to discuss the Complainant's nonselection and a related performance appraisal and rating, threatened to lower the performance appraisal and rating because of the Complainant's union activities. The ALJ found that the activity had violated section 19(a)(1) of the Order by the conduct of the activity official at the meeting in question. The ALJ further found that the official had considered the Complainant's union background when evaluating him for the job, and that the Complainant might have been selected if the performance appraisal ratings had been made absent consideration of his union activities. However, the ALJ concluded that no discrimination in the promotion action based on union considerations had been established as he was unable to find that the Complainant would have been selected but for his activities on behalf of the union. The ALJ therefore recommended that the section 19(a)(2) allegation in the complaint be dismissed. The Authority adopted in part and modified in part the findings, conclusions and recommendations of the ALJ. More specifically, the Authority concluded, contrary to the ALJ, that the activity had violated section 19(a)(2) of the Order because discrimination based on union considerations played a part in the failure to select the complainant for the position in question. The Authority thereupon issued a remedial order. (Decision and Order attached.)

NEGOTIABILITY CASES

2 FLRA No. 112 (March 14, 1980)

Service Employees' International Union, AFL-CIO, Local 556 and Navy Exchange, Pearl, United States Naval Base, Pearl Harbor, Hawaii, Case No. 0-NG-187. This dispute involved the negotiability of a union proposal concerning reductions-in-force which the activity alleged was inconsistent with an agency regulation. In its petition for review, the union sought

a determination as to whether a compelling need existed for the agency regulation. Subsequently, in a statement filed with the Authority, the agency withdrew the allegation made by the activity. Despite the agency's action, the union requested that the Authority render a decision on the compelling need issue. The Authority held that since the agency had withdrawn the allegation there no longer was an issue as to whether the union's proposal was within the parties' duty to bargain under the Statute; and, therefore, the dispute had been rendered moot. The Authority further noted that the union's request in response to the agency's action constituted a request for an advisory opinion which was precluded by section 2429.10 of the Authority's rules. Accordingly, the Authority dismissed the union's petition. (Dismissal letter attached.)

2 FLRA No. 113 (March 14, 1980)

American Federation of Government Employees, AFL-CIO, Local 2272 and Department of Justice, U.S. Marshals Service, District of Columbia, Case No. 0-NG-101. During the course of negotiating a local supplemental agreement, the union submitted a number of proposals concerning certain subjects contained in a master agreement negotiated at the national level. The activity declared the proposals nonnegotiable since they were covered by the master agreement; and the union filed a petition for review with the Authority. The Authority determined that the parties were essentially in dispute concerning the threshold question as to whether the master agreement authorized or precluded bargaining on the local union's proposals. The Authority concluded, based on its decision in AFGE Local 1661 and Department of Justice, Federal Correctional Institution, Danbury, Connecticut, Case No. 0-NG-43, 2 FLRA No. 56 (Report No. 27), that the union's petition was not appropriate for resolution under section 7117 of the Statute and Part 2424 of the Authority's rules of procedure; but, rather, to the extent that the case involved a dispute over the meaning of provisions in the master agreement, the proper forum in which to resolve that dispute would be that which the parties adopted for such purpose. Accordingly, and apart from other considerations, the Authority denied the union's appeal, but without prejudice to the renewal of its contention that the matters in dispute are negotiable under the Statute in a petition duly filed with the Authority after the matters are resolved, under applicable procedures, that bargaining on such matters is not precluded by the controlling national agreement. (Decision attached.)

2 FLRA No. 114 (March 14, 1980)

American Federation of Government Employees, AFL-CIO, Local 3488 and Federal Deposit Insurance Corporation, New York Regional Office, Case No. 0-NG-192. The Authority dismissed the union's

petition for review as untimely filed and denied its request for waiver of the expired time limit. (Decision letter attached.)

2 FLRA No. 115 (March 14, 1980)

American Federation of Government Employees, AFL-CIO, Local 2840 and Blytheville Air Force Base, Arkansas, Case No. 0-NG-221. The Authority found that since the agency, subsequent to the union's filing its petition for review, withdrew its allegation of nonnegotiability, the dispute involved was rendered moot. Accordingly, the Authority dismissed the union's petition. (Decision letter attached.)

2 FLRA No. 116 (March 21, 1980)

American Federation of Government Employees, AFL-CIO, Local 2118 and Department of Energy, Albuquerque Operations, Los Alamos Area Office, Case No. 0-NG-153. The union filed a petition for review of a negotiability issue, and the agency moved to dismiss the petition asserting, among other grounds, that the activity was excluded from coverage of the Statute by E.O. 12171, and that the Authority was therefore without jurisdiction in the matter. The Authority granted the agency's motion and dismissed the union's petition. (Decision attached.)

Appeal withdrawn:	Case No.	Date
	0-NG-252	March 19, 1980

ARBITRATION CASE

2 FLRA No. 119 (March 21, 1980)

Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma and American Federation of Government Employees, Local 916, AFL-CIO (Moore, Arbitrator), FLRC No. 78A-188. The arbitrator determined that certain of the activity's wage grade mechanics and general schedule inspectors were entitled to a 4 percent environmental pay differential for hazardous work and ordered that they be so compensated. The agency filed a petition for review of the arbitrator's award under E.O. 11491, as amended, alleging as one exception that the award, insofar as it granted hazard pay differential to the inspectors, violated the Federal Personnel Manual. The Authority, pursuant to the applicable rules of procedure, accepted the agency's petition for review insofar as it related to that exception (Report No. 3); and requested from the Office of Personnel Management (OPM) an interpretation of relevant civil service regulations. Based

upon OPM's response, the Authority remanded the award to the parties for resubmission to the arbitrator for clarification and interpretation in the light of OPM's response and the specific hazardous differential pay requirements cited therein. (Decision attached.)

Attachments (9)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

March 14, 1980

Mr. Robert E. Edwards
Associate General Counsel
Chief, Labor Relations Law Branch
Departments of the Army and the Air Force
Headquarters, Army and Air Force
Exchange Service
Dallas, Texas 75222

Re: Army and Air Force Exchange Service, Dallas, Texas, A/SLMR No. 1163, FLRA No. 0-AS-11

Dear Mr. Edwards:

The Authority has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision in the above-entitled case.

In this case, the National Association of Government Employees (the Union) filed a petition seeking to consolidate 13 separate bargaining units exclusively represented by certain of its constituent locals at elements of the Army and Air Force Exchange Service (AAFES). The consolidated unit sought would consist of all nonprofessional AAFES employees exclusively represented by the union in the continental United States.

The Assistant Secretary, after reviewing the mission, functions, organizational structure and operations of AAFES, found the proposed consolidated unit was appropriate for the purpose of exclusive recognition under the Order. In so finding, the Assistant Secretary referred to several Council decisions involving the consolidation of bargaining units in which the Assistant Secretary's establishment of a presumption favoring consolidations was construed ". . . as a recognition and affirmation of the strong policy in the Federal labor-management relations program of facilitating consolidation...." 1/ He also noted the Council's indication, in those decisions, that such affirmation accurately reflects the policy set forth in the Council's 1975 Report and Recommendations to facilitate the consolidation of existing units which conform to the appropriate unit criteria contained in section 10(b) of the Order.

Based upon the foregoing policy considerations and the particular facts of the instant case, the Assistant Secretary concluded that the proposed consolidated unit was appropriate for the purpose of exclusive recognition under the order. In this regard he stated:

1/ Education Division, Department of Health, Education and Welfare, Washington, D.C., A/SLMR No. 822, FLRC No. 77A-88 (Mar. 1, 1978), Report No. 145; Internal Revenue Service, Washington, D.C. and National Treasury Employees Union, A/SLMR No. 831, FLRC No. 77A-112 (Mar. 1, 1978), Report No. 145; and Bureau of Field Operations, Office of Program Operations, Social Security Administration, Department of Health, Education and Welfare, Chicago Region V-A, A/SLMR No. 876, FLRC No. 77A-136 (Mar. 1, 1978), Report No. 145.

Thus, . . . the unit sought encompasses all the employees within the AAFES represented by the [union] and all of the various units alone, or in combination, contain essentially all the nonprofessional employees at the various activities involved. Additionally, it is noted that all the employees within the petitioned for consolidated unit share a common mission, common overall supervision, essentially similar job classifications and working conditions, similar personnel and labor relations policies and practices as delegated in accordance with the AAFES' delegation of authority.

Under these circumstances, I find that the employees in the petitioned for unit share a clear and identifiable community of interest.

I find further that the petitioned for consolidated unit will promote effective dealings and efficiency of agency operations. Thus, the record reflects that Headquarters, AAFES, through AAFES regulations, promulgated by the Departments of the Army and Air Force, and through the promulgation and administration of its own Exchange Service Manual, effectively develops agency policy in all matters relating to AAFES personnel policies and practices, including reduction-in-force, hiring, promotions and wage and salary determinations, etc., which are then disseminated to the field for implementation of those policies within the local framework. Moreover, although the record reflects that each region, with the exception of the Alamo Region, has a labor relations specialist who handles labor relations for that region, the evidence establishes that all agreements must be approved by the General Counsel's office located at AAFES Headquarters. In addition, the General Counsel's office advises the regional labor relations specialists on technical matters and, in the case of the Alamo Region, representatives of the General Counsel handle the actual negotiations for that region. Field exchanges must notify the General Counsel's office when requests are made to negotiate new agreements or to modify existing agreements, when requests are made to use the services of the Federal Mediation and Conciliation Service or the Federal Service Impasses Panel, when negotiability issues are appealed to the Council, or when Applications for a Decision on Grievability or Arbitrability are filed with the Assistant Secretary. Furthermore, when negotiated agreements provide for automatic renewal upon appropriate notice, such notices may not issue without the approval of the General Counsel's office. The record shows that the AAFES and the [union] have negotiated six separate and two multi-unit agreements covering 11 of the units at the individual activities involved herein, and that there is a high degree of commonality between the agreements in that many of the individual subjects are dealt with uniformly. Thus, although the AAFES contends that the authority to negotiate agreements has been delegated to the regions in order to tailor local agreements to the particular needs of the region, area, base, or post exchange, the record shows a pattern of uniformity within the negotiated agreements.

> Under all of these circumstances, I find that effective dealings and efficiency of agency operations would be promoted by the establishment of the proposed consolidated unit and that AAFES labor relations policies could remain essentially the same, as evidenced by the uniformity in current contract provisions, and might well be enhanced if the proposed consolidated unit were effectuated. In this latter regard, regional labor relations specialists and other field personnel specialists could continue to provide input into the negotiating process and the particular needs of individual field exchanges could be satisfied by the use of local supplemental agreements. Moreover, I find that as the proposed consolidated unit, covering all of the employees represented by the [union] in the AAFES will provide for bargaining in a single unit, rather than in the existing 13 bargaining units, it will promote a more comprehensive bargaining unit structure and is consistent with the policy of the Executive Order set forth above. [Footnotes omitted.]

In the activity's petition for review it is alleged that the Assistant Secretary's decision raises major policy issues. Specifically, review is requested on the following four grounds:

1. The Assistant Secretary's decision errs because it fails to accord proper weight to appropriate unit criteria as required by controlling principles of unit determination.

2. The Assistant Secretary's decision errs in its application of unit criteria because in its analysis of "community of interest" the elements chosen for examination fail to delineate any "clear and identifiable" interest other than those common employment characteristics shared by all AAFES employees and because neither "effective dealings" [n]or "efficiency of agency operations" [is] served by consolidation.

3. The Assistant Secretary's decision errs in giving weight to the fact that agreements are approved at the AAFES General Counsel's Office because such approval has no more significance than putting into practice the provisions of Section 15 of Executive Order 11491.

4. The Assistant Secretary's decision here raises the identical issues that were raised in [Veterans Administration, A/SLMR No. 1016,] FLRC No. 78A-123 which the Authority currently has under review as having presented major policy issues and on which a stay was ordered pending consideration of the issues raised.

In the Authority's opinion, the activity's petition for review of the Assistant Secretary's decision does not meet the requirements of section 2400.2 of the Authority's transition rules and regulations which incorporates by reference section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not present any major policy issues and it is neither alleged, nor does it otherwise appear, that his decision is arbitrary and capricious.

With respect to the first allegation, that the Assistant Secretary failed to accord proper weight to the appropriate unit criteria contained in section 10(b) of the Order, no basis for Authority review is thereby presented. In this regard, it is noted particularly that the Assistant Secretary affirmatively found, based on the entire record, that the proposed consolidated unit in the instant case satisfies each of the criteria specified in section 10(b) and will promote a more comprehensive bargaining unit structure consistent with the policies of the Order. As to the second and third grounds asserted, in effect that the Assistant Secretary improperly applied the appropriate unit criteria to the facts in this case, such assertion constitutes essentially nothing more than mere disagreement with the Assistant Secretary's finding, based upon all of the facts and circumstances presented, that the proposed consolidated unit is appropriate for the purpose of exclusive recognition under the Order. Accordingly, no basis for review is thereby presented. Finally, no major policy issue is raised herein on the ground that the Authority accepted for review the Assistant Secretary's finding in a previous decision (A/SLMR No. 1016) that the proposed consolidated unit therein was appropriate for the purpose of exclusive recognition under the Order. In sustaining the Assistant Secretary's finding in that case, 2/ the Authority noted that the Assistant Secretary had relied on a series of decisions, also cited and relied on by the Assistant Secretary herein (see note 1, supra), in which the Council denied review of findings that proposed consolidated units similar to the one involved herein satisfied the three criteria of section 10(b) and were consistent with the purposes and policies of the Order. The Authority further cited and quoted from its own recent decision in Veterans Administration, Washington, D.C., Assistant Secretary, Case No. 22-08518 (UC), 1 FLRA No. 55 (June 12, 1979), Report No. 8, which was also issued under the Order, in concluding that the Assistant Secretary's finding was consistent with the purposes and policies of the Order. For the reasons more fully stated in that decision, and in light of established Council precedent, the Authority concludes that the Assistant Secretary's decision in the instant case does not raise a major policy issue warranting Authority review.

Since the Assistant Secretary's decision presents no major policy issue and it is neither alleged, nor does it otherwise appear, that his decision is arbitrary and capricious, the appeal fails to meet the requirements for review

2/ Veterans Administration, A/SLMR No. 1016, FLRC No. 78A-123, 2 FLRA No. 25 (Dec. 7, 1979).

as set forth in section 2400.2 of the Authority's transition rules and regulations which incorporates by reference section 2411.12 of the Council's rules. Accordingly, the petition for review is hereby denied, and the request for a stay is also denied. 3/

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhite, Member

FEDERAL LABOR RELATIONS AUTHORITY

cc: P. E. Trayers
NAGE

3/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the instant case was decided solely on the basis of E.O. 11491, as amended, and as if the Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision does not prejudge in any manner either the meaning or application of related provisions in the Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Order.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Veterans Administration
Veterans Administration Center
Laboratory Service
Temple, Texas

(Activity)

and

Assistant Secretary
Case No. 63-8479(CA)

Valerie Graves
American Federation of Government Employees,
AFL-CIO, Local Union 2109

(Union)

DECISION AND ORDER

On August 28, 1979, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain of the unfair labor practices alleged in the complaint and recommending it cease and desist therefrom. He recommended that certain other unfair labor practice allegations be dismissed. Thereafter, the Respondent filed exceptions to those portions of the Administrative Law Judge's Recommended Decision and Order which found that the Respondent had engaged in unfair labor practices.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (45 F.R. 3487, Jan. 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions, and noting that no exceptions were filed to certain portions of the Administrative Law Judge's Recommended Decision and Order, the Authority hereby adopts the

Administrative Law Judge's findings, 1/ conclusions and recommendation. 2/

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Veterans Administration, VA Center, Laboratory Service, Temple, Texas, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Executive Order by refusing to permit Valerie E. Graves or any other employee to attend a negotiating meeting as a duly appointed member of the union's negotiating team; or by imposing on Valerie E. Graves, or any other employee, because of union activity, any restriction on personal activity not uniformly required of all employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Order:

(a) Post at its facilities in Temple, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Hospital Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Hospital Director shall take reasonable steps to insure that such notices are not altered, defaced, or coverd by any other material.

(b) Notify the Federal Labor Relations Authority, in writing, within

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1/ In adopting the Administrative Law Judge's conclusion that section 19(a)(1) was violated by the Respondent's refusal to permit the Complainant to attend a pre-negotiation meeting, the Authority finds it unnecessary to rely upon the Administrative Law Judge's finding that this refusal was a "deliberate ploy" to influence the choice of the Union's bargaining representative.

2/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the portions of the complaint found not to be violative of the Executive Order in Assistant Secretary Case No. 63-8479(CA) be, and they hereby are, dismissed.

Issued, Washington, D.C., March 21, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to permit Valerie E. Graves or any other employee to attend a negotiating meeting as a duly appointed member of the union's negotiating team; or impose on Valerie E. Graves, or any other employee, because of union activity, any restriction on personal activity not uniformly required of all employees.

WE WILL NOT in any like or related matter interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address is: Downtown Post Office Station, Bryan and Ervay Streets, P. O. Box 2640, Dallas, Texas 75221; and whose telephone number is: (214) 767-4996.

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of VETERANS ADMINISTRATION VA CENTER, LABORATORY SERVICE, TEMPLE, TEXAS Respondent and VALERIE E. GRAVES, VICE PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL UNION 2109 Complainant	Case No. 63-8479(CA)

MR. PETE EVANS
National Representative
American Federation of Government
Employees
203 Timothy Trail
Duncanville, Texas 75137
For the Complainant

HERB STANDEVEN, ESQUIRE
Assistant District Counsel
Veterans Administration
1400 North Valley Mills Drive
Waco, Texas 76710
On Brief: Richard J. Jones, Esquire
District Counsel
D. Keith Rollins, Esquire
Attorney
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is a proceeding under Executive Order 11491, as amended (hereinafter also referred to as the "Order"). While instituted with the Labor-Management Services Administration, United States Department of Labor, pursuant to transition rules and regulations, Federal Register, Vol. 44, No. 1, January 2, 1979 (5 C.F.R. Section 2400.2) all proceedings in this matter after January 1, 1979, were conducted before the Federal Labor Relations Authority, the Notice of Hearing was issued by a Regional Director of the Authority, and this decision is issued in the name of the Authority in accordance with Transition Rules and Regulations, republished as Chapter XIV, Subchapter A, Part 2400, Federal Register, Vol. 44, No. 147, July 30, 1979.

On, or about, May 23, 1978, Complainant filed a charge (ALJ Exh. 1-A) and on July 24, 1978, Complainant filed a Complaint, each of which had alleged violations of Sections 19(a)(1) and (4) of the Order. However, the Notice of Hearing issued only as to alleged violations of Section 19(a)(1) of the Order. 1/

1/ As the "Basis of the Complaint", Complainant incorporated the May 23, 1978, charge. The portion of the charge denominated "Charge #2" set forth allegations of reporting restrictions placed on Complainant, Valerie R. Graves, and not on other employees; but erroneously asserted that such action constituted a violation of Section 19(a)(4) of the Order. In his letter accompanying the Notice of Hearing, the Regional Director stated that, in his view, "evidence and testimony should be adduced at the hearing concerning, but not necessarily limited to the following issues: 1. Did Respondent . . . interfere with, restrain, and coerce Valerie Graves in the conduct of her union duties by imposing extraordinary reporting restrictions upon her which were not imposed on other employees? . . . 3. . . . did such action constitute a violation of Section 19(a)(1) of the Order?"

At the commencement of the hearing, I informed the parties that the Regional Director's decision to refuse to issue a Notice of Hearing on alleged 19(a)(4) violations was jurisdictional; that no evidence would be received as to any 19(a)(4) violation, but that evidence would be received in support of all allegations in the complaint to the extent that such allegations constituted a violation of 19(a)(1), notwithstanding that such allegations might also constitute violations of Section 19(a)(4). Cf. United States Army Aviation Center, Fort Rucker, Alabama, 1 FLRA No. 98 (1979).

Each party was represented, was afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved herein, and to present oral argument. At the close of the hearing, July 2, 1979, was fixed as the date for mailing briefs and Respondent's brief, timely mailed, was received by this office on July 5, 1979; however, on July 2, 1979, at request of Complainant, and upon representation of the serious illness and hospitalization of Complainant's representative, Mr. Pete Evans, the time for filing briefs was extended to July 24, 1979, and Respondent, because it had already mailed its brief, was granted leave to file a reply brief on or before August 7, 1979. Complainant's brief, timely mailed, was received by this office on July 30, 1979. Respondent has not filed a reply brief.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommended order.

Findings

Mrs. Valerie Elizabeth Graves is a genetic counselor at the Veterans Administration Hospital, Temple, Texas. She began as a student at the Hospital in 1969 in the laboratory and in 1970 began full time work as a Medical Technician. From about September, 1972, until March, 1974, she lived in Topeka, Kansas, and was not employed by Respondent. She returned to Texas in 1974, and has been employed by Respondent continuously since about March, 1974. From 1974 until about June, 1978, she worked in the Chemistry Department of the Hospital. In about June, 1978, she was transferred to her present job. From 1975 until she left the Chemistry Department, her immediate supervisor was Mrs. Georgia Sehon. In 1976, Mrs. Graves received an outstanding performance rating. Mrs. Graves testified that her relationship with Mrs. Sehon was good until the latter part of 1977 when she (Mrs. Graves) became active in the Union. Although she had been a member of the Union for a long period of time, she did not take any active part until she was appointed to the Safety Committee in 1977. In April, 1978, she was elected Vice President of Local 2109. Mrs. Graves testified that her good relationship with Mrs. Sehon began to deteriorate in 1977 after she became active in the Union; nevertheless, the testimony and evidence shows principally three matters in March, April and May, 1978.

1. Denial of right to attend pre-negotiation meeting and denial of right of grievants to attend arbitration of their grievances.

a) Pre-negotiation meeting of March 28, 1978.

On March 28, 1978, Mrs. Williams called Mrs. Graves at about 9:00 a.m. and told her that a pre-negotiation meeting, called by the Federal Mediator, Mr. Guy, would be held at about 10:30 a.m. and that she should notify her supervisor. Mrs. Graves did notify Mrs. Sehon who informed her that she could not be spared and could not go; however, Mrs. Sehon said that she would talk to Mr. Rogers. Mrs. Sehon did talk to Mr. Rogers and was told that Mrs. Graves could not attend the pre-negotiation meeting. Mrs. Graves called Mrs. Williams and told her that she had been denied permission to attend the pre-negotiation meeting.

There is no doubt that: a) Mrs. Williams had appointed Mrs. Graves as a member of the Union's negotiation committee; that she (Mrs. Williams) had notified Mrs. Graves not less than a week prior to March 28 and that Mrs. Williams had also advised Ms. Weaver, the third member of the Union's committee, of Mrs. Graves' appointment; b) that Mrs. Williams did not notify Respondent of Mrs. Graves' appointment; and c) that the Union's negotiating committee, which had had 2 or 3 prior pre-negotiation (ground rules) meetings with Respondent, previously had not included Mrs. Graves. Although Mrs. Graves testified that she had advised Mr. Rogers about two weeks before March 28, 1978, that she had been appointed to the union's negotiating committee, Mr. Rogers denied that he had been so advised prior to March 28; Mrs. Sehon denied that she had been advised, prior to March 28, that Mrs. Graves had been appointed to a pre-negotiation committee; and Mr. Ford stated that prior to March 28, neither he, nor anyone in personnel, had been advised that Mrs. Graves had been appointed to the Union's negotiating team. In view of Mrs. Graves' testimony concerning Mrs. Williams' call, it is doubtful in the extreme that Mrs. Graves had given any notice prior to March 28, 1978, of her appointment to the Union's negotiating team. However, the more significant consideration is that Respondent, when fully advised on March 28, 1978, of Mrs. Graves' appointment to the Union's negotiating committee, persisted in refusing to allow Mrs. Graves attend the meeting as a duly appointed member of the Union's negotiating committee and relented only when the Hospital Director, Mr. Belda, intervened.

Thus, Mr. Rogers called Mrs. Williams and asked why Mrs. Graves was to attend the meeting when she was not a union officer. When Mrs. Williams told him that she, as president, had appointed Mrs. Graves to the committee, Mr. Rogers said that she could not attend. Mrs. Williams went to see Mr. Rogers in person and Mr. Rogers told her that Mr. Ford, Personnel Management Specialist, had told him that Mrs. Graves could not attend the meeting. Mrs. Williams then went to the Hospital Director, Mr. Belda, who accompanied Mrs. Williams and Ms. Weaver to the office of the Director of Personnel, Mr. Robinson. Present in Mr. Robinson's office were Mr. Lewis and Mr. Blankenship. Mr. Blankenship stated that Mrs. Graves was "not going to be on that committee." After a heated discussion between Mrs. Williams and Mr. Blankenship, Mr. Belda interrupted and asked Mr. Robinson if Mrs. Graves were supposed to be at the meeting and when he said yes, Mr. Belda said ". . . well, dammit somebody get her in there. . . ." Thereafter, Mrs. Graves was allowed to attend the meeting.

b) Arbitration hearing of May 2, 1978.

Nine employees filed a grievance which was set for hearing before an aribtrator on May 2, 1978. Three of the grievants, including Mrs. Graves, worked in the Chemistry Department under the immediate supervision of Mrs. Sehon. Mrs. Sehon told the three employees in her section (Mr. Farrar Keetch, Mrs. Graves and Ms. Lynda Weatherby) that they could not attend their arbitration hearing. Whether she directly told Mrs. Graves or Mr. Keetch in Mrs. Graves' presence is of no moment since all three employees were aware that Mrs. Sehon had denied permission for them, or any one of them, to attend the hearing. However, Mrs. Sehon did contact Mr. Rogers who told her they could attend the hearing and, accordingly, Mrs. Sehon advised all three that they could attend the arbitration hearing and each did so.

2. The Gary Baty matter. Mr. Baty, a cousin of Mrs. Graves' husband, is a disabled veteran who had been an out-patient at the hospital. On April 1, 1978, while waiting for prescriptions to be filled, he came to the laboratory to see Mrs. Graves. Mrs. Graves continued her work; had called in her report; and had walked to the door of the Chemistry Department to chat with Mr. Baty, who was leaving, when Mrs. Sehon returned from lunch and ordered Mr. Baty to leave, telling him that he was interrupting work. There is no dispute that it had been a long and well established practice that visitors freely came to the Chemistry Department. Mr. Baty was, obviously, angered by Mrs. Sehon's conduct, so much so that he wrote a letter to a Congressman in which he complained about his treatment.

However, at the time, when Mr. Baty had gone, Mrs. Graves told Mrs. Sehon that if she had wanted Mr. Baty to leave she (Mrs. Sehon) could have said something to her (Mrs. Graves) and not to Mr. Baty. Mrs. Graves testified that Mrs. Sehon responded that as a supervisor it was her right to do what she thought best. Mrs. Graves was concerned about Mrs. Sehon's treatment of Mr. Baty and asked for a meeting with Mr. Losson Rogers, Laboratory Supervisor, and Mrs. Sehon's immediate supervisor. In April, a meeting with Mr. Rogers and Mrs. Sehon was arranged. Mr. James S. Ford, Personnel Management Specialist, was also present and Mrs. Graves brought with her Ms. Billye Weaver, Chief Steward. Mr. Ford said Ms. Weaver could not attend the meeting so the meeting was aborted.

In early May, 1978, the date not having been precisely fixed, except that it was after May 2 and before May 10, 1978, Dr. Tessmer, Chief of Pathology and Chief of Laboratory Service, called Mrs. Graves to his office to investigate the letter Mr. Baty had written his Congressman complaining about his treatment by Mrs. Sehon on April 1st. Mrs. Graves asked Mrs. Jewell B. Williams, President of Local 2190, to accompany her. Mr. Rogers was also present. Dr. Tessmer accused Mrs. Graves of instigating the writing of the letter, which allegation Mrs. Graves denied. Mrs. Graves told Dr. Tessmer what had occurred and Mrs. Graves testified that Dr. Tessmer stated, ". . . there would be a policy issued about visitors coming into the laboratory and that the people in the lab would not be allowed to have any more visitors in their department and the employees would have me to thank for that." Although Dr. Tessmer did not testify, Mr. Rogers stated that "in view of what had happened in this particular incident with Mrs. Graves, that we should have something in writing. . . to maybe stop this sort of thing in the future -- to keep unauthorized personnel from the lab." Mrs. Graves' testimony as to Dr. Tessmer's statement at the meeting was fully corroborated by the testimony of Mrs. Williams and by direct inference by the testimony of Mr. Rogers and, accordingly, I fully credit her testimony concerning Dr. Tessmer's statement.

3. Restrictions on Mrs. Graves' Activities.

Mrs. Graves testified that in April, after she had been elected Vice President of the Union, Mrs. Sehon had told her not to talk to fellow employees in the corridor; told her that she had noticed for sometime, and it was worse lately, that Mrs. Graves was too friendly with everyone and spoke

to everyone and that she was going to put a stop to it; that she (Mrs. Graves) was not to talk to fellow workers in the laboratory and when Mrs. Graves, Ms. Weatherby and Ms. Klien were talking while counting tests performed for a report had told Mrs. Graves to be quiet that her conversation was distributing her (Mrs. Sehon). Mrs. Graves further testified that Mrs. Sehon told her that anytime she stepped out of the Chemistry Department, whether to get a drink of water or to go to the restroom, she should tell her (Mrs. Sehon) where she was going and how long she expected to be gone.

About the middle of April (Ms. Weaver stated about a week after the aborted meeting, Mrs. Graves had requested about the Baty matter) a meeting with Mr. Rogers and Mrs. Sehon, requested by Mrs. Graves, was held and Ms. Weaver was present with Mrs. Graves. Mrs. Graves brought up the various restrictions imposed by Mrs. Sehon, including going to the restroom. Ms. Weaver testified that at that point Mr. Rogers said, ". . . don't you think that's a little too much, Georgia [Mrs. Sehon], and she said well, no, because a supervisor has the right to know where her employees are at all times and he said well, I'd hate for this to be -- go into effect because it might become a laboratory policy and then, I would have to ask Dr. Tessmer everytime I needed to go to the bathroom." But, Ms. Weaver stated, Mrs. Sehon ". . . would not draw back on that."

Mrs. Sehon denied that she ever instructed Mrs. Graves to report to her prior to or upon return from the restroom. Mr. Rogers admitted that the restroom matter was discussed but insisted that, ". . . here again we were trying to have people conform to, I guess, an unwritten policy in the lab . . . which we feel like is a common courtesy, if you are going to be out of the lab, that somebody should know where you are." Mr. Rogers said that Mrs. Graves asked whether this meant she could not even go to the bathroom and ". . . we said, no. But this was where the context of these words came from." Mr. Rogers testified that Mrs. Graves was told simply ". . . if you are going to be away from the lab, tell somebody where you are going to be - this was all." Mrs. Sehon testified that part of the problem with Mrs. Graves had been that she had had reports that Mrs. Graves had been causing problems in other sections, possibly interferring with other work in other sections, although she stated that she did not know what section or the names of the persons that reported it to her.

The clearest statement as to what Mr. Rogers and Mrs. Sehon actually said is Mrs. Graves' statement, which I fully credit, that

> "They told me that I spent too much time discussing Union activities in the hall." (Tr. 63)

However, I do not credit Mrs. Graves' statement that she did not discuss union activities in the hall for the simple reason that she admitted that ". . . well, if someone says, you know, I need to talk to you about so and so I say OK, you need to clear it with your supervisor and mine. But I don't consider that discussing the whole thing."

Mrs. Graves readily admitted that the procedure in the laboratory had always been that if you left the laboratory you told your supervisor; that if you were going across the hall for a drink of water, you didn't say anything; and if you were going to the restroom, you would say "I'll be back in a second, you didn't have to announce to everyone I'm going to the bathroom." Ms. Weaver testified that she was not subjected to any similar restrictions; that she regularly receives telephone calls; that, as a courtesy to the people she works with in the laboratory, when she leaves the laboratory service she advises her supervisor, Mr. Rogers; that if she were leaving on union business she would leave a note for Mr. Rogers but she never had to give him the length of time she would be gone; and if she were going to the restroom, she simply told someone that she would be back in a minute.

Conclusions

Mrs. Sehon's initial refusal on May 2, 1978, to release three employees to attend an arbitration hearing on their personal grievances was improvident; however, she immediately checked with her immediate superior, was told that the three employees could attend the arbitration hearing, and she promptly advised the employees that they could attend the hearing and each did so. Consequently, without deciding whether there was, or was not, a violation of Section 19(a)(1), if there were a "technical violation", it was rendered moot by reversal of position whereby all three employees were released prior to the scheduled hearing, to attend the arbitration hearing. Moreover, the effect of such momentary denial of permission had such a de minimus effect that a finding that the activity violated the Order is not warranted. Cf. Vandenberg Air Force Base, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, FLRC No. 74A-77, 3 FLRC 491 (1975), A/SLMR No. 554, 5 A/SLMR 574 (1975).

Respondent's refusal, on March 28, 1978, to permit Mrs. Graves to attend a pre-negotiation meeting as a duly appointed member of Local 2109's negotiating committee, clearly appears to have been a deliberate ploy to compel Local 2109 to retain a National Representative of AFGE on its negotiating committee. The parties had "bargained" to impasse on Respondent's demand that the Union designate its Chief negotiator and Respondent had sought to characterize Ms. Griffin, an AFGE National Representative, who had attended the pre-negotiation meetings before March 28, 1978, as the Chief negotiator. With full knowledge of Mrs. Graves' appointment, Mr. Blankenship had stated that Mrs. Graves was "not going to be on that committee". This was stated in the presence of Mr. Robinson, Chief of Personnel, and with his implicit approval. Not until the Hospital Director intervened and directly asked Mr. Robinson if Mrs. Graves were supposed to be at the meeting did Mr. Robinson reluctantly admit that she was, whereupon the Hospital Director, obviously annoyed, said, in effect, well, get her there. Although Mrs. Graves was merely the victim of Respondent's ploy, as she had been duly appointed to the Union's negotiating committee, Respondent's action interfered with, restrained, and coerced her in the exercise of rights assured by the Order which include the right to act for Local 2109 as a representative of Local 2109. Cf. Internal Revenue Service, Omaha District Office, A/SLMR No. 417, 4 A/SLMR 493 (1974). Any effort by an agency to interfer with the right of an employee to serve as a duly designated representative of an exclusive representative is so serious a violation of the purpose and intent of the Order that I do not deem Vandenberg, supra, applicable. That is, Respondent's conduct was not rendered moot by its subsequent reversal of position and its allowance of Mrs. Graves to attend the meeting as a member of Union's negotiating team, nor can Respondent's conduct, under the circumstances, be considered to have had a de minimus effect.

Dr. Tessmer's meeting in May, 1978, obviously, was the result of Mr. Baty's letter to his Congressman. It is equally obvious that Dr. Tessmer believed that Mrs. Graves had instigated the letter and that he announced that the employees could thank Mrs. Graves for the new policy (Comp. Exh. 1) prohibiting visitors in the laboratory; but did this constitute a violation of Section 19(a)(1)? Mrs. Graves denied that she instigated the writing of the letter, indeed, denied any knowledge that any such letter had been written until she learned that a copy had been received by Respondent. At the time that Dr. Tessmer stated that the employees could thank Mrs. Graves for the new policy, Mrs. Graves was a union official; however, there is nothing in the record that suggests that Dr. Tessmer directed his comments to Mrs. Graves because she was a union officer. Nor does the record

contain any evidence that this was part of any general plan or design to discredit Mrs. Graves because of her Union membership or activity. Accordingly, I do not find that Dr. Tessmer's statement violated Section 19(a)(1) of the Order.

Respondent concedes that Mrs. Graves was told that when she left the laboratory she must "tell somebody where you are going to be" and I have further found that Mrs. Graves was told that she spent too much time discussing union activities in the hall. Use of official, or duty, time for the conduct of union business is not an inherent matter of right under the Order. Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485, 5 A/SLMR 112 (1975), FLRC No. 75A-25, 4 FLRC 586 (1976), A/SLMR No. 767, 6 A/SLMR 702 (1976) (Supplemental Decision); Puget Sound Naval Shipyard, Department of the Navy, Brementon, Washington, A/SLMR No. 768, 6 A/SLMR 709 (1976). As Mrs. Graves' union duties, first as a member of the Union's Safety Committee and later, on and after April 1st, as Vice President, increased, demands upon her time for union activities obviously increased. Indeed, Mrs. Graves readily admitted that employees stopped her in the corridors when they wanted to meet with her and accepting her testimony that she told them to clear it with their supervisor and hers, it is clear that union activities made inroads on her time. As in Vandenberg (No. 484), supra, an agency may monitor time spent on union activities and Respondent's insistance that Mrs. Graves advise her supervisor when she was leaving the laboratory was consistent with long established practice; but, Mrs. Sehon's instructions to Mrs. Graves went much further. Thus, Mrs. Sehon instructed Mrs. Graves to report when she was going to the restroom and how long she expected to be gone, a requirement imposed on no other employee; and instructed her not to speak to employees in the hall because she spent too much time discussing union activities. By contrast, Ms. Weaver, Chief Steward, testified that no similar restrictions were place on her; that she regularly received telephone calls about union matters; and that the only requirement imposed on her when she left the laboratory on union business was that she advise Mr. Rogers, generally by leaving a written note, where she was going. As Mrs. Sehon imposed restrictions on Mrs. Graves wholly unrelated to union activity, which restrictions were imposed on no other employee, as well as restrictions on Mrs. Graves which, to some extent, did relate to employee contacts about union matters, and which, to some extent, did not relate to union activities, which restrictions were imposed on no other

employee, including other union officers, I conclude that the restrictions placed on Mrs. Graves because of her union activities violated Section 19(a)(1) of the Order. Complainant has not questioned the propriety of reporting, when leaving the laboratory, where she was going. Indeed, the record shows that Complainant accepted without question the requirement that she obtain permission to leave the laboratory on union business; but to extend these requirements to Mrs. Graves' going to the restroom, when no such restriction was placed on any other employee, because she was a union officer, was improper. In the same manner, to restrict Mrs. Graves from all conversation in the halls, because she was a union officer, a restriction not placed on any other employee, was also improper. Moreover, the total restriction on employee contact by Mrs. Graves also interfered with, restrained, or coerced Mrs. Graves in the exercise of rights assured by the Order.

Having found that the Respondent has engaged in conduct which violated Section 19(a)(1) of the Order, I shall recommend that the Authority adopt the following order designed to effectuate the policies of Executive Order 11491, as amended.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, 29 C.F.R. Section 203.26(b), and Section 2400.2 of the transition rules and regulations (5 C.F.R. Section 2400.2, Fed. Reg., Vol. 44, No. 1, January 2, 1979, Vol. 44, No. 147, July 30, 1979), the Authority hereby orders that the Veterans Administration, VA Center, Laboratory Section, Temple, Texas, shall:

1. Cease and desist from:

a) Interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Executive Order by, inter alia, refusing to permit Mrs. Valerie E. Graves to attend negotiating meetings as a duly appointed member of the union's negotiating team; by instructing Mrs. Valerie E. Graves not to speak to persons in the corridors; or by imposing on Mrs. Valerie E. Graves any restriction on her personal activity not uniformly required of all employees.

b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Order:

a) Post at its facilities in Temple, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Hospital Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Hospial Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

b) Pursuant to 29 C.F.R. Section 203.27 and Section 2400.2 of the transition rules and regulations, notify the Authority in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: 26 AUG 1979
Washington, D.C.

APPENDIX

N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended, by, inter alia, refusing to permit Mrs. Valerie E. Graves to attend negotiating meetings as a duly appointed member of the Union's negotiating team; by instructing Mrs. Valerie E. Graves not to speak to persons in the corridors; or by imposing on Mrs. Valerie E. Graves any restriction on her personal activity not uniformly required of all employees.

WE WILL NOT in any like or related manner interfer with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

_____

Activity

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provision, they may communicate directly with the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, whose address is: Room 450, Downtown Post Office Station, P.O. Box 2640, Dallas, TX 75221.

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, NW.
Washington, D.C. 20036

Case No. 63-8479(CA)

SERVICE SHEET

Today, August 28, 1979, copies of a RECOMMENDED DECISION AND ORDER were sent to the following:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Pete Evans
National Representative
American Federation of Government
Employees
203 Timothy Trail
Duncanville, TX 75137
#612672

Herb Standeven, Esquire
Assistant District Counsel
Veterans Administration
1400 North Valley Mills Drive
Waxo, Texas 76710
#612673

Mr. Kenneth T. Blaylock, President
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005
#612674

REGULAR MAIL

Assistant Director, LMR
U.S. Office of Personnel Management
1900 E Street, NW.
Washington, D.C. 20415

FLRA
1900 E Street, NW.
Washington, DC 20424

1 cy. ea. Regional Director

Melva J. Marshall

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Directorate of Supply Operations,
Defense Logistics Agency,
Headquarters, Defense Logistics Agency

Respondent

and

Assistant Secretary
Case No. 22-08768(CA)

Louis J. Derdevanis

Complainant

DECISION AND ORDER

On August 3, 1979, Administrative Law Judge Eli Nash, Jr., issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint, recommending that it cease and desist therefrom, and recommending that certain other alleged unfair labor practices be dismissed. The Respondent did not file exceptions to the Administrative Law Judge's Recommended Decision and Order. 1/

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of

1/ The Complainant filed untimely exceptions which were not considered. Accordingly, the Respondent's request to file an answering brief was denied.

the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, the Authority hereby adopts the Administrative Law Judge's findings, conclusion and recommendations as modified below.

Regarding the Complainant's non-selection to the position advertised in Job Opportunity Announcement (JOA) 161, the Administrative Law Judge found it was obvious from the record that the Complainant's supervisor at least subjectively considered the Complainant's union background when evaluating the whole individual for the job. He further found the possibility exists that the Complainant might have been selected had he been rated for the job absent consideration of his union activities. However, the Administrative Law Judge concluded that no discrimination based on union considerations had been established as he was "unable to find that Complainant would have been selected but for his activities on behalf of the union. . . ."

Contrary to the Administrative Law Judge, the Authority finds that the Respondent violated section 19(a)(2), because discrimination based on union considerations played a part in its failure to select the Complainant for the JOA 161 position.

Section 1(a) of the Order guarantees to each employee of the Executive Branch of the Federal Government the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from such activity. Agency management's encouragement or discouragement of these rights by discrimination in regard to hiring, tenure, promotion, or other conditions of employment is violative of section 19(a)(2) and (1) of the Order. Specifically, to find a section 19(a)(2) violation, a Complainant must establish that management had discriminated in regard to terms and conditions of employment based on union considerations. 2/ Further, such a violation will be found where union considerations are shown to have played only a part in management's action.3/ Thus, if management's rating of the Complainant or its failure to select him for promotion was based in whole or in part on his union activity, a violation of section 19(a)(2) would be established. Therefore, in order to find a violation of section 19(a)(2) of the Order, it is not necessary to establish, in the circumstances of the case, but for management's consideration of his union activity it would have selected the Complainant. Rather, the Complainant

2/ U.S. Department of Housing and Urban Development, Milwaukee Area Office, Milwaukee, Wisconsin, 7 A/SLMR 948, 949, A/SLMR No. 925 (1977).

3/ Department of Health, Education and Welfare, Social Security Administation, Bureau of Hearings and Appeals, Region II, San Juan, Puerto Rico, 8 A/SLMR 1092, 1093, A/SLMR No. 1127 (1978).

must demonstrate only that he was discriminated against based on his union activity.

The Administrative Law Judge found that Holmes had considered the Complainant's union background when evaluating him for the job, and that the Complainant might have been selected if the ratings on his performance appraisal had been made absent consideration of his union activities. As these findings by the Administrative Law Judge are supported by the record, the Authority adopts them and concludes, therefore, that the Respondent violated section 19(a)(2) because discrimination based on union considerations played a part in its failure to select the Complainant for the JOA 161 position.

THE REMEDY

Although the Respondent has violated section 19(a)(2) of the Order, there is not a sufficient basis to order the discriminatee be retroactively promoted and awarded backpay as the record does not establish that "but for" consideration of the Complainant's union activity in the rating and selection process, the Complainant would have been selected. 4/

However, the Authority adopts the Administrative Law Judge's conclusion that the violation can properly be remedied only by requiring that the Complainant be rerated and that the selection process be rerun by another selecting official.

ORDER 5/

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management

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4/ The Federal Labor Relations Council noted that in order to make a valid award of backpay under The Back Pay Act of 1966, 5 U.S.C. section 5596, it is necessary not only to find that an employee has been adversely affected by agency management's improper action, but also that "but for" the improper action the employee would not have suffered a loss or reduction in pay, allowances, or differentials. Mare Island Naval Shipyard and Mare Island Navy Yard Metal Trades Council, AFL-CIO, 4 FLRC 143, 149, FLRC No. 74A-64 (1976). Compare U.S. Department of Housing and Urban Development, Milwaukee Area Office, Milwaukee, Wisconsin, 7 A/SLMR 948, A/SLMR No. 925 (1977) where the rank order of employees eligible for promotion was solely determinative of whether they were promoted.

5/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would have been reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

Relations Statute, the Authority hereby orders that the Directorate of Supply Operations, Defense Logistics Agency, Headquarters, Defense Logistics Agency, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing Louis J. Derdevanis in the exercise of his rights assured by Executive Order 11491, as amended, by threatening to downgrade his annual performance appraisal for assisting the American Federation of Government Employees, Local 2449.

(b) Discouraging Louis J. Derdevanis from membership in the American Federation of Government Employees, Local 2449, by discriminating against him in regard to evaluating his work performance and his fitness for promotion based on union considerations.

(c) In any like or related manner interfering with, restraining, or coercing Louis J. Derdevanis or any other employee in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the polices and provisions of the Order.

(a) Re-evaluate Louis J. Derdevanis' work performance for the periods covered by the June 1977 evaluation for Job Opportunity Announcement 161 and by the September 1977 annual performance appraisal, and ensure the re-evaluations are made free from any reference to union membership or activity.

(b) Take all steps necessary to ensure that the new official re-evaluating Louis J. Derdevanis' work performance pursuant to paragraph 2(a) of this order is made aware of the requirement that considerations of union membership or activity may not properly enter into an evaluation of an employee's work performance.

(c) Rerun the selection process for filling the position that was advertised by Job Opportunity Announcement 161, for the purpose of reappraising the five candidates on the original best qualified list, including Louis J. Derdevanis, in an atmosphere free of any reference to, or consideration of, union membership or activity. The reappraisal will consider the re-evaluation of Louis J. Derdevanis' work performance for the period covered by the June 1977 evaluation for Job Opportunity Announcement 161 mandated by paragraph 2(a) of this order.

(d) Take all steps necessary to ensure that the new selecting official rerunning the selection process pursuant to paragraph 2(c) of this order is

made aware of the requirement that considerations of union membership or activity may not properly enter into an appraisal of an employee's fitness for promotion.

(e) Post at its facility at the Directorate of Supply Operations, Defense Logistics Agency, Headquarters, Cameron Station, Virginia, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Defense Logistics Agency and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(f) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges violations of section 19(a)(2) with respect to non-selections prior to Job Opportunity Announcement 161, be, and it hereby is, dismissed.

Issued, Washington, D.C., March 21, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We Hereby Notify Our Employees That:

WE WILL NOT interfere with, restrain, or coerce employee Louis J. Derdevanis in the exercise of his rights assured by Executive Order 11491, as amended, by threatening to downgrade his annual performance appraisal for assisting the American Federation of Government Employees, Local 2449.

WE WILL NOT discourage employee Louis J. Derdevanis from membership in the American Federation of Government Employees, Local 2449, by discriminating against him in regard to evaluating his work performance and his fitness for promotion based on union considerations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employee Louis J. Derdevanis or any other employee in the exercise of rights assured by Executive Order 11491, as amended.

WE WILL re-evaluate employee Louis J. Derdevanis' work performance for the period covered by the June 1977 evaluation for Job Opportunity Announcement 161 and for the period covered by the September 1977 annual performance appraisal, and will ensure the re-evaluations are made free from any reference to union membership or activity.

WE WILL take all steps necessary to ensure that the new official re-evaluating employee Louis J. Derdevanis' work performance is made aware of the requirement that considerations of union membership or activity may not properly enter into an evaluation of an employee's work performance.

WE WILL rerun the selection process for filling the position that was advertised by Job Opportunity Announcement 161 in 1977, for the purpose of reappraising the five candidates on the original best qualified list, including employee Louis J. Derdevanis, in an atmosphere free of any reference to or consideration of union membership or activity. The reappraisal will consider the re-evaluation of employee Louis J. Derdevanis' work performance for the period covered by the June 1977 evaluation for Job Opportunity Announcement 161 as mandated above.

WE WILL take all steps necessary to ensure that the new selecting official rerunning the selection process is made aware of the requirement that considerations of union membership or activity may not properly enter into an appraisal of an employee's fitness for promotion.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority whose address is: 1730 K Street, NW, Room 401, Washington, D.C., and whose telephone number is: (202) 653-7213.

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of

DIRECTORATE OF SUPPLY OPERATIONS, DEFENSE LOGISTICS AGENCY, HEADQUARTERS, DEFENSE LOGISTICS AGENCY
Respondent

and

LOUIS J. DERDEVANIS
Complainant

Case No. 22-08768(CA)

EDWARD H. PASSMAN, Esq.
Passman and Price
1730 Rhode Island Avenue, NW., Suite 210
Washington, D.C. 20036
For the Complainant

ESSIE A. SCHLOSS, Esq.
Office of Counsel, Headquarters,
Defense Logistics Agency,
Cameron Station
Alexandria, Virginia 22314
For the Respondent

Before: ELI NASH, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to an amended complaint first filed on September 9, 1977, under Executive Order 11491, as amended, by Louis J. Derdevanis, an individual (hereafter referred to as Complainant), against Directorate of Supply Operations, Defense Logistics Headquarters (hereinafter referred to as Respondent), a Notice of Hearing was issued by the Regional Administrator, Philadelphia, Pennsylvania on July 27, 1978. Although this proceeding was conducted before the Assistant Secretary of Labor for Labor-Management Relations, this

decision is issued in the name of the Federal Labor Relations Authority pursuant to transition rules and regulations, Federal Register, Vol. 44, No. 1, January 2, 1979 (5 C.F.R. §2400.2).

The complaint alleges, in substance, that Respondent violated Section 19(a)(1) and (2) of the Executive Order by failing to promote Complainant to a GS-14 position (JOA 161) because of his union activities in order to discourage his membership in a labor organization. In addition, the complaint alleges that on or about September 22, 1977, Respondent through its agent or representative David L.H. Holmes threatened to give Complainant a lower Performance Element Appraisal and Rating because of his union activities and as a reprisal for the filing of an unfair labor practice charge on his behalf by American Federation of Government Employees, Local 2449.

Hearings were held in this matter on October 17, 1978 and December 14, 1978, in Washington, D.C. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and enter evidence related to the issues herein.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

Background

The Complainant was first hired by Respondent's predecessor agency, Defense Supply Agency in December 1961. He served with the Defense General Supply Center, Richmond, Virginia until September 1968. At that time he went to work in Respondent's Supply Management Division as a GS-13 Inventory Management Specialist. He was reassigned to his present job in Respondent's Requirement Branch in 1971.

According to Complainant, he first joined the union around September 1968. He participated in 1969 in establishing the election for exclusive recognition by AFGE Local 2449 for Respondent's headquarters and field activities and served in various union offices from 1969 until elected Local President in November 1973. Complainant served as Local Union President until his resignation in March 1977.

While serving as a union official Complainant was passed over for promotions on several occasions and on other occasions the position for which he applied was downgraded. Complainant testified that he was advised on various occasions by several high-ranking management officials, including Mr. George Brennan, formerly agency Staff Director of Civilian Personnel, Colonel Leonce E. Gaiter, former Chief, Transportation Division, and Herbert Sauter, Chief Defense Documentation Center to resign as union president to improve his chances for promotion. About May, 1976, Complainant discussed his failure to be promoted specifically because of his involvement as a union official with Colonel John J. McAleer, Jr., Chief, DLA Administrative Support Center, the agency's principal contact on labor-management relations matters who suggested that Complainant speak to Major General John C. Raaen, Jr., the then Acting Deputy Director of the agency. 1/ During the conversation Complainant mentioned several reasons which he believed prevented his selection. Also, he gave General Raaen a list of the promotions which he had applied for since May 1974 but was not selected.

After discussing the matter with Lieutenant General Vaughn, then agency head and Mr. Brennan who stated that there was no recourse without a formal complaint, General Raaen and Colonel McAleer both informed Complainant that they were convinced he had been discriminated against, citing the statistical probabilities and his qualifications although admitting it was difficult to prove. Apparently no formal investigation of the complaint was undertaken at that time.

About two weeks later on a Thursday or Friday afternoon following Ash Wednesday in 1976, General Raaen indicated to Colonel McAleer that he had discussed Complainant's problem with the Civilian Personnel Director, Mr. George Brennan and that he was going to do something about it. Colonel McAleer conveyed the message to Complainant and told him to go home and have a good weekend, because "I think something is going to be done." 2/ In June 1976, General Raaen was assigned to another responsibility at the agency. Subsequently, in September 1976, Mr. Brennan retired from government service. With this in mind, Complainant again raised the question of

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1/ On other occasions it appears that Complainant attributed his failure to be promoted to age and religion as well as his union activities.

2/ These and other facts were characterized by Complainant as the "Derdevanis committment".

promotion with Colonel McAleer. Colonel McAleer then met with General Raaen and Mr. Brennan, with a view toward conveying to General Raaen's successor and to the Deputy Personnel Director what was going on in Complainant's case. At this meeting, Colonel McAleer was asked by General Raaen if Complainant would settle for retroactive promotion. The Colonel reported that Complainant would settle for a promotion period.

Sometime during August or September 1976, Colonel McAleer inquired whether Complainant would accept a promotion to GS-14 retroactive to his last bypass. He was informed that Complainant would accept a promotion without retroactivity which would be a good birthday present. In September, 1976, Mr. Brennan retired and Complainant was assured by him at his retirement ceremony that everything was being taken care of in regard to his promotion. In late November, 1976 when nothing had happened, Colonel McAleer suggested a meeting with General Vaughn, which took place on December 8, 1976 with Admiral Crosby, Deputy Director and Colonel McAleer present. Complainant left a letter and backup material with General Vaughn who later sent him a response dated April 8, 1977 claiming there had been no discrimination.

In December, 1976, Complainant discovered that Jack Chelemer, GS-14 Inventory Management Specialist, Requirements Branch who was on extended sick leave because of a back injury was going to retire. From January to March, 1977 Complainant assumed approximately 75% of Mr. Chelemer's work in addition to his own duties. Since he was preparing to compete for this position in his own branch, following the earlier advice of the management officials previously cited, Complainant resigned as Union President effective April 1, 1977.

A luncheon was held in Complainant's honor in May, 1977 at which time Complainant was presented with a silver plaque for his services to the labor organization. Later that same afternoon when looking for a place in his office to display the plaque, he was informed by his supervisor, Mr. Holmes, "The proper place for this plaque is the home, . . . and why don't you take it home and end this union business or something like that and once and for all . . . . take it with you". Earlier in May 1976, Mr. Holmes had told Complainant that he should "concern yourself more with work rather than with union affairs it would be to your advantage." Mr. Holmes told Complainant that he was always finding an excuse to be away from the office and away from his work.

Similarly, in December, 1976, Mr. Holmes had remarked that Complainant did not attend the Director's traditional New Year's reception because it was on his own time. Also, Mr. Holmes allegedly slammed his door shut on occasions when Complainant was called to the telephone on union business.

II. JOA 161.

In August 1977 Complainant applied for JOA 161, as an Inventory Management Specialist, GS-2010-14, the job he was filling for Mr. Chelemer. Complainant was placed on the best qualified list with a rating of 89.4. Complainant previously had received an evaluation from his supervisor specifically for JOA 161 in which he was rated "Superior" on all elements but received no "Clearly Outstanding" rating although other employees in the branch allegedly received some outstanding elements. He was also interviewed for the position by Mr. Holmes. Complainant was then notified by mail that he had not been selected for the position although ranked among the best qualified applicants.

At the time of the non-selection for JOA 161, Complainant had 28 years Federal service, the previous 9 years as a GS-13 Inventory Management Specialist. While Complainant received 64 out of a possible 65 points on experience, he received only 15.4 out of a possible 20 points on his appraisal because of the lack of Clearly Outstandings which resulted in a score of 89.4 compared to the selectee's 91.9. Complainant was the only employee of the Requirements Branch who was a candidate for the job. As already stated the selectee for the job had a higher rating than Complainant's 89.4 and Complainant was number four on the best qualified list.

Following the non-selection, Complainant requested a meeting with Mr. Holmes, the selecting official for JOA 161. In early, September, 1977, the two met and Mr. Holmes showed Complainant his annual Performance Element Appraisal and Rating for the period 8/31/76 to 8/31/77 which he had prepared for Complainant's signature. After reviewing the rating with which he did not agree, Complainant requested a full discussion of the rating and the non-selection which Mr. Holmes had deferred.

On September 22, 1977, a meeting was held in Mr. Holmes' office which lasted about two hours. Complainant asked specifically why he was not selected for that vacancy. Mr. Holmes' responded that he had not been selected because of the "weaknesses" in his performance. Complainant had never been advised or counseled of any such weaknesses, and in fact, the record shows had been complimented on several

occasions prior to this meeting for his performance and attitude in taking up the slack due to Mr. Chelemer's absence. Complainant asked for specifics of his weaknesses but Mr. Holmes did not or was unable to furnish any. Complainant then requested that he do so in writing when he thought of them.

Turning to the Annual Performance Appraisal and Rating where Complainant had received all Superior ratings except for numbers 19 and 20 which were marked "nonratable". When Complainant expressed concern about not receiving any "clearly outstandings" Mr. Holmes, according to Complainant, responded:

> "Well Lou, you know, if I were ranking you for your work that you have done for the union," he says, "I would give you outstanding in all elements; but because of your absence, you haven't been here to do the work for me," he says, "I can't rank you as I would for the union, because of your absences. You haven't been here to perform the work that you have recently."

Complainant protested, stating that his union work was in accordance with the Executive Order and he would make his remarks a matter of record. Mr. Holmes allegedly became upset and stated that if Complainant followed through with his intention to record his remark, he "might be inclined to down-grade some of the elements that I have given you a superior on -- rereview of your performance appraisal." Complainant told Mr. Holmes that he could do as he saw fit, but no matter, he would still make his statements a matter of record with the union. The meeting was adjourned and Complainant went to see the AFGE Local President, Costa E. Apostalakis, and proceeded to write down of the prior conversation.

Mr. Daniel R. Treadway, Assistant Chief, Supply Management Division since August 1975 testified that he had supervised Complainant from 1970 to 1975. Mr. Treadway also testified that he had been the selecting official on at least one occasion when Complainant was not selected. This non-selection occurred in the fall of 1975 and Complainant was not selected because several other people on the selection certificate had many more years of specific policy and procedural development of the stock control and distribution area than Complainant. Although stating that Complainant's union activities played no part in his not being selected Mr. Treadway earlier noted that Complainant spent a majority of his time on union business.

According to Mr. Treadway, Complainant's union activities were never discussed during selections, but he added, "it was generally well known that he was president of the union, and he spent a lot of time on it, and he was very good at it." Admittedly, Mr. Treadway discussed the amount of time Complainant was spending on union activities with his superiors.

Complainant's immediate supervisor and the selecting official for JOA 161 Mr. Holmes testified that Complainant was a satisfactory but not outstanding employee. He further confirmed that between January 1977 and the selection for JOA 161 Complainant performed about 75% of the work in the job for which he was not selected. Mr. Holmes also testified that he selected the best qualified of five candidate for JOA 161. According to Mr. Holmes, the selectee had a very intimate detailed knowledge of the requirements system, knew all of the procedure, and was quite familiar with the mathematics involved in developing some of the requirements forecasting products. By contrast, he felt that Complainant was not as knowledgeable in the detail mathematical formulations and that he felt there was a need for someone to be knowledgeable in the formulas within the branch. He acknowledged that Complainant at the time of the selection for JOA 161 was no longer active in the union and spending 100 percent of his time on the job. Finally, he testified that he complimented Complainant on his job performance after January 1977 on several occasions.

Positions of the Parties

The Complainant contends that but for his union activities he would have been selected for promotion in JOA 161. He contends further that the mere reference to union activities in his performance appraisal is violative of Section 19(a)(1). On the other hand, Respondent argues that while Complainant was passed over on many occasions, on each occasion someone with superior credentials and experience was selected. Respondent also contends that reference to Complainant's union activities in the September 22, 1977 discussion with Mr. Holmes was not violative of the Order.

Conclusions of Law

The only non-selection alleged as violative of the Order is the August 1977 non-selection for JOA 161. Although Complainant was not selected for approximately 9 postings and engaged many conversation with management regarding his concerns, these activities took place well before a complaint was filed in connection with the non selection involved in JOA 161. Accordingly, in reaching a decision herein,

consideration has been given to the prior non-selection and Complainant's contact with various management officials only for purposes of background in connection with the relevant events which occurred within the six month period preceding the pre-complaint charge. Veterans Administration, Veterans Administration Hospital, Muskogee, Oklahoma, A/SLMR No. 301.

The remarks by Mr. Holmes, at the September 22, 1977 meeting concerning downgrading of the Annual Performance Rating when viewed in context with earlier remarks about Complainant's involvement in union affairs is clearly coercive in nature and indicates that adherence to a union could render one unfit for outstanding evaluations. Complainant is credited regarding these remarks which could be viewed as implying that Complainant's past active role as a union president simply did not allow him to properly discharge his responsibilities as an employee and that he could not receive the coveted outstanding rating. The latter follow too closely on the heels of Holmes earlier comments to be disregarded. In this respect, it is noted that Complainant was, as union president, properly exercising rights guaranteed by the Order and such remarks interfered with, restrained and coerced him in the exercise of rights assured under the Order.

It is my conclusion, nevertheless, that Respondent did not violate Section 19(a)(2) of the Order by not selecting Complainant for JOA 161. The discriminatory basis for non-selection of Complainant prior to JOA 161 was pure speculation engaged in between Complainant and several high management officials including Colonel McAleer, General Raaen and Mr. Brennan. Complainant's relationship with these management official appears to have been fairly close and his perspective was of course influenced, by the conjecture of these officials that he was being passed over because of his union presidency. The testimony of Colonel McAleer and General Raaen confirm that they were engaged in sheer speculation as to Complainant plight. I note that General Vaughn who was apparently being pressed to act on Complainant's behalf by influential members of his staff found that no discrimination existed in the earlier non-selections of Complainant. These events prior to JOA 161 almost certainly influenced Complainant's feeling that all his difficulty was based on his union activities, however, there is no record support for this feeling.

Moving to JOA 161, it is clear on the record that Complainant was no longer a union officer at the time of selection. Although already performing the job he was

ranked only fourth on the "Best Qualified List". While it is obvious from the record that Mr. Holmes at least subjectively considered Complainant's union background when evaluating the whole individual for the job, I believe that his selection was not based on union considerations, but upon his criteria for selecting the best qualified individual for the job, which included having a mathematical background which Complainant did not have.

As I am unable to find that Complainant would have been selected but for his activities on behalf of the union, I must conclude that no discrimination based on union considerations has been established. On the other hand, the possibility exists that Complainant might have been selected, had he been rated for his job absent consideration of his union activities. It must be concluded, therefore, that Respondent's violation of 19(a)(1) can properly be remedied only by requiring that Complainant be rerated and that the selection process be rerun by a selecting official other than Mr. Holmes. Although Complainant has not in my view established that he was discriminatorily non-selected, it has been established that Respondent's violation of Section 19(a)(1) may have deprived Complainant of the opportunity to successfully compete for promotion. The consequences of such a reappraisal should, if favorable to Complainant, be prospective in effect.

Recommendations

Having found that Respondent has engaged in certain conduct which is violative of Section 19(a)(1) of the Order, I recommend that the Federal Labor Relations Authority adopt the following order designed to effectuate the purpose of Executive Order 11491, as amended. With regard to the allegation of a discriminatory failure to promote Louis D. Derdevanis on August 8, 1977, in violation of the Order, it is recommended that the complaint be dismissed.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b), and Section 2400.2 of the transition rules and regulations, 5 C.F.R. Section 2400.2, Fed. Reg., Vol. 44, No. 1, January 2, 1979 hereby orders that Directorate of Supply Operations, Defense Logistics Agency Headquarters, Cameron Station, Virginia shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing Mr. Louis D. Derdevanis, or any other employee, in the exercise of their rights assured by Executive Order 11491, as amended, to join and assist a labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended.

(a) Post at its facility at the Directorate of Supply Operations, Defense Logistics Agency Headquarters, Cameron Station, Virginia, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an appropriate management official and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Said official shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Cause a new posting of JOA 161 to be convened, for the purpose of reappraising the five candidates in an atmosphere free of any reference to Union membership or activities.

(c) Take steps to ensure that all selecting officials are made aware of the requirement that considerations of Union membership and activity may not properly enter their deliberations and are not a proper subject of discussion in any interviews or may not enter into consideration in promotion selections.

(d) Pursuant to Section 203.26 of the Regulations and Section 2400.2 of the transition rules and regulations notify the Federal Labor Relations Authority, in writing, within 20 days from the date of this Order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges violations of Section 19(a)(2) be, and it hereby is, dismissed.

ELI NASH, JR.
Administrative Law Judge

Dated: 3 AUG 1979
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

We hereby notify our employees that:

WE WILL NOT interrogate our employees as to their membership and/or activities in the American Federation of Government Employees, Local 2449 or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL take appropriate steps to reappraise Mr. Louis J. Derdevanis and all other candidates for the position of Inventory Management Specialist and will ensure that matters relating to membership or nonmembership in AFGE Local 1224 will not arise either in employee appraisals or in the interviews.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for Federal Labor Relations Authority, whose address is: 1111 20th Street, N.W, Room 416, Washington, D.C. 20036.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

March 14, 1980

Mr. Laurence R. Ah Nee, Sr.
President, Local 556
Service Employees' International
Union, AFL-CIO
666 Kohou Street, Room 201
Honolulu, Hawaii 96817

Re: Service Employees' International Union, AFL-CIO, Local 556 and Navy Exchange, Pearl, United States Naval Base, Pearl Harbor, Hawaii, Case No. 0-NG-187

Dear Mr. Ah Nee:

This refers to your petition for review in the above-entitled case.

The record in this case indicates that during negotiations between the activity and the union, the activity alleged that a union proposal concerning reductions-in-force was inconsistent with a regulation issued by the Secretary of the Navy (agency) and, in effect, that the duty to bargain therefore did not extend to the proposal. Your petition on behalf of the union seeks a determination from the Authority, pursuant to section 7117(a)(2) of the Federal Service Labor-Management Relations Statute and section 2424.11 of the Authority's rules of procedure, as to whether a compelling need exists for the agency regulation in question. In its statement filed with the Authority in the case, the agency withdrew the allegation made by the activity. In your response to the agency's statement, however, you assert that the Authority "should issue a decision in all cases involving compelling need" and request "that a decision [on the compelling need question] be issued in the instant case despite the withdrawal of the [a]gency's allegation."

Since the agency has withdrawn the allegation concerning the union's proposal, there is no longer an issue as to whether the proposal in this case is within the parties' duty to bargain under the Statute. The dispute involved in the union's appeal therefore has been rendered moot. Further, your request that the Authority resolve any issue raised by the activity's initial allegation constitutes a request for an advisory opinion which is precluded by section 2429.10 of the Authority's rules.

Accordingly, your petition for review is hereby dismissed.

For the Authority.

Sincerely,

Samuel A. Chaitovitz
Executive Director

cc: E. F. Ormsbee
Navy

D. H. Green
DOD

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 2272

(Union)

and

Case No. 0-NG-101

DEPARTMENT OF JUSTICE, U.S. MARSHALS
SERVICE, DISTRICT OF COLUMBIA

(Activity)

DECISION ON NEGOTIABILITY APPEAL

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

The American Federation of Government Employees, AFL-CIO, Local 2272 (the union) is one of the local unions comprising the International Council of United States Marshals Service Locals, American Federation of Government Employees, AFL-CIO (the Council). In 1976, the Council negotiated with the U.S. Marshals Service (the agency), of which the activity is a component, a master agreement covering a unit of all eligible employees of the U.S. Marshals Service nationwide. The master agreement, which is still in effect on an extension basis, provides for negotiating local supplemental agreements "subject to the provisions of [the] National Agreement . . . ."

During the course of negotiations for a local supplemental agreement between the union and the activity, the union submitted five proposals to the activity concerning certain subjects contained in the master agreement. */ In response, the activity declared such proposals "nonnegotiable since they are all covered in the Negotiated Master Agreement." The American Federation of Government Employees, AFL-CIO (AFGE), on behalf of the union, then filed the instant negotiability appeal with the Authority. In its statement of position, the Department of Justice, on behalf of the activity, contends essentially that such proposals "would establish a policy or practice which would be inconsistent with, and therefore not authorized by, the terms of the controlling Master Agreement . . . ." In response, AFGE states, in part, that ". . . we do not believe our proposals are inconsistent with the master

*/ The union also submitted a sixth proposal involving, essentially, the distribution of door keys to deputy marshals. On January 7, 1980, such proposal was withdrawn from the issues in dispute and is therefore not before the Authority for consideration.

agreement, [and] therefore they are negotiable at the local level." For the reasons set forth below, the Authority concludes that the instant dispute is not properly before the Authority for resolution.

As indicated above, the parties are essentially in dispute concerning the threshold question as to whether the master agreement, negotiated at the national level, authorizes bargaining at the local level on certain matters contained therein. In American Federation of Government Employees, AFL-CIO, Local 1661 and Department of Justice, Bureau of Prisons, Federal Correctional Institution, Danbury, Connecticut, Case No. 0-NG-43, 2 FLRA No. 56 (Jan. 9, 1980), Report No. , the Authority decided, with respect to a question substantially identical to that presented here, that the proper forum in which to resolve disputes over the meaning of provisions contained in the master agreement would be that which the parties themselves have adopted for such purpose. For the reasons fully set forth in that decision, the Authority finds that the instant petition is not appropriate for resolution under the procedures set forth in section 7117 of the Statute and Part 2424 of the Authority's Rules and Regulations.

Accordingly, and apart from other considerations, the union's appeal is hereby denied, without prejudice to the renewal of its contention that the matters in dispute are negotiable under the Statute in a petition duly filed with the Authority after it is resolved, under applicable procedures, that bargaining on such matters is not precluded by the controlling agreement.

Issued, Washington, D.C., March 14, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

March 14, 1980

Mr. Donald M. Haines
Labor Relations Specialist
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005

Re: AFGE, AFL-CIO, Local 3488
and Federal Deposit Ins.
Corp., New York Reg. Office
Case No. O-NG-192

Dear Mr. Haines:

This refers to your October 25, 1979 petition for review of the activity's allegation of nonnegotiability in the above-captioned case; and to your December 7, 1979 request for waiver of an expired time limit.

In your petition of October 25, 1979, you state that the subject allegation dated October 5, 1979, was served upon your union on October 11, 1979. Therefore, under section 7117(c)(2)(A) of the Federal Service Labor-Management Relations Statute and section 2424.3 of the Authority's rules of procedure, any petition for review of that allegation was due in the office of the Authority no later than the close of business on October 26, 1979. Your petition was filed on October 29, 1979.

As to your December 7, 1979 waiver request, section 2429.23(b) of the Authority's rules provides that an expired time limit in a case such as the instant one may waived in "extraordinary circumstances." The reason you cite in your request is that your petition was inadvertently sent by mail instead of being hand delivered on October 25, 1979, and as a result, the Authority did not receive the petition until October 29, 1979. In our opinion, such reason does not constitute an "extraordinary circumstance" within the meaning of section 2429.23(b) of the rules.

Accordingly, your request for a waiver must be denied.

Moreover, as to your petition for review, since the petition was untimely filed, and apart from other considerations, it is hereby dismissed.

For the Authority.

Sincerely,

Samuel A. Chaitovitz
Executive Director

cc: J.S. Arnold
FDIC

2 FLRA No. 115

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

March 14, 1980

Mr. Ronald D. King
Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: American Federation of Government Employees, AFL-CIO, Local 2840 and Blytheville Air Force Base, Arkansas, Case No. O-NG-221

Dear Mr. King:

This refers to the union's petition for review and the agency's statement of position in the above-entitled case.

The agency's statement of position filed pursuant to section 7117(c)(3) (92 Stat. 1206 (1978)) of the Statute and section 2424.6 of the Authority's regulations in effect withdrew the agency allegation that the matters in dispute are not within the duty to bargain. The dispute involved in the union's appeal was thereby rendered moot.

Accordingly, the appeal is dismissed.

For the Authority.

Sincerely,

Samuel A. Chaitovitz
Executive Director

cc: D. Dresser
Air Force

2 FLRA No. 116

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,
LOCAL 2118

Union

and

Case No. 0-NG-153

DEPARTMENT OF ENERGY, ALBUQUERQUE
OPERATIONS, LOS ALAMOS AREA OFFICE

Activity

DECISION ON NEGOTIABILITY APPEAL

This matter is before the Authority as the result of a petition for review of a negotiability issue filed by the union under section 7117(c) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7117(c)). By letter dated January 17, 1980, the Department of Energy in effect moved to dismiss the union's petition, asserting, among other grounds, that the agency subdivision here involved was excluded from coverage of the Statute under section 1-210 of Executive Order No. 12171, November 19, 1979 (44 Fed. Reg. 66565),1/ and that the Authority is therefore without jurisdiction in this matter.2/

As appears from the union's petition, the activity involved in the present proceeding is the same as that which was before the Federal Service Impasses Panel in Department of Energy, Los Alamos Area Office, Los Alamos, New Mexico and Local 2118, Security Inspectors' Unit, AFGE, 79 FSIP 45. The record in the Panel case, of which the Authority takes official notice, indicates that the activity is part of the Albuquerque Operations Office which reports directly to the Assistant Secretary for Defense Programs. The President, as already mentioned (note 1, supra), specifically excluded the Offices of the Assistant Secretary for Defense Programs from coverage of the Statute under Executive Order No. 12171.

1/ Executive Order No. 12171, issued by the President pursuant to the authority contained in 5 U.S.C. §7103(b), excludes certain agencies and agency subdivisions from coverage under the Federal Service Labor-Management Relations Statute on the basis that they have been determined to have as a primary function intelligence, counterintelligence, investigative, or national security work and that the Statute cannot be applied to them consistent with national security requirements. Section 1-210 of this Executive Order excludes the Offices of the Assistant Secretary for Defense Programs, Department of Energy.

2/ Insofar as the agency's letter raises additional issues, those issues have not been considered and they will not be addressed in this decision.

In view of the exclusion of the activity from coverage of the Statute, the Authority finds that it is without jurisdiction in the present case, and that the union's petition must therefore be dismissed.3/ Accordingly, the agency's motion to dismiss is granted.

Issued, Washington, D.C., March 21, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ The Panel, in Case No. 79 FSIP 45, likewise declined to assert jurisdiction in the matter there involved because Executive Order No. 12171 had excluded the activity from coverage of the Statute.

2 FLRA No. 119

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

OKLAHOMA CITY AIR LOGISTICS CENTER,
TINKER AIR FORCE BASE, OKLAHOMA

Activity

and

FLRC No. 78A-188

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 916, AFL-CIO

Union

DECISION

This matter is before the Authority on the agency's petition for review of the award of Arbitrator Preston J. Moore filed with the Federal Labor Relations Council.1/

According to the arbitrator, the grievance in this case arose when the activity terminated the payment of an environmental differential to its egress mechanics, who are wage system employees, and to its egress inspectors, who are general schedule employees. The union filed a grievance that was ultimately submitted to arbitration.

The arbitrator determined that prior to the activity's action, both the mechanics and the inspectors were being paid differential pay. He also determined that no procedures or safety devices had been established which had "practically eliminated" the potential for hazard and which would thereby preclude payment of a differential. He found that there was "ever present" a potential for personal injury and loss of life. The arbitrator therefore found that both the mechanics and the inspectors were entitled to a 4 percent environmental pay differential. In this respect the arbitrator rejected the activity's contention that a finding entitling the inspectors, who are general schedule employees, to a differential required payment to them of a 25 percent hazard pay differential.

1/ The functions of the Federal Labor Relations Council, in matters such as here involved, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 Fed. Reg. 36040), which transfer of functions is implemented by section 2400.5 of the Authority's transition rules and regulations (44 Fed. Reg. 44741). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7135(b)).

As previously stated, the agency had filed a petition for review of the arbitrator's award with the Federal Labor Relations Council. On December 31, 1978, this case was pending before the Council. In accordance with section 2400.5 of the transition rules and regulations of the Authority (44 Fed. Reg. 44741) and section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215), the rules of procedure of the Federal Labor Relations Council, 5 C.F.R. part 2411 (1978), remain operative with respect to this case except that the word "Authority" is substituted, as appropriate, wherever the word "Council" appears in such rules.

Under section 2411.32 of these rules as so amended, the Authority accepted the agency's petition for review insofar as it related to the agency's exception that the award violates the Federal Personnel Manual. The agency's request for a stay of the award was also granted. Since the Civil Service Commission was responsible for prescribing regulations concerning the matters in this case and since under section 902(b) the Civil Service Reform Act of 1978 (92 Stat. 1224) this appeal must be resolved as if the Civil Service Reform Act had not been enacted, the Authority requested from the Office of Personnel Management (OPM) (the successor agency to the Civil Service Commission with respect to these matters) an interpretation of relevant civil service regulations as they pertain to the arbitrator's award.

The Office of Personnel Management replied in relevant part as follows:

> In this case, the union alleged before the arbitrator that Wage Grade Egress Mechanics are entitled to environmental differential pay as prescribed in the Federal Personnel Manual, for work performed on egress systems in the A-7, F-105 and B-52 aircraft and, similarly, that General Schedule Egress Inspectors are entitled to hazard duty pay, also prescribed in the same type of aircraft. The agency contended, among other things, that protective devices and/or safety measures have "practically eliminated" the potential for hazard, thereby precluding the payment of a differential. The arbitrator, in finding for the union, noted that prior to December 5, 1977, the mechanics and inspectors both were paid a differential for their exposure to a hazard (the Air Force states that only the mechanics received a differential prior to 1977) and that, "no procedures or safety devices have been established which have practically eliminated potential for personal injury and/or loss of life." Consequently he found that the "mechanics and inspectors are entitled to a four percent environmental differential pay." We have been asked whether the arbitrator's award violates applicable regulations and the Federal Personnel Manual only insofar as it pertains to the General Schedule Egress Inspectors.
>
> Initially it should be noted that a distinction exists between "hazard pay" for General Schedule employees and "environmental pay" for Federal Wage System employees. There are two separate and distinct sections of the Federal Personnel Manual which control: FPM Supplement 532-1 for Federal Wage System employees and FPM Supplement 990-2 for General Schedule employees.

There is no clear evidence in the award as to whether the arbitrator made a factual distinction in his own mind that the mechanics and inspectors were entitled to the "environmental pay" pursuant to these respective sections of the FPM or whether he awarded the entitlements relying exclusively on FPM Supplement 532-1. Nonetheless, the arbitrator did find that both the egress mechanics and egress inspectors are exposed to a hazard in the performance of their respective duties; that no procedures or safety devices have been established which have "practically eliminated" the hazard; that the exposure to this hazard warrants the payment of a differential; and, finally, that the differential should be four percent for both the egress mechanics and the egress inspectors.

There are important differences to be taken into account in the awarding of "hazard pay" pursuant to FPM Supplement 990-2 and the awarding of "environmental pay" pursuant to FPM Supplement 532-1. Specifically, the authorizations cited in the respective appendices (Appendix J to FPM Supplement 532-1 and Appendices A and E to FPM Supplement 990-2, Book 550) are not the same and the amount of the differentials are different in each instance.

Under the circumstances of the case before us we must examine the appropriateness of the arbitrator's award of "hazard pay" to the General Schedule inspectors in relation to Title 5, United States Code and the provisions of FPM 990-2, Book 550, Subchapter S9 - Pay for Irregular or Intermittent Duty Involving Physical Hardship or Hazard.

There are three statutory requirements which must be met before a differential can be authorized for a General Schedule employee:

(1) The hazard or physical hardship must be unusual, as set forth in Appendix A and explained in Appendix E of FPM Supplement 990-2, Book 550;

(2) It must be an irregular or intermittent duty; and

(3) The hazard or physical hardship must not have been considered in the classification of the position.

In regard to the first requirement, the egress inspection work must be examined against the established criterion in Appendix A and the explanatory material in Appendix E for "Work with or in close proximity to explosive or incendiary material which is unstable and highly sensitive." In evaluating the appropriateness of the application of this approved hazard category to the egress inspection work, it is important to consider two separate, but related, points. The first concerns the actual physical properties of the explosive and, specifically, is the explosive unstable and highly sensitive. Secondly, does the work subject the material to those circumstances which are likely to produce an explosion. If it can be determined that the explosives contained in the egress system are unstable and highly sensitive and/or the work performed with the explosive (even if normally stable and non-sensitive) alters the explosive to such an

extent that it becomes unstable and highly sensitive, then the work meets the unusually hazardous description of our regulations. Although the case file shows that the arbitrator determined that the egress inspection work was hazardous, it is not clear whether or not the unusually hazardous criteria established in FPM Supplement 990-2, Book 550, Appendices A and E were applied in arriving at this decision.

In regard to the second requirement, there is no indication within the case file to reflect if this requirement of the law and our regulations was examined in the arbitrator's review. The file does state that 200-300 seats are armed and de-armed annually on the F-105 aircraft, but no mention is made of the number on the A-7 and B-52 aircraft. The frequency and duration of such assignments are essential to a determination regarding whether this requirement has been met.

The case file is also silent with respect to whether or not the hazard or physical hardship was considered in the classification of the position. This may be determined by the examination of copies of the employee's official position description, and position evaluation reports. It should be noted, however, that the consideration of these duties in the classification of the position may or may not affect the grade of the position depending upon the level of skills, knowledges and abilities needed to deal with the hazard in relation to the skills, knowledges and abilities required by the other duties of the position.

If all three of the above requirements are met, OPM regulations specify that the employee must be paid a 25 percent differential, not a portion thereof.

In summary, civil service law, regulation, and the Federal Personnel Manual authorize the payment of a hazard differential, where the exposure to the hazard is: (1) unusual, in accordance with prescribed schedules established by the Office of Personnel Management; (2) performed on an irregular or intermittent basis; and (3) not taken into account in the classification of the position. The arbitrator's decision does not specifically address these matters nor does the activity's appeal raise them as reasons for rejecting the arbitrator's award. In our view, the question of the award's compliance with applicable laws, regulations and the Federal Personnel Manual cannot be resolved until a determination is made that it comports with the requirements cited above. The fact that the arbitrator referred to an improper section of the FPM is not violative, so long as the FPM criteria discussed above are met.

Based on this interpretation of the Office of Personnel Management and in accordance with section 2411.37(a) of the amended rules,[2/] the arbitrator's award must be remanded to the parties to have them obtain a clarification and interpretation of the award from the arbitrator. The resubmission is for the purpose of having the arbitrator, in view of the OPM response and the specific requirements for the payment of a hazard differential set forth therein, clarify and interpret his award with respect to whether in the work situation of the egress inspectors that was presented to him, the requirements for the payment of a hazard differential were met. As noted in the OPM response, if the requirements were met, OPM regulations specify that the employees must be paid a 25 percent differential, not a portion thereof.

Accordingly, the arbitrator's award is remanded to the parties and the stay of the award previously granted by the Authority is vacated.[3/]

Issued, Washington, D.C., March 21, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ Section 2411.37(a) of the amended rules provides:

(a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

3/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the instant case was decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision does not prejudge in any manner either the meaning or application of related provisions of the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Order.

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FLRA Report of Case Decisions and FSIP Releases

Contents of Package

This package should include the following items:

FLRA Report of Case Decision Number 37

FLRA Report of Case Decision Number 38

FLRA Report of Case Decision Number 39

FSIP Release Number 161

FSIP Release Number 162

FSIP Release Number 163

If any of the above items are not included, please contact the Administrative Office, Federal Labor Relations Authority, 1900 E Street, NW., Room 7469, Washington, D. C. 20424 - telephone 202- 653-8040.

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Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 37 REPORT OF CASE DECISIONS June 18, 1980

REPRESENTATION CASE

3 FLRA No. 4 (April 4, 1980)

U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Boston District Office, Criminal Enforcement, Case No. 1-RO-13. Upon a representation petition filed by AFGE under section 7111(b)(2) of the Statute, the Authority found that it was without jurisdiction in the case since the President had specifically excluded the activity from coverage of the Statute by Executive Order No. 12171 (issued by the President pursuant to section 7103(b) of the Statute). Accordingly, the Authority dismissed AFGE's petition. (Decision and Order attached.)

UNFAIR LABOR PRACTICE CASES

3 FLRA No. 2 (April 4, 1980)

Pennsylvania Army and Air National Guard, Assistant Secretary Case No. 20-06580(CA). Upon a complaint filed by the union (Association of Civilian Technicians) under E.O. 11491, the ALJ found that the record did not support a conclusion that the activity had violated section 19(a)(1) and (6) of the Order by sponsoring and encouraging employee attendance at briefings concerning changes in aspects of an insurance program administered under the auspices of the National Guard Association of the United States (NGAUS) (an organization that had previously supported legislation to prohibit unionization of National Guard technicians), without consultation with the union. The ALJ found in that regard that while the employees who attended the briefings were subjected to a "commercial" or "sales pitch" for NGAUS, the presentation contained nothing derogatory to the union or other labor organization in attendance at the briefings and participation in the insurance plan was voluntary. The ALJ concluded that although the activity's active support of NGAUS was clearly not consonant with fostering good labor-management relations, and thus was

censurable conduct, the activity had not committed an unfair labor practice within contemplation of the Order; and therefore recommended that the complaint be dismissed. The Authority adopted the ALJ's findings, conclusions and recommendation and dismissed the union's complaint. (Decision and Order attached.)

3 FLRA No. 3 (April 4, 1980)

Department of the Treasury, Internal Revenue Service and IRS Richmond District Office, Assistant Secretary Case No. 22-09522(CA). Upon a complaint filed by the union (NTEU and NTEU Chapter 48) under E.O. 11491, the ALJ found that the activity did not violate section 19(a)(1), (2), and (6) of the Order in keeping a tally of the number of incoming telephone calls received by a particular employee (who occasionally served as an alternate and acting union steward, and who had successfully pursued a grievance through arbitration), and in making copies of incoming telephone messages left for the employee. In that regard, the ALJ found, among other things, that the employee's telephone calls were monitored in the manner described because management had reasonable cause to believe that the employee was misusing official telephones for personal business. The ALJ also found, in concluding that the activity had not violated section 19(a)(6) of the Order, that the activity had not "intended to establish a new condition of employment and change it policies, practices and matters affecting working conditions." With the exception of the finding regarding the activity's intention in the ALJ's consideration of the 19(a)(6) allegation (wherein the Authority held that intent is not an element of a 19(a)(6) violation), the Authority adopted the findings, conclusions and recommendations of the ALJ and dismissed the union's complaint. (Decision and Order attached.)

3 FLRA No. 10 (April 14, 1980)

Social Security Administration, District Offices in Denver, Pueblo and Greeley, Colorado, et al., Assistant Secretary Case No. 61-4237(CA). The union (AFGE Locals 1802, 2540 and 3600) filed a complaint under E.O. 11491 which basically alleged that the activity violated section 19(a)(1) and (6) of the Order by unilaterally changing working conditions and existing collective bargaining agreements when it issued a vacancy announcement for a particular position without listing therein specific district office locations. The ALJ concluded that the dispute should have been resolved by the parties' negotiated grievance procedures and not by the unfair labor

practice procedures of the Order; further, that the issuance of the vacancy announcement did not constitute a unilateral change of an existing working condition, as there was no evidence that it was a past practice for all notices of vacancies for the position involved to include the precise district or office location of each position. Finally, the ALJ concluded that the activity did not engage in conduct which violated section 19(a)(1) and (6) of the Order, and recommended that the complaint be dismissed. The Authority adopted the findings, conclusions, and recommendation of the ALJ and dismissed the union's complaint. (Decision and Order attached.)

NEGOTIABILITY CASES

3 FLRA No. 1 (April 4, 1980)

American Federation of Government Employees, AFL-CIO, Local 1603 and Navy Exchange, Naval Air Station, Patuxent River, Maryland, Case No. O-NG-200. The dispute involved the negotiability of a union proposal that would establish mandatory conditions for the agency to meet before it could reduce particular categories of employees below specified hours of work per week. The Authority held that the proposal violated the right of the agency to remove employees under section 7106(a)(2)(A) of the Statute. Accordingly, the Authority sustained the agency's allegation that the union's proposal was not within the duty to bargain. (Decision attached.)

3 FLRA No. 7 (April 14, 1980)

American Federation of Government Employees, AFL-CIO, Local 695 and Department of the Treasury, U.S. Mint, Denver, Colorado, Case No. O-NG-114. The dispute involved the negotiability of two union proposals concerning (1) rotation of work assignments and (2) details. The Authority held that the proposals conflicted with the agency's right under section 7106(a)(2)(A) of the Statute to assign employees. Accordingly, the Authority sustained the agency's allegation that the disputed proposals were not within the duty to bargain. (Decision attached.)

3 FLRA No. 8 (April 14, 1980)

Association of Civilian Technicians, Pennsylvania State Council and the Adjutant General, Department of Military Affairs, Commonwealth of Pennsylvania, Case No. O-NG-50. The dispute involved the negotiability of two paragraphs

of a union proposal concerning reductions in force procedures. The first paragraph concerned retention ratings; the second would establish a procedure for a technician to appeal from an appraisal of his military performance rendered by a military supervisor. The Authority held that the first paragraph of the proposal was within the duty to bargain under the Statute, while the second paragraph was not. Accordingly, the Authority set aside the agency's allegation that the first paragraph was nonnegotiable and sustained the allegation of nonnegotiability with respect to the second paragraph. (Decision attached.)

3 FLRA No. 9 (April 14, 1980)

Association of Civilian Technicians, Delaware Chapter and National Guard Bureau, Delaware National Guard, Case No. O-NG-104. The dispute involved the negotiability of a union proposal which provided a procedure for defining the initial area of consideration for vacant positions under the agency's merit promotion plan and for expanding that area. The Authority found that the proposal did not preclude the activity from expanding the area of consideration for eligible candidates and did not require that any employee be selected from one of the three designated areas of consideration; and therefore held that the proposal did not violate section 7106(a)(2)(C) of the Statute. Accordingly, the Authority set aside the activity's allegation that the proposal was not within the duty to bargain. (Decision attached.)

Appeal withdrawn:	Case No.	Date
	O-NG-182	April 15, 1980

ARBITRATION CASES

3 FLRA No. 5 (April 9, 1980)

Immigration and Naturalization Service, Department of Justice, U.S. Government and American Federation of Government Employees, Local No. 1656 (Marlatt, Arbitrator), Case No. O-AR-81. The Authority dismissed the union's exceptions to the arbitrator's award as untimely filed under the Statute. (Decision letter attached.)

3 FLRA No. 6 (April 10, 1980)

Federal Aviation Science and Technological Association and Federal Aviation Administration, Department of Transportation, (Dyke, Arbitrator), Case No. O-AR-2. The arbitrator found that the activity had not violated the parties' agreement by not assigning the grievant to work on a Federal holiday. The union filed an exception to the arbitrator's award with the Authority, alleging that the award was based on a nonfact, that is, the arbitrator had made a "gross mistake of fact" in believing the holiday policy involved to be Federal rather than agency policy. The Authority held that the union failed to describe facts and circumstances to support its exception. Accordingly, the Authority denied the union's petition, because it failed to meet the requirements for review set forth in the applicable rules of procedure. (Decision attached.)

Appeal withdrawn:	Case No.	Date
	O-AR-63	April 3, 1980

Attachments (10)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
BOSTON DISTRICT OFFICE, CRIMINAL ENFORCEMENT

Activity

and

Case No. 1-RO-13

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Petitioner

and

INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS

Intervenor

DECISION AND ORDER

Upon a petition duly filed with the Federal Labor Relations Authority under § 7111(b)(2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101-7135, a hearing was held before Hearing Officer Daniel F. Sutton on October 17, 1979. The Authority has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case, including briefs filed by the Petitioner and the Activity, the Authority finds:

The American Federation of Government Employees, AFL-CIO hereinafter AFGE filed a petition for a unit of all professional and nonprofessional employees of the Activity. The Activity contends that the petition should be dismissed as the Criminal Enforcement Division of the Bureau of Alcohol, Tobacco and Firearms was excluded from coverage under Executive Order 11491, as amended under § 3(b)(3) of the Order and that it will probably be excluded from coverage under § 7103(b)(1), (A) and (B) of the Statute.

Executive Order No. 12171, issued by the President pursuant to the authority contained in 5 U.S.C. § 7103(b), excludes certain agencies and agency subdivisions from coverage under the Federal Service Labor-Management Relations Statute on the basis that they have been determined to have as a primary function intelligence, counterintelligence, investigative, or national security work and that the Statute

cannot be applied to them consistent with national security requirements. Section 1-203 of this Executive Order excludes The Office of Criminal Enforcement, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury.

Accordingly, as the President has specifically excluded the Activity from the coverage of the Statute, the Authority finds that it is without jurisdiction in the present case, and that the petition must therefore be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 1-RO-13 be, and it hereby is, dismissed.

Issued, Washington, D.C., April 4, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PENNSYLVANIA ARMY AND AIR
NATIONAL GUARD

Respondent

and

Assistant Secretary
Case No. 20-06580(CA)

ASSOCIATION OF CIVILIAN TECHNICIANS

Complainant

DECISION AND ORDER

On August 27, 1979, Administrative Law Judge Robert J. Feldman issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions to the Administrative Law Judge's Recommended Decision and Order and the Respondent filed a response to the Complainant's exceptions.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under Section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040) which transfer of functions is implemented by Section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in Section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to Section 2400.2 of the Authority's rules and regulations and Section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions and

Respondent's response to the exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation. */

IT IS HEREBY ORDERED that the complaint in Assistant Secretary Case No. 20-06580(CA) be, and it hereby is, dismissed.

Issued, Washington, D.C., April 4, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ In conformity with Section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
PENNSYLVANIA ARMY AND AIR NATIONAL GUARD, Respondent	
and	Case No. 20-06580(CA)
ASSOCIATION OF CIVILIAN TECHNICIANS, Complainant	

DENNIS T. GUISE, Esquire
Assistant Attorney General
Commonwealth of Pennsylvania
Fort Indiantown Gap
Annville, Pennsylvania 17003

For the Respondent

LEONARD SPEAR, Esquire
Meranze, Katz, Spear and Wilderman
Lewis Tower Building - 12th Floor
N.E. Corner, 15th and Locust Streets
Philadelphia, Pennsylvania 19102

For the Complainant

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION

This is an unfair labor practice proceeding in which a formal hearing of record was held pursuant to Executive Order 11491, as amended, (hereinafter referred to as "the Order") and 29 CFR Part 203. The Decision and Recommendation that follows is issued for the Federal Labor Relations Authority in accordance with the Transition Rules and Regulations published in the Federal Register, Vol. 44, No. 1, January 2, 1979, pp. 5-8.

Statement of the Case

The complaint alleges that Respondent violated Sections 19(a)(1),(2),(3),(5) and (6) of the Order in that it permitted representatives of the National Guard Association Insurance Trust and the Northwestern Life Insurance Company to conduct meetings and sell their insurance to the personnel employed by Respondent. It is further alleged that the profits from the sale of such insurance go to the National Guard Association, which, has taken the public position that Respondent's Technicians should be removed from the scope and provisions of the Order.

None of the documents transmitted to this Office by the Regional Administrator contains any reference to what disposition, if any, was made of the alleged violations of Sections 19(a)(2), (3) or (5) of the Order. In his Notice of Hearing, however, the Regional Administrator refers for hearing only the alleged violations of Sections 19(a)(1) and (6). Inferentially, therefore, it appears that some portions of the complaint were withdrawn or settled, or were dismissed by the Regional Administrator, or perphaps severed and referred by him to the Assistant Secretary upon stipulated facts.

With respect to the alleged violation of Section 19(a)(3), it is apparent from the comments of counsel and from a footnote in Respondent's post-hearing brief that so much of the complaint as charged Respondent with sponsoring, controlling or assisting a labor organization was dismissed by the Regional Administrator and no request for review thereof was made. In any event, I conclude that other alleged violations have been disposed of in accordance with the provisions of 29 CFR §§203.7 and 203.8, and that the sole question referred for my determination is whether the facts and circumstances established at the hearing constitute a violation of Section 19(a)(1) or (6), or both.

Findings of Fact

Complainant is the duly recognized exclusive bargaining agent for civilian technicians in Respondent's employ. For some years, many of its members (and other employees in the unit) had participated in a voluntary insurance program known as the Technician Protection Plan, which was administered under the auspices of the National Guard Association of the United States (NGAUS) Insurance Trust, with the Life Insurance Company of North America as the carrier. Respondent permitted premiums under the Plan to be paid by payroll deductions, but otherwise

had no voice in its management or administration.

NGAUS is a nation-wide organization of National Guard officers. Among its purposes are to protect and promote the interests of Guardsmen throughout the country and to make their views known to appropriate Federal agencies and officials. In the conduct of its legislative program, it actively supported a bill (S. 274) in the 95th Congress to prohibit union organization and membership in the armed forces, and its executive vice-president testified on its behalf before a subcommittee of the House Armed Services Committee with particular reference to its advocacy of the provisions therein (later deleted by amendment) prohibiting unionization of National Guard Technicians.

Listed among the assets of NGAUS is a restricted fund known as the Capital Improvement Fund, which was established to provide for maintenance and improvement of the National Guard Memorial building in Washington. Another restricted Fund called the Insurance Reserve Contingency Fund is usable solely for the benefit of insureds and is not available for any other purpose.

Under date of July 28, 1977, Respondent's Personnel Officer, Col. Niles, advised the Technician Personnel Office (TPO) that on August 1, 1977, the insurer or carrier for the Technician Protection Plan would be changed from L.I.N.A. to Northwestern National Life Ins. Co., but for the present, coverage would not be interrupted. On October 21, 1977, Col. Niles advised TPO as follows: (1) due to the change of carriers, each Technician would have to execute a new authorization form to establish the coverage desired; (2) in addition to the Term Life and Disability Income under the old Plan, permanent life insurance would now be available; and (3) between October 31 and November 11, 1977, briefings would be held at National Guard installations throughout the State as per attached schedule, during which representatives of Northwestern National Life and of TPO would explain the coverages available.

After the briefings were initiated, Col. Niles received notice of a union objection to holding them without prior consultation. No action was taken on the objection, however, and the briefings were held as scheduled.

All civilian technicians were requested by TPO to attend the briefings, which were held in various facilities of Respondent during working hours so as to facilitate participation by technicians assigned to every group at every location. Union

officials were among those who attended. At each session, which was conducted by a Northwestern National Life representative, assisted by one or two non-commissioned officers from TPO, a slide presentation was shown and the details of the insurance available were explained. The slide presentation, which had been produced for and at the direction of NGAUS, was to all intents and purposes a "commercial" for NGAUS and its Technician Protection Plan. It was, of course, extremely laudatory of the work and achievements of NGAUS on behalf of Guardsmen and Technicians, no mention being made of any efforts or accomplishments of Complainant or any other organization in the interests of the same constituency.

With respect to the coverage offered, it was made clear at each briefing that besides the addition of optional permanent life insurance for technicians and their families, two significant changes were made in the program: (a) premiums were increased; and (b) instead of experience credits (i.e., dividends) being distributed to participants, they would be paid to The Historical Society of the Militia and National Guard (hereafter "Historical Society").

The Historical Society is a non-profit charitable and educational corporation, organized in 1975 under the laws of the District of Columbia for the declared purpose of fostering and encouraging an enlightened public appreciation of the contributions of the American militia in the founding of this nation and its defense against enemies foreign and domestic, and of the unique status of the National Guard, under Federal control as reserve components of the Army and Air Force in time of war or national emergency, and under State control in their militia status at all other times. Its primary function is to raise funds for the maintenance and preservation of the National Guard Memorial Building in Washington.

At briefing sessions, technicians were urged to sign applications for insurance, or in the alternative, to sign a declination form. No attendance was taken, but a record was made of the applications and declination forms thereafter received. Subsequently, those who had submitted neither were notified that they must submit one or the other.

Conclusions of Law

From the foregoing facts, the conclusion is irresistible that Respondent sponsored the briefings and assisted NGAUS in its promotion of its Technician Protection Plan. It appears,

however, that the complaint was dismissed with respect to Section 19(a)(3) on the ground that NGAUS is not a labor organization as defined by the Order, citing Federal Aviation Administration, Atlanta ATC Tower, A/SLMR No. 300 (1973). Moreover, the circumstances of this case, while indicating a calloused disregard of union sensibilities, might not warrant a finding that aiding the solicitation of the insurance in question is per se inconsistent with the purposes of the Order. See Department of the Air Force, Grissom Air Force Base, Peru, Indiana, FLRC No. 77A-77, A/SLMR No. 1057 (1978).

In considering whether Respondent interfered with, restrained or coerced an employee in the exercise of the rights assured by the Order [Section 19(a)(1)], one must bear in mind that neither participation in the Plan nor attendance at the briefings was compulsory. Though it is reasonable to infer from the evidence that Respondent urged all technicians to do both, it has not been established that anyone was ordered to do either or that any adverse action was taken with respect to any technician who failed to comply with either request. Consequently, I find it difficult to ascertain what right, if any, assured by the Order, was denied or diminished by Respondent's conduct. It is true that at the briefings those present were subjected to a "sales pitch" that included a laudatory depiction of an organization that is avowedly "anti-military union". Although the presentation may have overstated the contribution of NGAUS to the advancement of the interests of technicians and failed to recognize the efforts of others, it contained nothing derogatory to Complainant or any other labor organization. I recall no testimony to the effect that anyone was prevented from walking out of a briefing if he found it objectionable.

If the program were not entirely voluntary, the change in the provisions for payment of dividends might present serious problems. Certainly it would be clearly inconsistent with the purposes of the Order to require employees to make monetary contributions to the Historical Society or any similar organization. Though the corporate and fiscal relationships between the Historical Society and NGAUS are not clearly spelled out in the record, it is not unreasonable to draw an inference that the dividends to be received by the Historical Society will benefit NGAUS to some extent by diminishing, or perhaps eliminating, its burden of maintaining the Memorial Building. As a result, it can be said that technicians who participate in the new Plan are likely to contribute indirectly to NGAUS. Since none of them are obliged, however, to participate in the Plan (and it was not

shown that similar coverage is not otherwise available at comparable cost), no such contributions are required.

As to a refusal to consult, confer or negotiate with the recognized bargaining agent as required by the Order [Section 19 (a)(6)], there is no doubt that Respondent declined Complainant's request for consultation on the subject of the briefings. Though Respondent had no power to change the selection of a carrier, or to alter any of the terms and conditions of the new Plan, it would be obliged under the Order to confer with respect to the impact or implementation thereof if it involved a change in existing personnel policies or practices and other matters affecting general working conditions. Cf. e.g. Rocky Mountain Arsenal, Denver, Colorado, A/SLMR No. 933 (1977).

It is the last proviso above that constitutes the strongest impediment to finding an unfair labor practice in this case. A change in premium rates or in dividend payments of a voluntary insurance program not administered by a Federal agency or activity does not seem to me to be the kind of personnel item or the kind of matter affecting working conditions as to which prior consultation is required by the Order. Surely, a government agency does not have to confer with its union every time that Blue Cross or Aetna raises its rates, even though the agency may permit, or even encourage, payment of premiums by payroll deduction, and even though the rate increase has an obvious impact on participating employees.

It is most unfortunate, of course, that in this instance the change may be found highly objectionable by union members because of the position taken by NGAUS against the right of National Guard Technicians to organize. Persistent protests -- even a boycott of the Plan -- would be understandable and perhaps justified. Yet, in my view, the record here does not support a conclusion that Respondent has violated Sections 19(a)(1) or (6) of the Order. Though Respondent's active support of NGAUS vis-a-vis Complainant is clearly not consonant with the fostering of good labor-management relations, and is thus found censurable, I cannot find that it has committed an unfair labor practice within the contemplation of the Order.

Whether the facts shown here constitute a violation of any provision of the Technician Personnel Manual or other internal regulation is not material in this proceeding. The motion for administrative leave on behalf of three witnesses is denied on the ground that their appearance at the hearing was not essential.

RECOMMENDATION

In view of the foregoing, I recommend that the complaint herein be dismissed.

ROBERT J. FELDMAN
Administrative Law Judge

Dated: August 27, 1979
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE AND
IRS RICHMOND DISTRICT OFFICE

Respondents

and

Assistant Secretary
Case No. 22-09522(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 48

Complainants

DECISION AND ORDER

On October 16, 1979, Administrative Law Judge Garvin Lee Oliver issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainants filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the Complainants' exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions, and recommendation except as modified herein. */ In reaching his conclusion that the Respondents had not violated section 19(a)(6) of the Executive Order, the Administrative Law Judge found that

*/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E. O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

the Respondents had not "intended to establish a new condition of employment and change its policies, practices and matters affecting working conditions. . . ." As intent is not an element of a section 19(a)(6) violation, the Authority does not rely on this portion of the Administrative Law Judge's reasoning in adopting his recommendation to dismiss the complaint.

ORDER

IT IS HEREBY ORDERED that the complaint in Assistant Secretary Case No. 22-09522(CA) be, and it hereby is, dismissed.

Issued, Washington, D.C., April 4, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of

INTERNAL REVENUE SERVICE AND
IRS RICHMOND DISTRICT OFFICE
Respondents

and

NATIONAL TREASURY EMPLOYEES
UNION AND NTEU CHAPTER 48
Complainants

Case No. 22-09522(CA)

GEORGE T. BELL, ESQUIRE
Assistant Regional Counsel
General Legal Services
Internal Revenue Service
2 Penn Center Plaza
Philadelphia, PA 19102
For the Respondents

MICHAEL MAUER, ESQUIRE
Assistant Counsel
National Treasury Employees Union
1730 K Street, NW., Suite 1101
Washington, D.C. 20006
For the Complainants

Before: GARVIN LEE OLIVER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arose pursuant to Executive Order 11491, as amended, as a result of an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and NTEU Chapter 48 (hereinafter called the Complainant or Union), against the Internal Revenue Service (IRS) and IRS Richmond District Office (hereinafter called the Respondents).

The complaint alleged, in substance, that the Respondents monitored the telephone calls of William Grogan, an assistant steward, who had previously won an arbitration decision, and used such information as the basis for a negative recordation

concerning Mr. Grogan. The complaint alleged that such actions interfered with employees in the exercise of rights assured by the Order, in violation of Section 19(a)(1), discouraged membership in a labor organization by discrimination in regard to conditions of employment, in violation of Section 19(a)(2), and changed personnel policies and practices and matters affecting working conditions without prior notification and negotiation with the Union, in violation of Section 19(a)(6) of the Executive Order. 1/ Respondent denied the allegations and asserted that the complaint was not timely filed.

Pursuant to a Notice of Hearing issued by the Regional Director, Washington Region, Federal Labor Relations Authority, a hearing was held in this matter before the undersigned in Richmond, Virginia. Both parties were represented by counsel and afforded full opportunity to be heard, to adduce relevant evidence, and to examine and cross-examine witnesses and file briefs.

Based on the entire record herein, including my observation of the witnesses and their demeanor, the exhibits, stipulations, and other relevant evidence adduced at the hearing, and the briefs, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

1. Complainant is the exclusive bargaining representative of the employees working in Respondent's Richmond, Virginia District Office and is a party to "Multi District Agreement Number Three" covering some 57 IRS Districts throughout the United States.

2. William K. Grogan was employed by the Richmond District Office, IRS, from June 30, 1972 to January 3, 1979. During the period June 1975 to January 1979 Mr. Grogan served as an attorney in the Estate and Gift Tax Division.

3. Beginning in 1975 and continuing during the period encompassed by the complaint, Mr. Grogan occasionally served as an NTEU Alternate and Acting Union Steward.

1/ Prior to the hearing, by letter dated August 10, 1979, the Complainant requested to withdraw an allegation in the complaint dealing with the initiation of an investigation of Mr. Grogan.

On reports prepared by Mr. Grogan, he recorded the following amount of time devoted to steward activities:

Month	Individual Bank Time	Chapter Bank Time
Jan. 1978	0 hours	0
Feb. 1978	3 hours	0
March 1978	0 hours	0
April 1978	1 hour 30 minutes	0
May 1978	0 hours	0
June 1978	4 hours	4 hours
July 1978	8 hours & 15 minutes	0 hour
August 1978	3 hours & 45 minutes	0 hour

4. In March 1976 Mr. Grogan, through the Union, filed three grievances with Mr. Russell Johnson, his supervisor, concerning Mr. Grogan's performance evaluation. The Activity denied these grievances. An arbitration hearing arising out of the grievances was held on April 29, 1977. An arbitration award in Mr. Grogan's favor was issued on September 22, 1977.

5. In April 1977 Mr. Johnson recommended Mr. Grogan for a special achievement award in recognition of the quality of his performance during the period May 1, 1976 to April 30, 1977. Mr. Grogan received the award on August 8, 1977.

6. On October 12, 1977 Mr. Johnson recommended Mr. Grogan for the position of special agent, a position for which Mr. Grogan had applied.

7. On November 11, 1977 Mr. Johnson rendered a performance evaluation on Mr. Grogan which rated Mr. Grogan above average in seven areas, and gave him an overall above average rating. In February 1977 Mr. Johnson had received an above average rating in only five areas and an overall performance rating of average. In both ratings Mr. Grogan was rated average in utilization of time.

8. During the period encompassed by the complaint it was the practice of IRS employees to receive and make personal telephone calls on IRS telephones; however, it was understood that official telephones could not be used unreasonably for personal business and that personal calls were to be limited.

9. During the period from the fall of 1977 to August 1978 Mr. Grogan received and made a large number of telephone calls. Some of the telephone calls were directly related to Mr. Grogan's Union responsibilities. However, the majority of the calls were personal in nature and not related to IRS or Union business. A large portion of Mr. Grogan's work day was spent receiving and placing personal telephone calls. Since Mr. Grogan did not have a telephone in his own office, he usually used telephones near the desks of Catherine Vines and Walter P. Jones. Mr. Grogan disturbed the work of these employees as well as his own work with his personal telephone conversations.

10. Mr. Grogan used the telephone more frequently than other employees and received and made approximately three times the number of personal telephone calls received and made by other attorneys in the unit.

11. In late January or early February 1978, Catherine Vines, an evaluation clerk, complained to Mr. Johnson that Mr. Grogan was using the telephone near her desk for personal calls to the extent that she could not do her work.

12. During January or early February, 1978, Mr. Johnson discussed with Mr. Grogan what Mr. Johnson believed was an excessive amount of incoming telephone calls received by Mr. Grogan. Mr. Johnson indicated to Mr. Grogan that he was concerned about the number of times Mr. Grogan was on the phone, the length of his conversations, and the fact that he was disturbing his own work and the work of others.

13. On or before February 17, 1978, Mr. Johnson directed group clerks of the Estate and Gift Tax Group to prepare for him a copy of all incoming telephone messages left for Mr. Grogan. Mr. Johnson concluded that such documentation might be necessary for disciplinary action since Mr. Grogan had not improved his telephone habits for any sustained period of time as a result of the conferences.

14. On or about March 15, 1978, Mr. Grogan observed a duplicate copy of one of his telephone messages on the desk of a group clerk and expressed his objections to Mr. Johnson. This was the first Mr. Grogan knew that copies of his incoming messages were being retained. Mr. Johnson advised Mr. Grogan that he considered this procedure a necessary step to control what was a misuse of the telephone.

15. In April 1978 Mr. Johnson noticed that the number of incoming messages for Mr. Grogan began to decrease. He found that the number of incoming calls had not changed, but the callers, upon finding that Mr. Grogan was unavailable, were declining to leave messages.

16. On approximately May 1, 1978, Mr. Johnson directed group clerks in the Estate and Gift Tax Group to keep a tally of the number of incoming telephone calls received by Mr. Grogan. This tally was accomplished by placing a tick mark on the clerks' desk calendars. Between May 1 and August 4, 1978, Mr. Grogan received approximately 220 telephone calls. In June, 1978, Mr. Grogan first became aware that this tally of the number of incoming telephone calls was being kept.

17. With the exception of Mr. Grogan, Mr. Johnson previously had never either kept copies of phone messages received by an employee or kept a tally of the number of phone calls received by any employee in his group.

18. Management provided no notification to the NTEU of its keeping a tally of the number of phone calls received by Mr. Grogan, or of its copying phone messages left for Mr. Grogan.

19. On August 9, 1978 Mr. Johnson sent Mr. Grogan a memorandum concerning his performance rating. Mr. Johnson stated that although Mr. Grogan's performance for the past twelve months had been rated as satisfactory, his performance in the areas of examination planning, scheduling, and time utilization since October 1, 1977 had become an increasing concern. Mr. Johnson set forth five examples to illustrate the problem. One of these examples, as amended on October 3, 1978, was as follows:

> (1) Personal Phone Calls - You and I have had several counselling sessions concerning this problem. According to the group clerk's record you had over 220 phone calls from May 1, 1978, to August 4, 1978. While some of the calls were business related, many of them must have been personal in nature. Receiving an average of 73 calls per month is a serious disruption to you and to the clerical staff having to answer the calls.

20. During the period July 1977 through August 1978, there were 13 grievances filed in the Richmond District. Mr. Grogan represented one grievant during this time period in a grievance which was filed on July 7, 1978. The agency denied the grievance as being untimely filed, and although it proceeded through four steps of the negotiated grievance procedure, it was never appealed to arbitration.

21. From the date of Mr. Grogan's grievance (March 1976) until the filing of the unfair labor practice (September 6, 1978), Mr. Grogan's arbitration was the only one in the Richmond District.

22. There are a total of 15 steward positions in the Richmond District, including the Chief Steward, Stewards and Alternate Stewards.

23. Mr. George B. Cousins, who was the President of NTEU Chapter 48 from November 1976 until May 1977 and from October 1978 to present, received a High Quality Increase Award on August 27, 1978 for the period August 10, 1977 to August 10, 1978. He was also Chief Steward from 1972 until October 1978.

Mr. Robert M. Spencer, who was President from May 1977 to September 1978 and Executive Vice President from October 1978 to present, received a High Quality Increase Award on December 3, 1978 for the period November 1, 1977 to November 1, 1978. Mr. Charles S. Bailey, who was a shop steward from 1974 until October 1978 when he became Chief Steward and was under Mr. Russell Johnson's supervision since June 1975 to present, received a Suggestion Award on June 2, 1977. Mr. Johnson has a cordial relationship with Mr. Bailey.

24. In February 1978 Mr. Grogan applied for administrative leave to attend a Federal Bar Association meeting on taxation in Washington, D.C. at which the Commissioner, IRS would speak. Mr. Grogan's immediate supervisor, Mr. Johnson, as well as the second-line supervisor and training officer, approved administrative leave, but the District Director disapproved the request for the reason that it was not IRS policy to approve training in order to attend a meeting where an IRS officer is the speaker. Mr. Grogan disagreed with this interpretation of the policy. There is no evidence that other IRS employees similarly situated were allowed administrative leave for attendance at the meeting.

25. In May 1978 Mr. Grogan applied for administrative leave for 3 days to attend another training session. IRS paid the registration fee and granted Mr. Grogan administrative leave for one day to attend a session pertaining to his primary duties. IRS granted administrative leave to another employee for subsequent days so that the employee could also attend meetings dealing with his duties. There is no evidence that any other employee was allowed administrative leave for three days to attend the entire meeting.

Discussion, Conclusions, and Recommendation

In making the foregoing findings, I gave greater weight to the testimony of Respondents' witnesses, including Mr. Grogan's supervisor and three co-workers, than to that of Complainants' only witness, Mr. Grogan. I found the testimony of Respondents' witnesses to be consistent on essential aspects, forthright, and convincing.

Respondents contend that the allegation that Mr. Grogan's telephone messages were copied, as opposed to tallied, in violation of Section 19(a)(1) of the Order, is untimely. 29 C.F.R. §203.2(a)(2) requires that a party desiring to file a complaint must first file a charge "within six (6) months of the occurrence of the alleged unfair labor practice." Respondents point out that clerks began making copies of Mr. Grogan's messages on approximately February 17, 1978, but the charge was not filed until September 6, 1978, over six months later.

The charge, filed on September 6, 1978, alleges, in part, that the supervisor "kept a file of all incoming telephone calls and also a copy of all messages left. . . ." The record reflects that the copying of messages continued for some time, including a message copied on March 15, 1978, which was within six months period prior to the filing of the charge. Thus, I conclude that the charge alleged a continuing violation and was timely within the requirements of Section 203.2(a)(2) of the regulations. Veterans Administration, Veterans Administration Hospital, Muskogee, Oklahoma, 3 A/SLMR 491, A/SLMR No. 301 (1973).

29 C.F.R. §203.15 requires that, "A complainant in asserting a violation of the order shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." Complainants have not met this burden.

Complainants contend that Respondents' action in keeping a tally of the number of incoming calls received by Mr. Grogan and making copies of telephone messages left for Mr. Grogan violated Section 19(a)(1) of the Order. 1/ Complainants assert that such action interfered with Mr. Grogan's right to present a grievance, assist and be an alternate steward of a labor organization, and that it chilled other employees in the exercise of their rights.

The record established that Mr. Grogan's telephone calls were monitored in the above manner because management had reasonable cause to believe that Mr. Grogan was misusing official telephones for personal business. The record does not indicate that the information gained was used by management in any manner except to compile statistics with regard to Mr. Grogan's possible misuse of Government telephones. These statistics were not otherwise broken down in any manner by caller or subject matter, and there is no evidence that Mr. Grogan's supervisor disseminated such information outside his office. The record does not establish that this activity interfered with, restrained, or coerced Mr. Grogan in any manner with respect to his representational duties or in the exercise of other rights assured by the Order.

The record reflects that Mr. Grogan's use of the telephone for personal business was well known in his office. While the monitoring of an alternate steward's telephone calls raises immediate and serious questions concerning the possible screening of calls to union officials and interference with the Union's effective means of communication, I do not find that such activity, conducted for the reasons and in the manner set forth in this record, was inherently destructive of basic rights assured by the Order, or that it had a chilling effect on the exercise of such rights by other employees. Compare U.S. Department of Health, Education and Welfare, et. al, A/SLMR No. 1080 (1978).

1/ Section 19(a)(1) of the Order provides that agency management shall not "interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order." Section 1(a) of the Order guarantees to each employee of the executive branch of the Federal Government the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity. The right to assist a labor organization extends to participation in the management of the organization.

Complainants contend that Respondents activity violated Section 19(a)(2) of the Order 2/ because it was retaliation from Mr. Grogan's having won a grievance through arbitration and being an alternate steward. A preponderance of the evidence does not support the allegation.

There was no showing of discriminatory motivation or disparity of treatment based on Union membership. The record demonstrates that Mr. Grogan was the only employee in the office who used the telephone for personal use to such an extent. Prior to this problem, but following Mr. Grogan's filing of a grievance involving Mr. Johnson, Mr. Johnson had recommended Mr. Grogan for a special achievement award, recommended him for another position, and gave him a more favorable performance rating in November 1977 than previously. The record does not show that Mr. Grogan was subjected to different standards than other employees in the granting of administrative leave. There was no evidence of anti-union animus and the record reflects that Mr. Johnson's relations with other union officials are cordial and cooperative.

Accordingly, it is concluded that Respondents' actions as alleged in the complaint did not constitute disparate treatment and discrimination in reprisal for Mr. Grogan having exercised his rights under the Executive Order, and were not motivated, even in part, by anti-union animus.

Complainants contend that Respondents, by keeping a tally of the number of incoming calls received by Mr. Grogan and making copies of telephone messages left for Mr. Grogan, unilaterally changed personnel policies and practices and matters affecting working conditions in violation of Section 19(a)(6) of the Order. I do not agree.

While such action may be an indication of discrimination, it falls short of a unilateral change in employment conditions. I am not convinced that Respondents intended to establish a new condition of employment and change its policies, practices and matters affecting working conditions, or, assuming such a change, that it materially affected, or had a substantial impact on personnel policies, practices, and general working condtions. Cf. U.S. Customs Service, Region IV, Miami, Florida, A/SLMR No. 1118 (1978). The

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2/ Section 19(a)(2) provides that agency management shall not "encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment".

policy and practice was for employees to limit personal telephone calls and not to use Government telephones unreasonably for personal business. The records of Mr. Grogan's calls were made in order to enforce this policy and determine if he was adhering to it.

Recommendation

Having found that Respondents have not engaged in conduct prohibited by Sections 19(a)(1), (2), and (6) of the Executive Order, it is hereby recommended that the complaint be dismissed in its entirety.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: October 16, 1979
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
DISTRICT OFFICES IN DENVER, PUEBLO
AND GREELEY, COLORADO, ET. AL.

Respondent

and

Assistant Secretary
Case No. 61-4237(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1802, ET. AL.

Complainant

DECISION AND ORDER

On October 4, 1979, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under § 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by § 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in § 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to § 2400.2 of the Authority's rules and regulations and § 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation. */

*/ In conformity with § 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191)

(Continued)

ORDER

IT IS HEREBY ORDERED that the complaint in Assistant Secretary Case No. 61-4237(CA) be, and it hereby is, dismissed.

Issued, Washington, D.C., April 14, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

(Continued)

had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
SOCIAL SECURITY ADMINISTRATION DISTRICT OFFICES IN DENVER, PUEBLO AND GREELEY COLORADO, ET AL Respondents	
and	Case No. 61-4237(CA)
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1802 ET AL Complainants	

WILSON G. SCHUERHOLZ
Labor Relations Staff
Social Security Administration
2218 West High Rise Building
6401 Security Boulevard
Baltimore, Maryland 21045

For the Respondents

KENNETH BULL
National Representative
American Federation of Government Employees
5001 South Washington
Englewood, Colorado 80110

For the Complainants

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on May 11, 1979 by the Regional Director for the Federal Labor Relations Authority, Kansas City Region, a hearing was held before the undersigned in Denver, Colorado.

This proceeding was initiated under Executive Order 11491, as amended (herein called the Order). It is based on a complaint filed on November 6, 1978 by American Federation of Government Employees, AFL-CIO, Local 1802, 3600 and 2540 (herein called collectively Complainants and severally called, respectively, Local 1802 AFGE, Local 3600 AFGE, and Local 2540 AFGE) against Regional Commissioner, Social Security Offices, Denver Greeley, Pueblo and Health, Education and Welfare Region (herein called collectively Respondents and severally called respectively Regional Commissioner, SSA, SSA Denver District, SSA Greeley District, SSA Pueblo District and HEW Denver Regional Office or HEW Region VIII) which alleges that Respondents violated Sections 19(a)(1) and (6) of the Order by unilaterally changing the contents of a Vacancy Announcement for Claims Representative Trainee thus altering an existing working condition and violating various collective bargaining agreements.

All parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence and to examine as well as cross-examine witnesses. Thereafter briefs were filed which have been duly considered by the undersigned.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all the testimony and evidence adduced at the hearing, I make the following recommended Findings of Fact, Conclusions of Law and Order.

Findings of Fact

1. HEW, Region VIII, is headquartered in Denver, Colorado. The Region covers six States (Colorado, Utah, Wyoming, North Dakota, South Dakota, Montana) and numerous organizational components of which the Social Security Administration (SSA) is one. SSA is then broken down into various organizational parts, one of which is Field Operations, the Office of Program Operations.

2. The Pueblo, Denver, And Greeley Districts are 3 of 27 districts under Field Operations in the Denver Region. Each district is composed of an office in that city, as well as numerous smaller satellite offices in different cities or towns around the district office city. These three particular districts report to Area Director, Joe McHenry, who in turn, reports to the Assistant Regional Commissioner for Field Operations, R. Thomas Williams. Williams then reports to the Regional Commissioner for Social Security in the Denver Region (Sandy Crank). The Denver Regional Commissioner reports to the Commissioner of SSA in Baltimore, Maryland.

Various other Assistant Regional Commissioners with other functions also report to Crank.

3. The HEW, Region VIII, office is headed by the Principal

Regional Official, Mr. Wellington Webb. The Regional Personnel Office is part of the HEW Regional Office under Mr. Webb and provides personnel service to the various components of HEW in the region. The Regional Personnel Office is responsible for developing and administering a Regional Merit Promotion Plan. The current plan is dated September 29, 1975.

4. AFGE locals are the exclusive bargaining representatives for the bargaining units in the Districts of Pueblo, Greeley, and Denver, Colorado. In Pueblo, the exclusive collective bargaining representative is Local 2540 AFGE, which has a contract dated January 3, 1978. In Denver, the exclusive representative is AFGE Local 1802 which has a contract dated November 10, 1976. In Greeley, the exclusive representative is AFGE Local 3600, which had a contract dated April 5, 1976. This Greeley contract was renegotiated during the period of August through December 1978 and became effective in February 1979.

5. In each bargaining unit the union represents a unit composed of all nonsupervisory and nonprofessional employees in the District.

6. The Pueblo contract in Article 17 adopts the applicable Regional Merit Promotion Plan and makes it a part of the agreement. The Denver contract in Article 17 makes the applicable promotion plan a part of the agreement. It also physically attaches the September 29, 1975, Region VIII Merit Promotion Plan to the agreement. Article 15 of the Greeley contract adopts the Region VIII Merit Promotion Plan and makes it a part of the agreement.

7. Section 7a(2) of the Merit Promotion Plan provides that each vacancy announcement will include, as a minimum, inter alia, the organization location of the vacancy. 1/

8. On June 18, 1976 a Dept. of HEW Region VIII vacancy announcement was issued for ten claims representative trainee positions. The announcement, under location, indicated: "DHEW, SSA, BFO, Ft. Collins, CO; Billings & Havre, MT: Bismarch, Pevils Lake, & Jamestown, ND; Sioux Falls & Watertown, SD; Riverton, WY; and Salt Lake City, UT."

9. On July 20, 1976 a Dept. of HEW Region VIII vacancy announcement was issued for two claims representative trainee positions. The announcement under location indicated: "DHEW, SSA, BFO, Ogden, Utah and Williston, No. Dak."

1/ During the negotations of the three collective bargaining agreements that are involved in this case, there was no discussion of the meaning or interpretation of Section 7a(2) of the Merit Promotion Plan or the meaning of "organization location".

10. On December 15, 1976, a vacancy announcement was issued for the claims representative trainee position. The announcement, under location, indicated: "HEW, SSA, Field Operations, Colorado-3, Montana-2, North Dakota-2, South Dakota-2, Utah-2, Wyoming-1." It was posted in the Pueblo, Denver, and Greeley Districts and in other Districts throughout the Region.

11. In the Denver District, Local 1802 AFGE filed an unfair labor practice charge on January 13, 1977, alleging that the merit promotion plan, and therefore the contract, had been unilaterally changed without negotiation by this announcement. Specifically, it claimed Section 7(a)2 of the Merit Promotion Plan dealing with "organization location" was altered by not showing an individual office location. An unfair labor practice complaint was filed on March 15, 1977. No charges or complaints were filed in either the Pueblo or the Greeley Districts.

12. On September 8, 1977, the Department of Labor approved the Local 1802 AFGE withdrawal of the unfair labor practice complaint filed in March 1977.

13. On September 1, 1978, another vacancy announcement was issued for the claims representative trainee position. This announcement, under location, indicated: "HEW, SSA, Field Operations, Colorado (5 or more position); North Dakota (2 or more positions); Utah (2 or more positions); Wyoming (1 or more positions); South Dakota (1 or more positions); Montana (1 or more positions)." This announcement was posted in the Pueblo, Denver, and Greeley Districts as well as other Districts throughout the Region.

14. This issuance of the vacancy announcement on September 1, 1978 is the subject of instant unfair labor practice case.

15. The vacancy announcement position in question in this case is that of the claims representative. This is the top nonmanagement job in the Field Operations structure. Individuals in this position are responsible for taking and adjudicating social security claims. The journeyman grade for this job is the GS-10 level. The claims representative vacancy announcement is not prepared by a district manager, but is done by higher levels of management (Area Director and Assistant Regional Commissioner for Field Operations). Nearly all other vacancy announcements for district positions are prepared by the district manager.

16. There are many different types of vacancy announcements issued in the Denver Region, some of which provide a specific office

location and some of which don't. 2/

17. Claims representative positions are filled from a variety of sources. The internal promotion procedures involved in this case is only one such source. Other sources include hiring off of a civil service register, transfer, and reassignment. Selectees from a register are hired with the understanding that they may be placed anywhere within the Region after their general training is complete.

18. Claims representative vacancy announcements for internal promotion are usually done only once or twice a year. Use of the different sources varies with such things as personnel ceilings and program expansion.

19. The record does not establish that, uniformly, vacancy announcements for claims representative positions always included the location of the specific district or office location. On the contrary the record establishes that in the past claims representative vacancy announcements have been issued without listing a specific district or office location.

Conclusions of Law

The Complainants contend, basically, that Respondents violated Sections 19(a)(1) and (6) of the Order by unilaterally changing working conditions and the existing collective bargaining agreements in the Denver, Greeley, and Pueblo Districts without bargaining with the respective Local AFGE exclusive representatives. This violation allegedly occurred when the vacancy announcement for claims representative trainees, dated September 1, 1978, was issued without listing specific district office locations.

The Complainants point out that the negotiated agreement in each of the units refers to and incorporates the Regional Merit Promotion Plan into the contract. They then contend that Section 7a(2) of the plan, which states that each vacancy announcement will include as a minimum the organizational location of the vacancy, means that a specific geographic location must be listed. Thus, they contend, no announcement can be made unless and until a specific vacancy location is actually known. The record establishes that there had been no discussion during any of the negotiations as to what the section in question meant. In fact, there was little, if any, discussion of the Merit Promotion Plan, other than to refer to and incorporate the Regional Plan into the agreement. The plan itself provides no

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2/ Often vacancy announcements for other jobs in the district list no specific job location other than the district. This is so when the particular office within the district is not known at the time of the announcement.

further insight or explanation as to the meaning of the term. It is the Respondent's position that "organizational location" refers to the particular component of HEW involved in the action, and not to geographic location as the Complainant argues.

In essence the matter at hand revolves around an interpretation of the meaning of organizational location. The Federal Labor Relations Council has held that the interpretation of agency policies and regulations on matters within agency discretion, where those policies and regulations are specifically incorporated in a negotiated agreement, is a matter to be left to the judgment of an arbitrator. Cf. FAA, Department of Transportation, Fort Worth and PATCO, FLRC No. 75A-31.

The law is clear that alleged violations of a negotiated agreement which concern differing and arguable interpretations of such agreement, as distinguished from alleged actions which would constitute fundamental, clear, and unilateral breaches of the agreement, are not violative of the Order and that, under such circumstances, the aggrieved party's remedy for such matters lies within the grievance machinery of the negotiated agreement, rather than through the unfair labor practice procedure. Accordingly, it is concluded that the case at bar should have been resolved by the grievance procedures 3/ and not by the unfair labor practice procedures of the Order.

Finally with respect to the Complainants contention that there was a unilateral change in an existing working condition, it is concluded that the record does not establish that it was a past practice for all notices of vacancies, or even for all notices of vacancies for claims representative trainees, to include the precise district or office location of each position. Thus, it is further concluded that the issuance of the September 1, 1978 vacancy announcement for Claims Representative Trainees, did not constitute a unilateral

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3/ The Complainants seem to feel that because the notice of vacancy in question was issued at the Regional level, a level above the District level covered by the contracts, the grievance and arbitration procedure would not be able to deal with such a breach of the agreements. However, where there is, as their is here, a clear dispute as to the interpretation of the contract, and where it is not absolutely clear that an arbitrator could not or would not resolve the dispute, it is concluded that we must defer to the grievance and arbritration procedures available. It must be presumed, absent clear evidence to the contrary, that the grievance and arbitration procedures contained in a collective bargaining agreement can adequately resolve all disputes concerning interpretation and application of that collective bargaining agreement.

change of a working condition and did not violate Sections 19(a)(1) and 6 of the Order.

Having concluded that Respondents did not engage in conduct which violated Sections 19(a)(1) and (6) of the Order it is recommended that the Federal Labor Relations Authority issue the following order:

ORDER

IT IS HEREBY ORDERED that the Complaint in Case No. 64-4237(CA) be, and it hereby is, dismissed.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: October 4, 1979
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
AFL-CIO, LOCAL 1603

(Labor Organization)

and

Case No. O-NG-200

NAVY EXCHANGE, NAVAL AIR
STATION, PATUXENT RIVER,
MARYLAND

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 et seq.).

Union Proposal

No temporary part-time employees may have their hours of work reduced to less than 20 hours per week until all intermittent employees have been separated.

No temporary full-time employees may have their hours of work reduced to less than 35 hours per week until all temporary part-time employees are reduced to less than 20 hours per week, or are separated.

No regular part-time employees may have their hours of work reduced to less than 24 hours per week until all temporary employees are reduced to less than 20 hours per week or are separated.

No regular full-time employees may have their hours of work reduced to less than 35 hours per week until all regular part-time employees are reduced to less than 24 hours per week, or are separated.

The provisions of this Memorandum shall be incorporated into the Negotiated Agreement of 12 November 1976 and shall be subject to the grievance procedure therein.

Question Here Before the Authority

The question is whether the union's proposal violates section 7106 of the Statute[1/] as alleged by the agency.

Opinion

Conclusion: The union proposal violates the right of the agency to remove employees under section 7106(a)(2)(A) of the Statute. Pursuant to section 2424.10 of the Authority's rules and regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that the union proposal is not within the duty to bargain is sustained.

Reasons: The proposal at issue would establish mandatory conditions for the agency to meet before the agency could reduce particular categories of employees below specified numbers of hours of work per week. The first sentence of the proposal would require the agency, if it decided to reduce any temporary part-time employee to less than 20 hours per week, to first separate all intermittent employees. The second sentence of the proposal would require the agency, if it decided to reduce any temporary full-time employee to less than 35 hours per week, to first reduce all temporary part-time employees to less than 20 hours per week or to separate them. Thus, in conjunction with the first sentence of the proposal, which would require that before such temporary part-time employees may be reduced below 20 hours per week, that all intermittent employees must first be separated, the second sentence also derivatively would require prior separation of all intermittent employees. Continuing to build in this pyramid-like manner, each subsequent sentence of the proposal would impose upon the agency the same derivative requirement of separating all intermittent employees as a mandatory condition precedent to reducing the hours of any other category of employee below the levels specified in the proposal.

It is clear from the legislative history of the Statute that a proposal which directly and integrally infringes on the exercise of the management

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1/ Section 7106 provides, in relevant part:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws--

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees[.] [Emphasis added.]

rights specified in section 7106 of the Statute is barred from negotiations.2/ These rights include the authority of the agency to determine to "remove" employees. The literal language of the union's proposal would require the agency to "separate" (i.e. to "remove") certain employees as explained above. In thus compelling the separation of particular employees, the proposal directly interferes with the agency's discretion to determine whether to remove employees, and if so, which employees to remove, in violation of section 7106(a)(2)(A) of the Statute. Thus, it is outside the duty to bargain. Consequently, the agency's allegation that the proposal is not within the duty to bargain is sustained.

Issued, Washington, D.C., April 4, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ See, e.g., statement of Congressman Clay during the House debate on Title VII:

> [I]t is essential that only those proposals that directly and integrally go to the specified management rights be barred from the negotiations.

124 CONG. REC. H9638 (daily ed. Sept. 13, 1978). See also discussion of legislative history of management rights clause in American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, Case No. O-NG-40, 2 FLRA No. 77 (Jan. 31, 1980), at 4 of the Authority's decision.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 695

(Union)

and

Case No. 0-NG-114

DEPARTMENT OF THE TREASURY,
U.S. MINT, DENVER, COLORADO

(Activity)

DECISION ON NEGOTIABILITY ISSUES

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

Union Proposal I

ARTICLE VI. WORK ASSIGNMENTS

Section 2. Work and position rotation in the Coin press branch: Work assignments shall be rotated weekly.

Section 4. Work and position rotation in the Coin blanking sec: Work assignments shall be rotated weekly.

Question Here Before the Authority

The question is whether the union's proposal is within the duty to bargain under the Statute or is outside the duty to bargain under section 7106(a)(2)(A), */ as alleged by the agency.

*/ Section 7106(a)(2)(A) of the Statute (92 Stat. 1198) provides:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . .

(Continued)

Preliminarily, it is noted that the agency, after the union filed its response to the agency's statement pursuant to section 2424.7 of the Authority's regulations, requested permission, in effect, to make an additional submission herein and the union objected to that request.

Neither the Statute nor the Authority's rules of procedure provides for any submissions by the parties to a negotiability case before the Authority beyond the union's petition, the agency's statement, and the union's response to that statement. Further, the Statute and the Authority's regulations provide the agency 30 days from the date of the agency head's receipt of a copy of the union's appeal to set forth in full the agency's position on any matters relevant to the petition which it wishes the Authority to consider in reaching a decision. Therefore, it is the policy of the Authority, as reflected in section 2424.8 of its regulations (45 Fed. Reg. 3512-3513), not to consider submissions in negotiability cases other than those prescribed in the Statute and the Authority's regulations, unless additional information is either requested by the Authority or the Authority, in its discretion, grants permission to file such submission.

No additional information, beyond that contained in the appeal, the agency's statement, and the union's response, is deemed necessary in the instant case. Accordingly, the agency's request to file such additional submission is hereby denied, and nothing submitted with that request has been considered by the Authority in reaching its decision herein.

Opinion

Conclusion: The proposal conflicts with management's right to assign employees within the meaning of section 7106(a)(2)(A) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that the disputed proposal is not within the duty to bargain is sustained.

Reasons: The agency contends, among other things, that the union's proposal would prevent the activity from assigning any employee in either the Coin press branch or Coin blanking section to any appropriate work at any time and therefore violates section 7106(a)(2)(A) of the Statute. In its submissions to the Authority, the union does not specify the intent of its proposal. However, for the reasons stated below, it is concluded that the proposal violates management's right to assign and therefore is outside the duty to bargain under the Statute.

(Continued)

(2) in accordance with applicable laws--

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees. . . .

On its face, the disputed proposal requires that "[w]ork assignments shall be rotated weekly" in the Coin Press branch and the Coin Blanking section of the activity. However, it is unclear whether the proposal would compel the activity to assign employees to different positions within these operations (each position requiring particular skills and qualifications in the performance of specific duties identified with that position) or would merely require employees to be rotated through the variety of duties contained in his or her own position description. In the instant case, it is immaterial which interpretation of the proposal was intended, for in either case the language of the disputed proposal would conflict with management's reserved right to assign within the meaning of section 7106(a)(2)(A) of the Statute. That is, even if the union intended only that employees be rotated to the various duties within their own position description, the specific language of the proposal at issue would require all employees to be rotated each week regardless whether any work were available which required the performance of such duties or whether the work previously assigned had been completed. In other words, management would be restricted in making new assignments, or in modifying, terminating, or continuing existing ones as deemed necessary or desirable. Accordingly, the specific proposal at issue herein is outside the duty to bargain under the Statute.

Union Proposal II

ARTICLE VII. DETAILS

Section 1. Necessity of a Detail
Management will determine when details are necessary, the number of employees to be detailed and the area from which they will be detailed.

[This portion of the proposal was found negotiable by the agency and is therefore not in dispute.]

Section 2. General Details
In situations where details of employees to positions outside their branch are expected to be regular or recurring and where no special skills or qualifications are required, the employee selected for the detail will be the senior employee within the branch who has volunteered for the assignment. When asking for volunteers, management will inform employees of the type of work to be performed and the duration of the assignment. If there are no volunteers, the least senior employee within the branch will be selected.

Section 3. Details Involving Special Qualifications
In situations where it is necessary to select an employee with specific qualifications for a detail outside his branch, the employees within the branch will be informed of the type of work to be performed, the length of the detail and the qualifications for the assignment. The senior qualified employee within the branch who has volunteered for the detail will be selected. If there are no volunteers, the least senior qualified employee within the branch will be selected.

Section 4. Emergency Details
It is understood that the detail procedures outline[d] in Sections 2 and 3 will be followed (use of seniority and volunteers). Where an unforeseen situation arises that temporarily precludes compliance of the use of seniority and volunteers, the following steps and conditions will apply:

1. The detail will not exceed two (2) hours duration.

2. The union steward will be informed of the reasons for applying this section (Section 4) within this two (2) hour period.

3. At the end of the two (2) hour period Section 2 or 3 will be utilized for any further detail needs.

Section 5. Application of this Article
This Article shall constitute the sole procedure for the detailing of unit employees to positions within the unit at the United States Mint, Denver, Colorado, and shall supersede any and all previous such memoranda and/or agreements between Management and the Local Union.

Question Here Before the Authority

The question is whether the union's proposal conflicts with the agency's right to assign employees under section 7106(a)(2)(A) of the Statute.

Opinion

Conclusion: The proposal conflicts with the agency's right to assign under section 7106(a)(2)(A) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that the disputed proposal is not within the duty to bargain is sustained.

Reasons: The agency alleges that the proposal is nonnegotiable because the requirement that volunteers be solicited and seniority be used as the sole factor in the selection of employees for details would directly interfere with the activity's right to assign employees and would not, as the union argues, constitute merely a procedure used in selection.

In a recent decision, American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, Case No. 0-NG-40, 2 FLRA No. 77 (Jan. 31, 1980), the Authority found that proposals requiring the selection of a particular individual for a temporary assignment on the basis of seniority directly interfered with the right of an agency to assign employees. In this regard, the Authority stated (at p. 10 of the decision):

> The right to assign employees in the agency under section 7106(a)(2)(A) of the Statute is more than merely the right to decide to assign an employee to a position. An agency chooses to assign an employee to a position so that the work of that position will be done. Under section 7106(a)(2)(A) of the Statute, the agency retains discretion as to the personnel requirements of the work of the position, i.e., the qualifications and skills needed to do the work, as well as such job-related individual characteristics as judgment and reliability. Therefore, the right to assign an employee to a position includes the discretion to determine which employee will be assigned. . . A procedure for selecting an employee for assignment solely on the basis of seniority removes from the agency that discretion which . . . is an essential part of the decision to assign . . . .

The procedure that is outlined in Sections 2 and 3 of the instant proposal mandates the selection of a particular employee for assignment to a detail solely on the basis of seniority and therefore removes from the activity any discretion in making such assignments. Accordingly, for the reasons fully set forth in the above-referenced Air Force Logistics Command case, the Authority finds that Sections 2 and 3 of the union's proposal directly interfere with the discretion to determine which employee to assign, in violation of section 7106(a)(2)(A) of the Statute. Sections 4 and 5 of the union's proposal similarly violate section 7106(a)(2)(A) of the Statute inasmuch as they call for the use of the procedures contained in Sections 2 and 3 that have been found nonnegotiable. Additionally, it is noted that the agency contends that Section 5 of the union's proposal violates the parties' National Agreement, whereas the union asserts that it is "consistent with . . . the Master Agreement." As the Authority has previously held, where there is a dispute as to whether a master agreement, negotiated at the national level, authorizes bargaining at the local level on certain matters contained therein, the proper forum in which to resolve such disputes would be that which the parties themselves have adopted for such purpose. See American Federation of Government Employees, AFL-CIO, Local 1661 and Department of Justice, Bureau of Prisons, Federal Correctional Institution, Danbury, Connecticut, Case No. 0-NG-43, 2 FLRA No. 56 (Jan. 9, 1980), and American Federation of Government Employees, AFL-CIO, Local 2272 and Department of Justice, U.S. Marshals Service, District of Columbia, Case No. 0-NG-101, 2 FLRA No. 113 (March 14, 1980).

In conclusion, since both of the union's proposals conflict with section 7106(a)(2)(A) of the Statute, the agency's allegation that they are not within the duty to bargain must be sustained.

Issued, Washington, D.C., April 14, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ASSOCIATION OF CIVILIAN TECHNICIANS,
PENNSYLVANIA STATE COUNCIL

(Union)

and

Case No. 0-NG-50

THE ADJUTANT GENERAL, DEPARTMENT OF
MILITARY AFFAIRS, COMMONWEALTH OF
PENNSYLVANIA

(Activity)

DECISION ON NEGOTIABILITY ISSUES

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105 (a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

Union Proposal

6. Retention Register Standing

a. Excepted Service - Retention standing of a technician is determined by the combined cumulative totals of the annual technician performance rating NGB Form 2, prepared in accordance with TPP 902, and the appraisal by the immediate military supervisor NGB Form 351-2, prepared at the same time. Military appraisals will be completed at the time of a RIF only for those technicians who do not have a current military appraisal in their Official Personnel Folders. The weighted value of the annual Technician Performance Rating will be as follows:

Satisfactory - 25 to 40 points
Excellent - 50 to 65 points
Outstanding - 75 to 90 points

c. An appeal of the military appraisal will be as follows:

(1) If a technician is not satisfied with his military appraisal, he may appeal to the immediate military supervisor of his rater. This second level supervisor will gather all facts and render a decision within 15 days of request.

(2) If the technician is still not satisfied, he may appeal to the next level military supervisor. This supervisor will gather all facts and render a decision within 15 days of request.

(3) If the technician remains dissatisfied, the next step will be the next level military supervisor. This supervisor will gather all facts and render a decision within 15 days of the request.

(4) If the technician remains dissatisfied he may then appeal to the Adjutant General who will gather all facts and render a decision within 15 days of the request.

Question Here Before the Authority

The question is whether the union's proposal is within the agency's duty to bargain under the Statute or, as alleged by the agency, is outside the obligation to bargain.

Opinion

Conclusion: (1) Paragraph (a) of the proposal is within the duty to bargain under the Statute. (2) The second part of the proposal, paragraph (c), is outside the duty to bargain under the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that the union's proposal is outside the duty to bargain is sustained in part and set aside in part.

Reasons: (1) The union's proposal set forth above involves the reduction in force (RIF) procedures for National Guard technicians 1/ established by National Guard Bureau (NGB) regulations. 2/ The agency alleges that its duty

1/ National Guard technicians are employed pursuant to the National Guard Technicians Act of 1968, 32 U.S.C. § 709 (1970), in full-time civilian positions to administer and train the National Guard and to maintain and repair the supplies issued to the National Guard or the armed forces. Such technicians must, as a condition of their civilian employment under the Act, become and remain members of the National Guard (i.e., in a military capacity) and hold the military grade specified for the technician position pursuant to 32 U.S.C. § 709(b) and (e).

2/ The NGB regulation, Technician Personnel Manual (TPM) 351, provides in essence that RIF retention standing is based on a composite measurement of technician performance and related military performance. Insofar as pertinent to paragraph (a) of the union's proposal, TPM 351 provides that a technician whose annual performance rating is "satisfactory" will receive 25 points, while a technician rated "excellent" will receive 50 points and one rated "outstanding" will receive 75 points.

to bargain in good faith does not extend to paragraph (a) of the union's proposal inasmuch as a "compelling need" exists within the meaning of section 7117(a)(2) of the Statute 3/ and Part 2424 of the Authority's Rules and Regulations 4/ for the NGB regulation (TPM 351) concerning RIF procedures for National Guard technicians. The union contends, on the other hand, that nothing in paragraph (a) of its proposal conflicts with the NGB regulation for which a compelling need exists, but that paragraph (a) ". . . merely gives more latitude to the technician supervisor by expanding the point range of each class of performance rating." 5/ For the reasons stated below, the Authority concludes that paragraph (a) is within the duty to bargain under the Statute.

The National Guard Technicians Act of 1968, as previously indicated, contains the authority for the employment of National Guard technicians. The Act provides further that RIF actions involving National Guard technicians are to be accomplished by the adjutants general of the respective jurisdictions concerned subject to the regulations of the appropriate military service

3/ Section 7117(a)(2) of the Statute (92 Stat. 1205) provides as follows:

> (a)(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

4/ The criteria for determining compelling need for agency rules and regulations are contained in section 2424.11 of the Authority's Rules and Regulations (45 Fed. Reg. 3513 (1980)). It appears that the agency principally relies on section 2424.11(c), which provides that a compelling need exists for an agency rule or regulation concerning any condition of employment when:

> (c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

5/ While the proposal is entitled "Retention Register Standing" and paragraph (a) thereof refers to "retention standing," it is clear from the record before the Authority that the union intended (and the agency construed) paragraph (a) to address only technicians' retention ratings (determined by combining the point totals from the annual technician and military performance appraisals) rather than their retention standing (which involves placing technicians, according to their relative retention rating, in one of three descending tenure groups based upon whether their status is "career/permanent," "temporary/probationary," or "indefinite"). Therefore, the proposal is construed in a manner consistent with the parties' mutual understanding.

secretary. 6/ Additionally, it requires that, as far as practicable, such regulations should apply uniformly to both Army and Air Force National Guard technicians. 7/ Other sections of the Act mandate that National Guard technicians be excepted from the application of veterans' preference and from the application of RIF procedures developed by the Civil Service Commission (now the Office of Personnel Management) which apply veterans' preference. 8/ Moreover, the Act requires technicians to maintain military membership in the National Guard and hold the military grade specified for their technician position as a condition of continued technician employment. 9/

6/ 32 U.S.C. § 709 (e) provides in relevant part as follows:

(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned--

. . . . .

(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

. . . . .

7/ Section 10 of the National Guard Technicians Act of 1968 provides:

Regulations prescribed by the Secretary of the Army and the Secretary of the Air Force under this Act shall be approved by the Secretary of Defense and shall, so far as practicable, be uniform.

8/ 32 U.S.C. § 709(f) provides:

(f) Section 2108, 3502, 7511 and 7512 of title 5 United States Code, [establishing entitlement to veterans' preference and effect of such entitlement in RIF and adverse actions] do not apply to any person employed under this section.

9/ 32 U.S.C. § 709(b) provides in relevant part as follows:

[A] technician . . . shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

32 U.S.C. § 709(e) provides in relevant part as follows:

. . . . .

(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position . . . shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned[.]

The NGB, acting on behalf of the Secretary of the Army and the Secretary of the Air Force, promulgated the RIF regulations involved herein, implementing these statutory mandates. That is, as relevant to this dispute, to implement the statutory mandate that technicians maintain military membership in the National Guard and hold the military grades specified for their technician positions, even in a RIF situation, the regulations require technician RIF displacement rights within and across competitive levels to be based on a measurement of both civilian technician and military job performance. In short, the NGB regulations implement in an essentially nondiscretionary manner the statutory mandate that technicians maintain military membership in the National Guard and hold the military grade specified for their technician positions, and therefore a compelling need exists within the meaning of section 7117(a)(2) of the Statute and section 2424.11(c) of the Authority's Rules for the NGB regulation so as to bar negotiations on conflicting union proposals.

In the instant case, however, nothing in paragraph (a) of the union's proposal would conflict with any part of the NGB regulation which implements the nondiscretionary statutory mandate that technicians must maintain military membership in the National Guard and hold the military grade specified for their technician positions as a condition of continued technician employment. That is, while the National Guard Technicians Act of 1968 requires both civilian and related military performance to be considered as part of a technician's overall evaluation, nothing in the language or legislative history thereof specifies what relative weight must be accorded to each appraisal. The proposal at issue herein would require technician supervisors to rate each technician as either "satisfactory," "excellent" or "outstanding," as required by the NGB regulation (supra note 2), but would permit more accuracy and precision by establishing a range of points rather than a specific point value for each category. Since the range for each category would start with the point value contained in the NGB regulation and extend no higher than the point value specified therein for the next higher category, there is at least the potential for a technician's civilian rating to acquire slightly greater weight relative to his or her military appraisal so long as the weight attributed to the military appraisal remained unchanged. However, nothing in the proposal would interfere with management's right to establish point ranges for military appraisals or otherwise alter the weight thereof, to determine which technicians to retain in a RIF or sanction the retention of any technician unqualified to hold the corresponding military grade for such position. Accordingly, it is concluded that paragraph (a) of the proposal is within the duty to bargain under the Statute. 10/

(2) However, it is concluded that paragraph (c) of the proposal is outside the duty to bargain under the Statute. As set forth above, paragraph (c) would establish a procedure for a technician to appeal from an appraisal of his military performance rendered by his military supervisor. That is, it would permit a technician dissatisfied with his military appraisal to appeal that appraisal through four levels of military personnel culminating with the Adjutant General. While National Guard technicians are required by law (supra n. 9) to maintain military status in the National Guard as a condition of their civilian technician employment relationship (which relationship is, of course,

10/ In so concluding, however, the Authority makes no judgment as to the merits of the proposal.

subject to the Statute), the military relationship itself is not covered by the Statute but is totally mandated by law. Therefore, inasmuch as paragraph (c) of the union's proposal concerns a matter in connection with the military aspects of technician employment for members of the bargaining unit, it concerns a subject which is not a "condition of employment" within the meaning of section 7103(a)(14) of the Statute 11/ and accordingly is outside the duty to bargain under the Statute. 12/

Issued, Washington, D.C., April 14, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY 13/

11/ Section 7103(a)(14) of the Statute (92 Stat. 1192) provides in pertinent part:

> (14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters--
>
> . . . .
>
> (c) to the extent such matters are specifically provided for by Federal statute[.]

12/ The exclusion of "matters . . . specifically provided for by Federal statute" (such as the military relationship of National Guard technicians in the instant case) from the definition of "conditions of employment," which exclusion originated in section 7103(a)(14)(C) of the House committee bill (H.R. 11280), was described in the House committee report as "removed from the obligation to bargain." See H.R. REP No. 95-1403, 95th Cong., 2d Sess. 41 (1978). See also the statements of Congressman Clay of Missouri and Congressman Ford of Michigan, proponents of the House bill, at 124 CONG. REC. H 9638 and 9650 (daily ed. Sept. 13, 1978), respectively.

13/ In reaching the foregoing conclusions, the Authority fully considered the agency's statement of position filed pursuant to section 7117(c)(3) of the Statute and section 2424.6 of the Authority's Rules and Regulations. Contrary to the union's contentions, such statement of position was filed within 30 days of the union's completion of its petition for review herein and was therefore timely.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ASSOCIATION OF CIVILIAN TECHNICIANS
DELAWARE CHAPTER

(Union)

and

Case No. 0-NG-104

NATIONAL GUARD BUREAU
DELAWARE NATIONAL GUARD

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor Management Relations Statute (5 U.S.C. section 7101 et seq.).

Union Proposal

Section 3. Position Announcement - When positions are announced, distribution of the announcements will be throughout the area of consideration and will contain, as a minimum, the following information:

. . . . . .

e. Area of Consideration as follows
(1) 1st area - All civilian technicians
(2) 2nd area - All members of the National Guard
(3) 3rd area - All others

Question Here Before the Authority

The question is whether the union's proposal concerning the filling of vacant positions is a matter outside the duty to bargain established by the

Federal Service Labor Management Relations Statute or violates section 7106(a)(2)(C) of the Statute, 1/ as alleged by the agency.

Opinion

Conclusion: The subject proposal is within the agency's duty to bargain under the Statute and does not violate section 7106(a)(2)(C) thereof. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that the disputed proposal is not within the duty to bargain is set aside. 2/

Reasons: The agency alleges that the proposal is nonnegotiable because it establishes a mandatory rank order preference which would operate as a constraint on management's authority to recruit and select employees for positions within the agency. To the contrary, the union's proposal would not prevent management from exercising its right to make selections from among properly ranked and certified candidates for promotion or from any other appropriate source. Rather it merely provides a procedure for defining the initial area of

1/ Section 7106(a)(2)(C) of the Statute (92 Stat. 1198) provides:

> Section 7106. Management rights.
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--
>
> . . . . . .
>
> (2) in accordance with applicable laws--
>
> . . . . . .
>
> (C) with respect to filling positions, to make selections for appointment from--
>
> (i) among properly ranked and certified candidates for promotion; or
>
> (ii) any other appropriate source....

2/ In deciding that the subject proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

consideration for candidates under the agency merit placement plan and for the expansion of that area of consideration, a matter clearly negotiable under section 7106(b)(2) of the Statute. 3/

The proposal is not in conflict with section 7106(a)(2)(C) of the Statute which reserves to management the authority to select employees from among properly ranked and certified candidates for promotion or from any other appropriate source. As the union itself stated in its response:

> We disagree with the Agency's contention that the union's proposal in this case establishes a "preference" method of selection to available positions in the agency. The procedural aspects of announcements, as provided for in the Union's proposals are not selective in nature as they do not require selection. (Emphasis in original.)

See American Federation of Government Employees, Local 331 and Veterans Administration Hospital, Perry Point, Maryland, Case No. 0-NG-17, 2 FLRA No. 59 (January 17, 1980), wherein the Authority concluded that a proposal which would require only that consideration be given to employees within the bargaining unit in filling vacant positions but would not prevent management from considering other applicants, or expanding the area of consideration once bargaining unit employees were considered, or using any other appropriate source in filling such vacancies, did not prevent management from exercising its reserved right to select. In that case the Authority pointed out that the proposal was concerned only with limiting the area of such intensive search and would require only that consideration be given to employees within the bargaining unit in filling vacant positions. The Authority noted that the proposal would expressly permit agency employees from outside the minimum area of consideration to apply for positions covered by the provision, and would not limit management consideration of such applicants. Moreover, it would not prevent management from expanding the area of intensive search for eligible candidates or from making selections from any appropriate source once the minimum area of consideration was considered. The

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3/ Section 7106(b)(2) of the Statute (92 Stat. 1199) provides:

> Section 7106. Management rights.
>
> . . . . . .
>
> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating--
>
> . . . . . .
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section.

proposal herein does not preclude the agency from expanding the area of consideration for eligible candidates, nor does it require that any employee be selected from one of the three designated areas of consideration.

In view of the foregoing, the proposal at issue is a matter within the agency's duty to bargain under the Statute, and the agency's determination of non-negotiability must be set aside.

Issued, Washington, D.C., April 14, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier, III Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

April 9, 1980

Mr. Ronald D. King, Director
Contract and Appeals Division
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Immigration and Naturalization Service, Department of Justice, U.S. Government and American Federation of Government Employees, Local No. 1656 (Marlatt, Arbitrator), Case No. 0-AR-81

Dear Mr. King:

This refers to your exceptions to the arbitrator's award in the above-entitled case, dated March 6, 1980, and filed with the Authority on March 12, 1980. For the reasons indicated below, it has been determined that your exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the Authority's regulations (copy enclosed) provides:

(b) The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in your submission, is dated February 11, 1980. Therefore, under section 2425.1(b) of the Authority's regulations, your exceptions were due in the office of the Authority no later than March 11, 1980. However, as stated above, your exceptions were not filed with the Authority until March 12, 1980. In this regard, the Authority is not empowered to extend or waive the time limit for filing exceptions to arbitrators' awards.

Accordingly, as your exceptions were untimely filed, and apart from other considerations, your appeal is hereby dismissed.

For the Authority.

Sincerely,

Samuel A. Chaitovitz
Executive Director

Enclosure

cc: A. E. Ross
Justice

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL AVIATION SCIENCE AND
TECHNOLOGICAL ASSOCIATION

Union

and

Case No. 0-AR-2

FEDERAL AVIATION ADMINISTRATION,
DEPARTMENT OF TRANSPORTATION

Activity

DECISION

This matter is before the Authority on a petition for review of the award of arbitrator Theodore Dyke filed by the union under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)).

According to the arbitrator's award, the grievance arose when the grievant, an electronics technician at the activity, was not assigned to work February 20, 1978, a Federal holiday (George Washington's Birthday), although she had not asked for the day off and other employees in the crew of which she was a member were assigned to work that day. A grievance was filed in which the grievant sought "[t]o work Holidays per the intent of Article 40" of the collective bargaining agreement[1/] and also "restitution or other premium pay lost due to the actions of the Employer." The matter was ultimately submitted to arbitration. The issue as stated by the arbitrator was:

> Did the employer violate the Contract by giving [the grievant] the day off on February 20, Washington's Birthday, a legally established federal holiday.

1/ Article 40 of the parties' agreement states in pertinent part:

. . . . . .

> Section 3. To the extent that operational requirements permit, employees scheduled to work on actual established legal holidays or days observed in lieu of such holidays shall be given such day off if they so request.
>
> Section 4. A list of employees assigned to work legal holidays and days in lieu of holidays shall be posted at least twenty-one (21) days in advance, and these assignments, once posted, will not be deleted without consent of the employees involved.

In his award the arbitrator cited specific provisions of the parties' agreement and found, contrary to the union's position, that the activity had not changed the basic watch schedule in violation of the agreement. He further found that the activity had not violated Article 40 of the agreement. In doing so he stated:

> The union would, by its posture, reverse the contract language to read, in effect, that '. . . employees shall be allowed to work such holiday if they so request.' There is nothing by way of the Contract or past practices or in the negotiations themselves supportive of this conclusion. If at all, the opposite predominately prevails.

The arbitrator therefore denied the grievance, concluding that "it is 'the Union which is attempting to gain through arbitration something they could not gain during negotiations.'"

The union filed a petition for review of the arbitrator's award pursuant to the rules of procedure set forth in 5 C.F.R. part 2411 (1978), which, to the extent consistent with the provisions of section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)) and as amended by section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority (44 Fed. Reg. 44741), remain operative with respect to this case. The union seeks Authority acceptance of the petition on the basis of the exception discussed below. The agency did not file an opposition.

Pursuant to section 2411.32 of the amended rules and section 7122(a) of the Statute, the Authority will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award is deficient because it is contrary to law or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its exception, the union alleges that the arbitrator's award is based upon a nonfact. In support of this exception the union refers to a portion of the arbitrator's opinion accompanying his award in which the arbitrator referred to the agency's holiday policy contained in agency regulations[2/] as "Federal Holiday Policy." The union thus asserts that had the arbitrator not made this "gross mistake of fact," believing the holiday policy to be a Federal policy rather than an agency policy, he "would have been forced to rule that Article 40, Section 3 displaced the FAA holiday policy contained in the FAA's

---

2/ The agency policy referred to by the arbitrator is as follows:

> 81. BASIC POLICY. Employees will not be assigned to duty on holidays unless work is necessary for the protection of life or property, is in the interest of the general public, or is necessary to meet an emergency in which the Government requires the completion of a particular job without delay. In line with this general policy, as many employees as feasible in continuously operating activities (i.e., activities open 16 to 24 hours a day, 7 days a week) will be excused from duty on a holiday; and as many employees as necessary to meet operating requirements will be required to work. . . .

internal regulations, and that . . . Article 40, Section 3 of the FASTA/FAA agreement should apply."3/

The Federal Labor Relations Authority will grant a petition for review of an arbitration award on the ground that the award is based on a nonfact. United States Army Missile Materiel Readiness Command (USAMIRCOM) and American Federation of Government Employees, Local 1858, AFL-CIO, Case No. 0-AR-7, 2 FLRA No. 60 (January 17, 1980). However, in this case the union has not described facts and circumstances to support its exception. The union has not shown that the arbitrator's reference to the agency "holiday policy" as "Federal Holiday Policy" is the central fact underlying his award and that but for the arbitrator's misapprehension he would have reached a different result. While the union argues that but for the arbitrator's finding of this nonfact, he would have been forced to rule that the holiday policy contained in Article 40 of the agreement applied, it is noted that the arbitrator specifically addressed the application of Article 40 to the grievance and concluded that "[t]he Union would, by its [argued for interpretation], reverse the contract language . . ." and "[t]here is nothing by way of the Contract or past practices or in the negotiations themselves supportive of this conclusion." Thus the union's argument in support of its exception constitutes nothing more than disagreement with the arbitrator's interpretation and application of the agreement provision before him. This does not constitute a basis for reviewing arbitration awards. United States Army Missile Materiel Readiness Command, supra. Therefore the union's exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules.

Accordingly, the union's petition for review of the arbitrator's award is denied because it fails to meet the requirements of section 2411.32 of the amended rules for acceptance by the Authority of a petition for review of an arbitrator's award.

Issued, Washington, D.C., April 10, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ The union refers, in support of this argument, to Article 55 of the parties' agreement which, as set forth by the arbitrator, provides in part:

> Any provision of this agreement shall be determined a valid exception to and shall supersede any existing FAA rules, regulations, orders and practices which are in conflict with the agreement.

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 38 REPORT OF CASE DECISIONS June 26, 1980

REPRESENTATION CASES

3 FLRA No. 12 (May 29, 1980)

Department of Energy, Western Area Power Administration, Assistant Secretary Case No. 61-4217(RA). The activity filed a representation petition under E.O. 11491, contending (1) that as a consequence of changes resulting from creation of the Department of Energy it had a good faith doubt as to the continuing appropriateness of any bargaining units in which any labor organization asserts that it is the exclusive representative of activity employees; and (2) that the only appropriate unit is an activity-wide unit of Wage Board (WB) employees. Intervenors (IBEW Locals 611, 640, 1245, 1759, 1959 and 2159) contended that the activity was the statutory successor of the U.S. Bureau of Reclamation (USBR) in 5 separate bargaining units that continued to be viable entities; and that supervisory employees who were in those bargaining units prior to 1962 should be included in any unit found appropriate. The Authority found that the activity was not the successor employer in the bargaining relationship between USBR and the intervenors; that an activity-wide unit of all Wage Board employees was appropriate for the purpose of exclusive recognition; and, without passing upon their supervisory status, that certain foremen should be included in the unit; and that the employees should continue to have the right to negotiate, through their exclusive representative, wages and other terms and conditions of employment analogous to those that existed at USBR. The Authority thereupon directed an election in the unit found appropriate. (Decision and Direction of Election attached.)

3 FLRA No. 17 (April 28, 1980)

Department of the Air Force, 6th Missile Warning Squadron, Otis Air Force Base, Massachusetts, Case No. 1-RO-5. AFGE filed a representation petition with the Authority under section 7111(b)(2) of the Statute, seeking to represent a unit of employees at the 6th Missile Warning Squadron. NAGE Local R-154 intervened, claiming that employees AFGE sought to represent had accreted to and were part of another unit of

Otis Air Force Base employees represented by NAGE. The activity agreed with NAGE's position. The Authority found that the 6th Missile Warning Squadron constituted an appropriate unit for the purpose of exclusive recognition. Moreover, the Authority found that although accretion of the the Missile Warning Squadron to NAGE's existing unit without an election was not justified, NAGE's unit would remain an appropriate one with the addition to it of such employees. Accordingly, the Authority directed an election in the unit found appropriate in which election the employees would be asked whether they desired to be represented by AFGE, NAGE or neither. (Decision and Direction of Election attached.)

UNFAIR LABOR PRACTICE CASES

3 FLRA No. 11 (April 14, 1980)

Social Security Administration, Headquarters, Baltimore, Maryland, Assistant Secretary Case No. 22-09141(CA). The ALJ recommended dismissal of the complaint filed by the union (AFGE Local 1923) under E.O. 11491, for lack of prosecution when the complainant/union failed to appear at the scheduled hearing. The Authority denied as untimely the union's request for permission to withdraw its complaint, adopted the ALJ's findings, conclusions, and recommendation and dismissed the complaint. (Decision and Order attached.)

3 FLRA No. 15 (April 28, 1980)

Norfolk Naval Shipyard, Assistant Secretary Case No. 22-09154(CA). The ALJ, upon a complaint filed by the union (IFPTE Local 1) under E.O. 11491, concluded that the activity violated section 19(a)(1) and (6) of the Order by unilaterally ending the existing practice of free access by employees to certain work files used in the performance of their duties, as well as in preparing responses to adverse ratings, appraisals and letters of caution, and thereafter requiring a supervisor's permission to use the files. The failure to give notice also precluded an opportunity to negotiate about the impact of the decision, in further violation of section 19(a)(1) and (6). In reaching this conclusion, the ALJ found, among other things, that although use of the files facilitated the performance of employee duties, the new rule was merely a change in how employees secured access to the files and, thus, negotiable as it was not a management right reserved in sections 11(b) and 12(b)(5) of the Order. Contrary to the ALJ, the Authority found that the change in procedures for employee access to the work files, as used in the performance of their duties, related to the activity's methods of

operation, and was thus a decision reserved to management by section 12(b)(5) of the Order. Accordingly, the Authority dismissed that aspect of the complaint. The Authority adopted the remainder of the ALJ's recommended decision, which found violations of section 19(a)(1) and (6) by the activity for the failure to give notice and opportunity to bargain about the impact of the change in access for performance of employee duties, as well as for the failure to bargain over the change in practice regarding access to files for preparing responses to charges of poor work, and the impact of that change; and issued a remedial order as to that aspect of the complaint. (Decision and Order attached.)

3 FLRA No. 18 (April 28, 1980)

Aircraft Fire and Rescue Division, Air Operations Department, Naval Air Station, Norfolk, Virginia, Assistant Secretary Case No. 22-09088(CA). The ALJ, upon a complaint filed by the union (AFGE Local 2225) under E.O. 11491, concluded that the activity had violated section 19(a)(1) and (6) of the Order when it failed to give specific advance notice to the union of changes in the worksite of aircraft crash and rescue crews assigned to duty at its heliport and to provide the union with an opportunity to negotiate over the impact and implementation of such a change. The Authority adopted the ALJ's findings, conclusions, and recommendation and issued a remedial order. (Decision and Order attached.)

NEGOTIABILITY CASES

3 FLRA No. 13 (April 28, 1980)

The National Council of CSA Locals, A.F.G.E., AFL-CIO and The Community Services Administration, Case No. 0-NG-127. This dispute involved the negotiability of a union proposal, which, as interpreted, would require management to select one of five qualified applicants from within the minimum area of consideration for merit promotions and would restrict management's discretion to consider other candidates only to a situation where applicants were rated qualified and the area of selection could be expanded. The Authority held that the union's proposal violated section 7106(a)(2)(C) of the Statute and, accordingly, sustained the activity's allegation that the disputed proposal was not within the duty to bargain. (Decision attached.)

3 FLRA No. 14 (April 28, 1980)

National Federation of Federal Employees, Local 1451 and Naval Training Center, Orlando, Florida, Case No. O-NG-75. This dispute involved a union proposal that each party have a minimum of three designated representatives for the purpose of negotiations, but attendance of all representatives at negotiating sessions was not required. The Authority held that insofar as the union's proposal would require management to designate a minimum number of representatives for negotiations, the proposal was not within the activity's duty to bargain and, accordingly, sustained the activity's allegation to that effect. (Decision attached.)

3 FLRA No. 16 (April 28, 1980)

American Federation of Government Employees, AFL-CIO, Local 2578 and General Services Administration, National Archives and Records Service, Case No. O-NG-163. This dispute involved a union proposal requiring that the agency maintain certain ranges of temperature and humidity in work areas, except as otherwise required by law or executive order. The agency alleged that the proposal was nonnegotiable, principally because it was contrary to Government-wide regulations, and the union appealed to the Authority. Subsequently, in response to the agency's statement of position, the union submitted a brief which revised its original proposal by including within the exceptions to its proposal "binding Government-wide regulation" among the authorities which would permit management to deviate from the temperature and humidity ranges prescribed in the proposal. The Authority held that since the revised proposal was not the subject of an allegation of nonnegotiability by the agency, the union's petition did not meet the conditions for review set forth in section 2424.1 of the Authority's rules and regulations. Accordingly, the Authority dismissed the appeal as premature without a determination as to the negotiability of the union's revised proposal. (Decision attached.)

Attachments (8)

Corrected Copy

3 FLRA No. 12

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF ENERGY,
WESTERN AREA POWER ADMINISTRATION

Activity

and

Assistant Secretary
Case No. 61-4217(RA)

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 640, IBEW; LOCAL UNION NO. 1245, IBEW; LOCAL UNION NO. 2159, IBEW; LOCAL UNION No. 1759, IBEW; LOCAL UNION No. 1959, IBEW; LOCAL UNION NO. 611, IBEW

Intervenors

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under § 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer, Patricia L. Wigglesworth. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under § 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by § 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in § 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Upon the entire record in this case, including the briefs filed by the Activity and the Intervenors, the Authority finds:

The Department of Energy, Western Area Power Administration (WAPA) filed the subject petition contending that as a consequence of the changes resulting from the creation of the Department of Energy (DOE), it has a good faith doubt of the continuing appropriateness of any bargaining unit in which any labor organization asserts it is the exclusive representative of its employees. WAPA argues that the only appropriate unit of recognition is an activity-wide unit of Wage Board (WB) employees, excluding supervisors. The petition originally questioned also the continued appropriateness of existing units of GS employees, and the American Federation of Government Employees, AFL-CIO (AFGE) and the National Federation of Federal Employees (NFFE) intervened on the basis of their status

as the exclusive representative of those units. However, subsequent to the opening of the hearing herein, the WAPA, the AFGE and the NFFE stipulated as to the appropriateness of a single, activity-wide unit of all GS employees, and executed a consent election agreement, and, on this basis, the AFGE and the NFFE withdrew their interventions herein. The Intervenors herein, the International Brotherhood of Electrical Workers, Local Union 640, Local Union 1245, Local Union 2159, Local Union 1759, Local Union 1959, and Local Union 611, AFL-CIO (IBEW) contend that WAPA is a statutory successor of the United States Bureau of Reclamation (USBR) in five separate bargaining units and that the five units continue to be viable entities. The Intervenors further contend that the affected supervisory employees who have been members of the five bargaining units prior to 1962 should be included in any unit that may be found appropriate.

Prior to October 1, 1977, the subject employees, with others, were employed by USBR, whose mission involved the production, transmission and wholesale marketing of electric power generated at Federal power projects throughout a 15 state area in the western part of the country. At that time, the WB employees, who numbered approximately 1066 employees, were variously assigned to six USBR organizational sub-elements located throughout the 15 state area. These employees were represented exclusively in six separate bargaining units which were coextensive with the geographical and organizational assignments of the employees, and represented variously by each of the individual Intervenors. As of October 1, 1977, as a consequence of legislation creating the DOE, a segment of these employees, and their function were transferred to DOE, and assigned to WAPA. Approximately 408 of the USBR's 1066 WB employees involved in the power transmission and marketing functions were transferred to WAPA, with the balance of the employees, involved in the power production functions, remaining with the USBR. Thus, approximately 40% of the WB employees of USBR transferred to DOE, and approximately 60% remained with USBR. The record reveals that all six employees engaged in transmission and marketing functions who were in the bargaining unit represented by IBEW Local Union 611 retired subsequent to the reorganization and transfer. As a consequence, there are no current WAPA employees who were previously in the bargaining unit of USBR employees represented by Local 611.*/ Of the 151 employees represented by Local 640, 102 were transferred to WAPA; of the 350 employees represented by Local 1245, 20 were transferred to WAPA; of the 133 employees represented by Local 2159, 48 were transferred to WAPA; of the 201 employees represented by Local 1759, 74 were transferred to WAPA; and, of the 200 employees represented by Local 1959, 158 were transferred to WAPA.

WAPA, with headquarters in Golden, Colorado, is under the direction of an Administrator, and several Assistant Administrators. Organizationally, WAPA is sub-divided into five area offices and seven district offices. The Administrator and his staff are responsible for the overall operation of WAPA, and, under guidelines established by DOE, establish operational and personnel policies. Each area office is responsible within its geographic area, for the power marketing operations, including planning, contracting and negotiating with public utility companies and other major customers. The district offices are responsible, within their respective geographical area, for the construction, maintenance and repair of power transmission lines and equipment.

The record reveals that all personnel and labor relations policies are established and administered by WAPA headquarters, and are uniformly applicable to all employees, activity-wide. Subsequent to the creation of WAPA and the

*/ Accordingly, IBEW Local 611 will not appear on the ballot as described in the Direction of Election.

transfer of personnel, the WB employees have remained in the same locations, performing the same jobs under the same immediate supervision as they had under USBR. Further, the record establishes that all of these employees have basically similar job classifications, requiring essentially equivalent skills, training and educations, and have, and are, experiencing a significant degree of interchange between organizational units to meet emergency and/or work overload situations.

The record reveals that certain employees classified as Foreman, I, II, and III have been included as members of the bargaining unit prior to 1962. As indicated above, the WAPA seeks to have these employees excluded from any unit or units found appropriate by the Authority on the basis of their alleged supervisory status. A primary reason these employees were historically in the respective units was that the wage rates of these employees were negotiated by the Intervenors and the USBR in the same manner as the wage rates of other employees in the units. The record herein does not set forth the duties, authority and responsibilities of employees in the disputed classifications.

Contrary to the contention of the Intervenors, the Authority concludes that the WAPA is not the successor employer to the bargaining relationship between the Intervenors and the USBR, and is therefore not obligated to continue to accord to the individual Intervenors the rights of exclusive representatives. In this regard, the Authority notes that the Federal Labor Relations Council, in its decision in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, 3 FLRC 789, 802, FLRC No. 74A-22 (1975), established three criteria which must be met in order to establish that a gaining employer is a successor obligated to recognize an exclusive representative for a predecessor agency or activity: (1) The recognized unit is transferred substantially intact to the gaining employer; (2) the appropriateness of the unit remains unimpaired in the gaining employer; and, (3) a question concerning representation is not timely raised as to the status of the incumbent labor organization. As noted above, in the subject case the bargaining units were not transferred substantially intact from USBR to WAPA; rather, the original units containing significant numbers of USBR employees remained and continued to be recognized by the USBR. Thus, it is clear that the WAPA is not the successor employer to the bargaining units represented exclusively by the Intervenors.

With regard to issue of appropriateness of unit, the Authority concludes, in agreement with the WAPA, that an activity-wide unit of all WB employees would be appropriate. Thus, as noted above, such a unit would embrace employees who share in a common mission, enjoy common overall supervision, are employed in substantially similar work classifications requiring essentially the same skills, training and education, experience a significant degree of interchange, and are subject to uniform personnel and labor relations policies. Under these circumstances, the Authority finds that such unit includes all employees who share a clear and identifiable community of interest separate and distinct from other employees of the Activity. Moreover, such unit will promote effective dealings and efficiency of agency operations. In this regard, the Authority notes that such a unit is coextensive with the organizational structure of the WAPA, exists at the level at which personnel and labor relations policies are established, and prevents fragmentation of the employees, promoting a more comprehensive bargaining unit structure within the WAPA.

The record evidence is insufficient upon which a determination of the supervisory status of Foreman, I, II, and III can be based. However, as already indicated, these workers were included as members of the bargaining units at USBR since before 1962 and their wage rates were negotiated in the same manner as the wage rates of other personnel in the units. Congressman Ford stated with respect to the bargaining practices concerning these "trade and craft employees in units or portions of units" transferred from Interior to DOE that: "This has produced some of the most stable and effective collective bargaining in the history of public employee labor relations" (124 Cong. Rec. H8469, Aug. 11, 1978). To disrupt the historical inclusion of Foreman, I, II, and III with the nonsupervisory employess in any unit established at WAPA through the period of the Executive Orders and before could frustrate the long history of stable and effective collective bargaining. Accordingly, in the special circumstances of this case, we include Foreman, I, II, and III in the unit here found appropriate, without passing upon their supervisory status.

Accordingly, the Authority finds the following to constitute an appropriate unit for the purpose of exclusive recognition under Executive Order 11491, as amended: */

> All Wage Board (WB) employees of the Department of Energy, Western Area Power Administration, including employees classified as Foreman I, Foreman II or Foreman III, excluding management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

During the proceeding and in the parties' accompanying briefs, the parties indicated substantial concern as to the possible effect of the decision of the Authority herein on the scope of bargaining which the wage board employees had previously enjoyed at USBR. In this regard, it appears from the record that, prior to the establishment of DOE and WAPA, and dating back to the 1950's the wages of these employees were determined by negotiation on a prevailing wage basis, that is, by wage survey of identical craft positions within the area of jurisdiction of the respective IBEW locals here involved. This scope of bargaining enabled USBR to compete with private industry in attracting employees with the high degree of competence required for the fulfillment of the agency's mission. The legislative history of the Civil Service Reform Act of 1978 shows the intent of Congress that the wage board employees transferred from Interior to DOE should continue to enjoy this broad scope of bargaining at DOE similar to that which has existed at Interior. Thus, the Conference Committee, in discussing § 704 of Title VII of the CSRA (92 Stat. 1218), as subsequently enacted, stated:

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*/ In conformity with § 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and direction of election does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

> As revised, [section 704] overrules the decision of the Comptroller General . . . relating to certain negotiated contracts applicable to employees under the Department of the Interior and the Department of Energy. This section also provides specific statutory authorization for the negotiation of wages, terms and conditions of employment and other employment benefits traditionally negotiated by these employees in accordance with prevailing practices in the private sector of the economy (H. Rep. No. 95-1717, Oct. 5, 1978, at 159).

Similarly, Congressman Ford, in explaining his proposed amendment of the House bill which lead to the adoption of § 704, stated:

> During committee markup, I offered an amendment . . . which is intended to preserve the scope of collective bargaining heretofore enjoyed by certain trade and craft employees. This includes certain trade and craft employees of the Department of the Interior, and those trade and craft employees in units or portions of units, transferred, effective October 1, 1977, from the Department of the Interior to the Department of Energy (124 Cong. Rec. H8468, Aug. 11, 1978).

Under these circumstances, it is the Authority's view that the subject employees shall continue to have the right to negotiate wages and other terms and conditions of employment at DOE (through their exclusive representative), analogous to that which had existed at USBR and regardless of the identity of the representative selected by the employees in the unit found appropriate.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees of the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Regional Director shall supervise the election, subject to the Authority's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or on furlough, including those in military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and

have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by International Brotherhood of Electrical Workers Local Unions 640, 1245, 2159, 1759 and 1959, or by no union.

Issued, Washington, D.C., May 29, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE,
6th MISSILE WARNING SQUADRON
OTIS AIR FORCE BASE, MASSACHUSETTS

Activity

and

Case No. 1-RO-5

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Petitioner

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R1-54

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed with the Federal Labor Relations Authority under section 7111(b)(2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. sections 7101-7135, a hearing was held before Hearing Officer Robert E. Bailey on July 25, 1979. The Authority has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case, including a post-hearing brief filed by the Intervenor, the Authority finds:

The American Federation of Government Employees (AFGE) filed the petition herein, seeking a determination whether the employees of the 6th Missile Warning Squadron constitute a unit appropriate for exclusive recognition. The Intervenor, the National Association of Government Employees (NAGE), contends that the employees in the unit sought by the AFGE have accreted to and are a part of the NAGE's exclusively recognized unit of Air Force civilian employees at Otis Air Force Base, and that its collective bargaining agreement with the Activity is a bar to the petition filed by the AFGE. The Activity, Otis Air Force Base, agrees with the Intervenor's position in this matter.

Since February 18, 1965, the NAGE has been the exclusive representative of a unit of all Air Force civilian employees at Otis Air Force Base which includes a detachment of employees stationed at North Truro Air Force Station, North Truro, Massachusetts. In addition to the NAGE's overall unit of Air Force employees, a unit of guards and police officers at the Activity is represented by a local of the International Brotherhood of Police Officers, a division of NAGE, certified on June 1, 1976. Since June, 1977, there also has been a unit of firefighter personnel at the Activity represented by a local of NAGE. The record does not indicate whether the civilian employees at the Activity who are not employed by the United States Air Force are represented for the purpose of collective bargaining. The collective bargaining agreement currently in effect was executed on December 13, 1977, and approved on January 26, 1978.

Otis Air Force Base is a complex amalgamation of different agencies and units located on a 22,000 acre site at Cape Cod, Massachusetts. In addition to the Air Force units, there are a number of other tenant organizations at Otis with civilian employees, including the Coast Guard, an Army installation, a Marine Corps battalion, and an office of the U.S. Department of Agriculture.

The 6th Squadron was established in August, 1977, and was originally staffed with six employees, two of whom had been employed at other units of the Activity. Since that time, it has reached a full complement of approximately 100 employees, 70 of whom are in the unit sought. Approximately 50 percent of these were not previously employed by the Activity. The 6th Squadron is located at a separate, secured, fenced-in site on Otis, approximately 16 miles from the nearest other Air Force group and over 54 miles from the detachment stationed at North Truro. Its misssion is to discover, identify and track foreign missiles over a specific geographic area. It does not appear from the record that the creation of the 6th Squadron represents a reorganization of a prior existing function. Its work is not integrated with that of any of the other Air Force divisions located at Otis and North Truro, although together these groups share the responsibilities of the Air Defense Command whose role is to ward off intrusive forces.

The work performed by employees of the 6th Squadron is varied; engineers, radar mechanics, plumbers, warehousemen, crane operators and clericals are among the employees assigned to the unit. With the exception of warehousemen, crane operators, and clericals, the 6th Squadron shares no job classifications in common with other Air Force organizations of the Activity.

There is no base commander with overall authority at Otis. Rather, each of the organizations at Otis, including the 6th Squadron, has its own commander. Further, there is neither common supervision nor integration of work among the employees of the 6th Squadron and the four other Air Force units which comprise the Intervenor's unit, and employees of the 6th Squadron have no regular or routine working contacts with other civilian Air Force personnel at Otis. While the Activity's Central Civilian Personnel Office (CPO) administers a base-wide program which includes hiring, career development, and merit promotion, and a cooperative base-wide promotion plan, promotions in the 6th Squadron generally have been in-house. The area of consideration for reductions-in-force is

base-wide. The CPO also monitors labor-management relations, and is the Activity's agent for collective bargaining purposes.

In view of the foregoing, the Authority finds that the 6th Missile Squadron constitutes an appropriate unit for the purpose of exclusive recognition under the Statute. Thus, it is located at a self-contained, physically distinct site, with its own commander, and its employees perform a well-defined mission which is not integrated with other units of the Activity. Further, the employees of the 6th Squadron share no common supervision, no regular working contacts, and few common job classifications with other employees of the Activity, and there is no temporary interchange between the 6th Squadron employees and the rest of the Activity. Thus, the record demonstrates that employees of the 6th Squadron share a clear, separate and distinct community of interest among themselves. Further, noting that the employees of the 6th Squadron are separate and distinct geographically, organizationally and functionally from all other civilian employees at Otis, it is concluded that the unit sought herein would promote effective dealings and efficiency of operations. Moreover, the record demonstrates that those functions of the CPO which are common to all civilian employees of the Activity have not proved to be inconsistent with such a conclusion.

The Intervenor alleged that the unit in question accreted to the unit it now represents. In support of its allegation, the NAGE contended that the two units share a community of interest demonstrated by common personnel programs and policies, participation in a base-wide promotion plan, and geographic location on Otis. Additionally, the NAGE argued that the language of the present contract covers 6th Squadron employees and that approximately 50% of these employees were former base employees who were placed in 6th Squadron positions according to the terms of that agreement.

Although a substantial number of the employees of the 6th Squadron were formerly employed by other segments of the Activity, it does not appear that the transfers occurred through an administrative reorganization, but rather that they occurred over a period of time after the creation of the 6th Squadron. Thus, as the employees of the 6th Squadron share a separate, distinct and identifiable community of interest, the circumstances herein do not justify accreting them to an existing unit.

Based on the foregoing, the Authority finds the following unit appropriate for the purpose of exclusive recognition under Section 7112 of the Statute:

> All GS and Wage Grade Employees employed by the U.S. Air Force, 6th Missile Warning Squadron, at Otis Air Force Base, Massachusetts, excluding all professional employees; management officials; supervisors; and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).

Although it has been determined that accretion of these employees to the Intervenor's existing unit without an election is not justified, that unit would remain an appropriate unit with the addition to it of such employees. Thus, both groups share in common the programs administered by the Civilian Personnel Office, as well as several job classifications. Further, it is noted that the

existing unit already includes employees who are geographically separated, with no evidence that this has impaired effective dealings, efficiency of operations, or community of interest. Therefore, the employees sought will be asked whether they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, the National Association of Government Employees, 1/ or by neither. If the majority of the votes cast is for the American Federation of Government Employees, the employees will be taken to have indicated their desire to be represented by that labor organization in a separate unit. If, on the other hand, a majority of the votes cast is for the National Association of Government Employees, the employees will be taken to have indicated their desire to be represented by the National Association of Government Employees in its existing unit. 2/ Following the election, an appropriate certification will be issued by the Regional Director indicating whether the American Federation of Government Employees, the National Association of Government Employees, or neither labor organization was selected.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as soon as possible but not later than 60 days from the date below. The appropriate Regional Director shall supervise the election, subject to the Authority's rules and regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or on furlough, including those in the military

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1/ The NAGE has been placed on the ballot in this election in accordance with Section 7111(c)(2) and (3) of the Statute which provides:

> (c) A labor organization which-
>
> (2) has submitted a valid copy of a current or recently expired collective bargaining agreement for the unit; or
>
> (3) has submitted other evidence that it is the exclusive representative of the employees involved;
>
> may intervene with respect to a petition filed pursuant to subsection (b) of this section and shall be placed on the ballot of any election under such subsection (b) with respect to the petition.

2/ In the event that the Intervenor, the NAGE, does not desire to proceed to an election in the unit found appropriate, it may request that the Regional Director remove its name from the ballot. The request must be in writing and must be received no later than seven days before the date of the election. Such request is subject to the approval of the Regional Director whose decision is final.

service who appear in person at the polls. Ineligible to vote are employees who quit or who were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, in which case they will constitute a separate unit; by the National Association of Government Employees, indicating their desire to be represented by that labor organization in its existing unit of Air Force civilian employees at Otis Air Force Base; or by neither labor organization.

Issued, Washington, D.C., April 28, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION,
HEADQUARTERS, BALTIMORE, MARYLAND

Respondent

and

Assistant Secretary
Case No. 22-09141(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1923, AFL-CIO

Complainant

DECISION AND ORDER

On December 4, 1979, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, recommending that the complaint be dismissed in its entirety for want of prosecution. Complainant filed exceptions to the Recommended Decision and Order. Although the Complainant characterizes its communication to the Authority as exceptions, the Complainant merely explains the reason for failing to appear at the hearing and requests permission to withdraw the complaint. Under the circumstances, the request to withdraw the complaint is untimely and, therefore, denied. Complainant's communication has been treated as general exceptions to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under § 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by § 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in § 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to § 2400.2 of the Authority's rules and regulations and § 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation. */

*/ In conformity with § 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge

(Continued)

ORDER

IT IS HEREBY ORDERED that the complaint in Assistant Secretary Case No. 22-09141(CA) be and it hereby is, dismissed.

Issued, Washington, D.C., April 14, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

(Continued)

in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
SOCIAL SECURITY ADMINISTRATION, HEADQUARTERS, BALTIMORE, MARYLAND Respondent	Case No. 22-09141(CA)
and	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1923, AFL-CIO Complainant	

JOHN BARRETT
Labor Relations Specialist
Social Security Administration
Division of Labor Relations
G-314 West High Rise Building
6401 Security Boulevard
Baltimore, Maryland 21235
For the Respondent

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION AND ORDER

Pursuant to a complaint filed on July 27, 1978, under Executive Order 11491, as amended, by the American Federation of Government Employees, Local 1923, AFL-CIO, (hereinafter called the Union or Complainant), against the Social Security Administration, Headquarters, (hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Regional Director for the Washington, D.C. Region of the Federal Labor Relations Authority on October 23, 1979.

The Complaint alleges, in substance, that the Respondent violated Sections 19(a)(1) and (2) of Executive Order 11491, as amended, by virtue of its actions in discriminating against Mr. N. A. Steve Darden with respect to the assignment of work because of Mr. Darden's union activities.

Pursuant to the above "Notice of Hearing", which was duly served upon Complainant, a hearing in the captioned matter was convened at 10:00 a.m. on November 20, 1979, in Room 1011, Fallon Federal Office Building, Hopkins Plaza, Baltimore, Maryland. Representatives of the Respondent and a number of witnesses, some of whom had been requested by the Complainant, appeared at the hearing. Complainant, however, failed to make an appearance. After waiting some thirty-five minutes and attempting unsuccessfully to reach Complainant by telephone contacts with Mr. Darden's place of employment, the Union's office and the Authority's Regional Office, the undersigned closed the hearing after putting in the formal papers.

Upon the basis of the foregoing, it is hereby recommended that the complaint be dismissed for lack of prosecution.

RECOMMENDED ORDER

It is hereby ORDERED that the complaint be dismissed in its entirety.

Burton S. Sternburg

BURTON S. STERNBURG
Administrative Law Judge

Dated: December 4, 1979
Washington, D.C.

3 FLRA No. 15

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NORFOLK NAVAL SHIPYARD

Respondent

and

Assistant Secretary
Case No. 22-09154(CA)

INTERNATIONAL FEDERATION OF PROFESSIONAL
AND TECHNICAL ENGINEERS, LOCAL ONE

Complainant

DECISION AND ORDER

On August 16, 1979, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint, and recommending that it cease and desist therefrom and take certain affirmative action. The Respondent filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation as modified herein.

The Administrative Law Judge concluded that the Respondent violated section 19(a)(1) and (6) of the Order by unilaterally ending the existing practice of free access by employees to certain work files used in the performance of their duties, as well as in preparing responses to adverse ratings, appraisals and letters of caution, and thereafter requiring a supervisor's permission to use the files. The failure to give notice also precluded an opportunity to negotiate about the impact of the decision, in further violation of section 19(a)(1) and (6). In reaching this conclusion, the Administrative Law Judge found, among other things, that although use of the files facilitated the performance of employee duties, the new rule was merely a change in how employees secured access to the files and, thus, negotiable as it was not a management right reserved in sections 11(b) and 12(b)(5) of the Order. Contrary to the Administrative Law Judge, the Authority finds that the change in procedures for employee access to the work files, as used in the performance of their duties, related to the Respondent's methods of operation, and was thus a decision reserved to management by section 12(b)(5) of the Order. 1/ Accordingly, that

1/ Section 12(b)(5) of the Order provides:

> Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--
>
> . . . .
>
> (b) management officials of the agency retain the right, in accordance with applicable laws and regulations--
>
> . . . .
>
> (5) to determine the methods, means and personnel by which such operations are to be conducted;. . . .

The term "methods" as it appears in section 12(b)(5) of the Order has been defined by the Federal Labor Relations Council to mean "the procedures, processes, ways, techniques, modes, manners and systems by which operations are to be conducted -- in short, how operations are to be conducted." Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431 at page 436, FLRC No. 71A-56 (June 29, 1973). See also 78th Division (Training), Kilmer USAR Center, Edison, New Jersey, 1 FLRA No. 97 (1979).

aspect of the complaint will be dismissed. The Authority hereby adopts the remainder of the Administrative Law Judge's decision, which found violations of section 19(a)(1) and (6) for the failure to give notice and opportunity to bargain about the impact of the change in access for performance of employee duties, as well as for the failure to bargain over the change in practice regarding access to files for preparing responses to charges of poor work, and the impact of that change. 2/

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Norfolk Naval Shipyard, Norfolk, Virginia, shall:

1. Cease and desist from:

(a) Enforcing the policy of requiring employees in Code 134.1 to seek permission from their supervisor prior to gaining access to, examining and using work files for the purpose of responding to evaluations by management concerning their work performance.

(b) Changing the procedures for employees to gain access to work files used for non-duty purposes without first affording Local One, International Federation of Professional and Technical Engineers, the exclusive representative of the employees, or any other exclusive representative of employees, notice of any intended change, and an opportunity to bargain concerning the intended change, its implementation, or its impact upon employees it represents.

(c) Changing the procedures for employees to gain access to work files used for duty purposes without first affording Local One, International Federation of Professional and Technical Engineers, the exclusive representative of the employees, or any other exclusive representative of employees, notice of any intended change, and an opportunity to bargain concerning the change's implementation and impact upon employees it represents.

2/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Executive Order:

(a) Repeal the procedure which requires employees in Code 134.1 to seek permission from their supervisor prior to gaining access to, examining and using work files for the purpose of responding to evaluations by management concerning their work performance.

(b) Notify Local One, International Federation of Professional and Technical Engineers, of any intended changes in the procedures for gaining access to, examining and using work files for non-duty purposes, and afford Local One, International Federation of Professional and Technical Engineers, an opportunity to bargain concerning any such proposed changes, their implementation, or impact upon employees it represents.

(c) Notify Local One, International Federation of Professional and Technical Engineers, of any intended changes in the procedures for gaining access to, examining and using work files for duty purposes or of any other changes in personnel policies, practices or other matters affecting working conditions of employees in the unit, and afford Local One, International Federation of Professional and Technical Engineers, an opportunity to bargain concerning the implementation and impact of such changes on employees it represents.

(d) Post at its facilities in Norfolk, Virginia, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Norfolk Naval Shipyard and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Norfolk Naval Shipyard shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(f) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., April 28, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We Hereby Notify Our Employees That:

WE WILL NOT enforce the policy of requiring employees in Code 134.1 to seek permission from their supervisor prior to gaining access to, examining and using work files for the purpose of responding to evaluations by management concerning their work performance.

WE WILL NOT change the procedures for employees to gain access to work files used for non-duty purposes without first affording Local One, International Federation of Professional and Technical Engineers, the exclusive representative of the employees, or any other exclusive representative of employees, notice of any intended change, and an opportunity to bargain concerning the intended change, its implementation, or its impact upon employees it represents.

WE WILL NOT change the procedures for employees to gain access to work files used for duty purposes without first affording Local One, International Federation of Professional and Technical Engineers, the exclusive representative of the employees, or any other exclusive representative of employees, notice of any intended change, and an opportunity to bargain concerning the change's implementation and impact upon employees it represents.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL repeal the procedure which requires employees in Code 134.1 to seek permission from their supervisor prior to gaining access to, examining and using work files for the purpose of responding to evaluations by management concerning their work performance.

WE WILL notify Local One, International Federation of Professional and Technical Engineers, of any intended changes in the procedures for gaining access to, examining and using work files used for non-duty purposes, and afford Local One, International Federation of Professional and Technical Engineers, an opportunity to bargain concerning any such proposed changes, their implementation, or impact upon employees it represents.

WE WILL notify Local One, International Federation of Professional and Technical Engineers, of any intended changes in the procedures for gaining access to, examining and using work files for duty purposes or of any other changes in personnel policies, practices or other matters affecting working conditions of employees in the unit, and afford Local One, International Federation of Professional and Technical Engineers, an opportunity to bargain concerning the implementation and impact of such changes on employees it represents.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, whose address is: 1730 K Street, NW, Room 401, Washington, D.C. 20006, and whose telephone number is (202) 653-7213.

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
Suite 700, 1111-20th Street, NW.
Washington, D.C. 20036

In the Matter of	:	
NORFOLK NAVAL SHIPYARD Respondent	:	
and	:	Case No. 22-09154(CA)
INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL ONE Complainant	:	

WALTER B. BAGBY, JR.
Labor Relations Advisor
Department of the Navy
Office of Civilian Personnel
Southern Field Division
Norfolk, Virginia 23511

For the Respondent

JAMES E. LYONS
Director of Public Employee Affairs
1126 - 16th Street, NW., Suite 111
Washington, D.C. 20036

For the Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on December 28, 1978 by the Regional Administrator for Labor-Management Services, U.S. Department of Labor, Philadelphia

Region, a hearing was held before the undersigned in Norfolk, Virginia.

This proceeding was initiated under Executive Order 11491, as amended (herein called the Order). It was based on a complaint filed by International Federation of Professional and Technical Engineers, Local One (herein called Complainant and Local One IFPTE) against the Norfolk Naval Shipyard (herein called Respondent). Said complaint alleged that Respondent violated Sections 19(a)(1) and (6) of the Order by unilaterally changing a working condition by denying access to laboratory reports and specifications without first obtaining supervisory permission.

Both parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence and to examine and cross-examine witnesses. Thereafter both parties filed briefs with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the Respondent and Complainant have been parties to a collective bargaining agreement covering a unit of employees including Chemists and Physical Science Technicians. This unit includes Chemists employed within Code 134.1. Code 134.1 is a quality control laboratory within which the chemical quality of materials in the shipyard is examined and in which various materials, from oils to metals, are analyzed.

2. There were present in the Code 134 work area certain files contained in file cabinets. These files contained the analytical tests run by employees and the work sheets used by employees in running such tests. Additionally certain specifications and shipyard directives on material analysis were contained in the files.

3. These files were used by employees in Code 134.1 for a number of purposes in performing their duties, including to determine if a sample could be tested in the same manner as in the past, to achieve consistency in results in running samples and tests, to determine if a specification can be interpreted in the same manner as in the past and to expedite

the performance of the work.

4. These files could be and were also used by employees in Code 134.1 to answer allegations and charges of poor and insufficient work performance.

5. Prior to March 31, 1978 employees in Code 134.1 had free and unlimited access to the files and the employees used the files regularly. There was no need to ask for permission or to establish a justification for using the files and they could be used at any time both at the file cabinets and at the employees' desks.

6. On or about March 21, 1978 Code 134.1 Supervisor Paul Wilson observed a Code 134.1 employee, Ms. Terry Emory, examining the files in order to prepare a response to a letter of caution she had received which alleged poor work performance. Although Supervisor Wilson contends that he did not know why Ms. Emory was using the files he ordered her out of the files. This was apparently the first instance of Supervisor Wilson refusing access to the files to anyone in Code 134.1.

7. On March 31, 1978 a meeting of all Code 134.1 employees was called by Supervisor Wilson. Also present at the meeting was Union Steward Jim Rieves, a Code 134.2 employee. Supervisor Wilson stated that from that point on if the Code 134.1 employees wanted to use the files they would be able to use the files on a need to know basis and only after they received Supervisor Wilson's permission. Supervisor Wilson made it clear that this policy of asking permission went into effect immediately and applied even in his absence and even in the case of emergency.

8. Union Steward Rieves objected because he contended the statements of Supervisor Wilson constituted a change in policy. Mr. Saul Lowe, Supervisor Wilson's immediate superior, then announced that there would be a separate meeting with the Complainant to clarify the new policy.

9. On April 4, 1978 another meeting was held. Present at the meeting were Supervisor Wilson, Mr. Lowe, and Local One IFPTE Treasurer Wilson, and Mr. Colgin, a union member. Among other items, the limitation on the use of the files was discussed, but the Union did not request to bargain about the policy.

10. On April 10, 1978 Supervisor Wilson called another meeting of the Code 134.1 employees and, although there was some

confusion, reiterated the policy stated at the March 31, 1978 meeting.

11. Subsequent to the March 31 meeting Supervisor Wilson denied no one permission to use the files. Some Code 134.1 employees did not use the files any longer and others ignored the new policy and used the files without seeking permission.

12. Normally when a policy was changed by Respondent, if it was in writing, a draft of the proposed change was furnished to the Complainant which would make comments and have an opportunity to negotiate about the policy. If the proposed policy were oral, the Complainant was given advance notice of the proposed change and an opportunity to negotiate.

Conclusions

The decision to change the existing practice of free access to files to one requiring each employee to demonstrate a need to use the files and to secure a supervisor's permission before using the files was a substantial enough change in working conditions to entitle the Complainant to advance notice of the proposed change and to an opportunity to negotiate concerning such change. The files in question were used by the employees and facilitated the performance of their duties. The change of procedure with respect to access to the files could foreseeably affect the ease and speed with which the employees performed their duties, might lead to poor performance ratings 1/ and thus was a matter about which the Union had a right to negotiate. 2/

Respondent's contentions that it was not obliged to bargain about the change in procedure because it is a management right under Section 12(b)(5) of the Order, which deals with the methods by which operations are to be conducted, and is a management prerogative under Section 11(b) of the Order, which deals with the technology of performing its work, are rejected. The

---

1/ The fact it had not actually led to such adverse appraisals is irrelevant. The fact that sufficient effect and impact upon employees was reasonably foreseeable or possible was sufficient to entitle Complainant to negotiate about the change.

2/ Because some employees ignored the new procedure and continued to use the files freely does not mean that Respondent had not changed the procedure for using the files.

employees were not told that they were prohibited from using the files and Supervisor Wilson testified that he would always grant permission to use the files when it was related to performing an employee's work. Accordingly this was not a change in the technology or the methods for doing the work, rather it was merely a change in how employees secured access to the files and was thus negotiable. Cf. National Labor Relations Board, A/SLMR No. 246. Further the files in question could be, and were, used by employees in preparing responses to adverse or uncomplimentary ratings, appraisals and letters of caution and any change in the access to them would be negotiable because, clearly, such use of the files is in no way encompassed by the management rights set forth in Sections 12(b)(5) and 11(b) of the Order.

It is concluded, therefore that Respondent violated Sections 19(a)(1) and (6) of the Order because it did not give the Complainant advance notice of the proposed change and an opportunity to negotiate concerning it. Rather, Respondent notified the employees and the Complainant simultaneously, at the March 31 meeting, and the announced change went into effect immediately. This conduct did not afford the Complainant sufficient notice and opportunity, as required by the Order, to negotiate concerning the change. Cf. Federal Railroad Administration, A/SLMR No. 418 and National Labor Relations Board, supra.

Finally Complainant was not given sufficient notice and afforded an opportunity to bargain concerning the impact and implementation of the change. In this regard Complainant was entitled to such notice and opportunity even if the Respondent was not obligated to bargain about the change itself. Again, the Complainant was entitled to notice of the change sufficiently in advance of the change to enable it to bargain meaningfully and effectively about the change's impact and implementation before the change became effective. Complainant was not afforded such advance notice and therefore it could not have requested to bargain about the impact and implementation of the change before it became effective. By not affording Complainant such notice and opportunity to bargain about the impact and implementation of the change, Respondent violated Sections 19(a)(1) and (6) of the Order. Department of Treasury, IRS Southwest, 1 FLRA 70 and Federal Railroad Administration, supra.

Having found that Respondent has engaged in conduct which is violative order, I recommend that the Federal Labor Relations Authority issue the following order pursuant to Section 2400.2

of the Authority's transition rules and regulations (44 FR 7) and Section 7135(b) of the Federal Service Labor Management Relations Statute (92 Stat. 1215):

ORDER

Pursuant to Section 2400.2 of the transition rules and regulations of the Federal Labor Relations Authority and Section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Norfolk Naval Shipyard shall:

1. Cease and Desist from:

(a) Enforcing the policy of requiring employees in Code 134.1 to seek permission from their supervisor prior to gaining access to, examining and using work files.

(b) Changing the procedures for employees to gain access to work files or making any other changes in working conditions without first affording Local One, International Federation of Professional and Technical Engineers, the exclusive representative of the employees, or any other exclusive representative of employees, notice of any intended change and, an opportunity to bargain concerning the intended change and its implementation and impact upon employees it represents.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Executive Order:

(a) Repeal the procedure which requires employees in Code 134.1 to seek permission from their supervisor prior to gaining access to, examining and using work files.

(b) Notify Local One, International Federation of Professional and Technical Engineers, of any intended change in the procedures for gaining access to, examining and using work files or any other changes in personnel policies practices or other matters affecting working conditions of employees in the unit and afford Local One, International Federation of Professional and Technical Engineers an opportunity to bargain concerning any such proposed changes and concerning the implementation and impact of such changes on employees it represents.

(c) Post at its facilities in Norfolk, Virginia copies of

the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Norfolk Naval Shipyard and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Norfolk Naval Shipyard shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: August 16, 1979
Washington, D.C.

APPENDIX

N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT enforce the policy of requiring employees in Code 134.1 to seek permission from their supervisor prior to gaining access to, examining and using work files.

WE WILL NOT change the procedures for employees to gain access to work files or make any other changes in working conditions without first affording Local One, International Federation of Professional and Technical Engineers the exclusive representative of the employees, or any other exclusive representative of employees, notice of any intended change and an opportunity to bargain concerning the intended change and its implementation and impact upon employees it represents.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL repeal the procedure which requires employees in Code 134.1 to seek permission from their supervisor prior to gaining access to, examining and using work files.

WE WILL notify Local One, International Federation of Professional and Technical Engineers of any intended change in the procedures for gaining access to, examining and using work files or any other changes in personnel policies practices or other matters affecting working conditions of employees in the unit and afford Local One, International Federation of Professional and Technical Engineers an opportunity to bargain concerning any such proposed

changes and concerning the implementation and impact of such changes on employees it represents.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material. If the employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address is Room 418, 1111-20th Street, NW., Washington, D.C. 20036, whose telephone number is: (202) 254-6581.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AIRCRAFT FIRE AND RESCUE DIVISION,
AIR OPERATIONS DEPARTMENT,
NAVAL AIR STATION, NORFOLK, VIRGINIA

Respondent

and

Assistant Secretary
Case No. 22-09088(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2225, AFL-CIO

Complainant

DECISION AND ORDER

The Administrative Law Judge in the above-entitled proceeding issued his Recommended Decision and Order finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action. Thereafter, the Complainant filed exceptions to the Administrative Law Judge's Recommended Decision and Order, and a supporting brief.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions and supporting brief, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation.

ORDER */

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Aircraft Fire and Rescue Division, Air Operations Department, Naval Air Station, Norfolk, Virginia, shall:

1. Cease and desist from:

(a) Instituting any future change in the place of duty or worksite, involving employees represented exclusively by the American Federation of Government Employees, Local 2225, AFL-CIO, or any other exclusive representative of its employees, without first notifying the exclusive representative of the proposed change, and affording it an opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing the change of worksite, and on the impact such change of worksite will have on adversely affected unit employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended, or refusing to consult, confer, or negotiate with the exclusive representative of its employees as required by the Order.

2. Take the following affirmative action in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request, meet and confer with the American Federation of Government Employees, Local 2225, AFL-CIO, to the extent consonant with law and regulations concerning the procedures which management observed in implementing a change of place of duty or worksite involving its employees from Building LP-166 to Structural Station No. 2, Norfolk Naval Air Station, Norfolk, Virginia, and the impact such change of worksite had on adversely affected unit employees.

(b) Post at all facilities and installations of the Aircraft Fire and Rescue Division, Air Operations Department, Naval Air Station, Norfolk, Virginia, copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Director of the Aircraft Fire and Rescue Division, Air Operations Department, Naval Air Station, Norfolk, Virginia, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

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*/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224) the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., April 28, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We Hereby Notify Our Employees That:

WE WILL NOT institute any future change in the place of duty or worksite, involving employees represented exclusively by the American Federation of Government Employees, Local 2225, AFL-CIO, or any other exclusive representative of our employees, without first notifying the exclusive representative of the proposed change, and affording it an opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing the change of worksite, and on the impact such change of worksite will have on adversely affected unit employees.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended, or refuse to consult, confer, or negotiate with the exclusive representative of our employees as required by the Order.

WE WILL upon request, meet and confer with the American Federation of Government Employees, Local 2225, AFL-CIO, to the extent consonant with law and regulations, concerning the procedures which management observed in implementing a change of place of duty or worksite involving our employees from Building LP-166 to Structural Station No. 2, Norfolk Naval

Air Station, Norfolk, Virginia, and the impact such change of worksite had on adversely affected unit employees.

_____
(Agency or Activity)

Dated:_____ By:_____
(Signature)

This Notice must remain posted for sixty (60) consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, whose address is: Room 401, 1730 K Street, NW, Washington, D.C. 20006, and whose telephone number is (202) 653-7213.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
AIRCRAFT FIRE AND RESCUE DIVISION, AIR OPERATIONS DEPARTMENT, NAVAL AIR STATION Respondents	
and	Case No. 22-9088(CA)
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2225, AFL-CIO Complainant	

EDWARD E. RUTLEDGE
National Representative
AFGE, AFL-CIO
Post Office Box 15126
Chesapeake, Virginia 23320
For the Complainant

WALTER BAGBY
Labor Relations Advisor
Building A-67
Naval Air Station
Norfolk, Virginia 23511
For the Respondents

Before: WILLIAM A. POPE, II
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arose pursuant to Executive Order 11491, as amended, as a result of an unfair labor practice complaint filed on June 21, 1978, as amended on October 31, 1978, by the American Federation of Government Employees, Local 2225, AFL-CIO (hereinafter referred to as the Complainant), against the Aircraft Fire and Rescue Division, Air Operations Department, Naval Air Station, Norfolk, Virginia (hereinafter referred to as the Respondent), alleging that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by instituting a change in worksite of unit employees employed at the Naval Air Station, Norfolk, Virginia, without prior negotiation with the Complainant over impact and implementation. A hearing was held in Norfolk, Virginia, at which both parties

were represented and afforded the opportunity to present evidence, cross-examine adverse witnesses, and present oral argument on the issues. Post-hearing briefs have been received from the parties and duly considered.

Statement of the Case

Complainant is the exclusive bargaining agent for a unit composed of all non-supervisory, graded, Civil Service employees assigned to the Aircraft Fire and Rescue Division, Air Operations Department, Naval Air Station, Norfolk, Virginia, the primary function of which is to provide aircraft fire and rescue services at the Naval Air Station.

Aircraft operations at the Naval Air Station involve both fixed-wing and rotary wing (helicopters) aircraft, which utilize an airfield, known as Chambers Field, and a heliport. Prior to April 3, 1978, aircraft fire and rescue services were provided at both locations by fire fighters, represented by the Complainant as exclusive bargaining agent, who were stationed at Building LP-166, which is located in close proximity to Chambers Field. Fire Fighting crews assigned to cover air operations at the heliport, which is several miles distant, were dispatched from Building LP-166 and remained at the heliport while air operations were in progress.

As a result of an inspection conducted between June 1 and June 7, 1976, the Area Fire Marshal, Atlantic Division, Naval Facilities Engineering Command, recommended numerous changes, including that the heliport be designated a Category 2 airfield, and that "two MB-5 (crash truck) crews be assigned to the heliport during flight operations utilizing structural station #2 as a CFR station for standby alert vehicle." 1/ Respondent's Exhibit 1.

No official action was taken to implement the Fire Marshal's recommendation that aircraft crash/fire and rescue crews utilize Structural Station #2 as a base of operations while on standby alert status at the heliport, until

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1/ Responsibility for providing fire protection services at the Norfolk Naval Station and the Naval Air Station is divided between the Respondent and the Naval Base Structural Fire Department, which operates under a separate chain of command, and maintains and operates its own equipment and physical facilities, including Structural Station #2, which is located in close proximity to the heliport.

Langley James, the Crash Fire Chief, notified his personnel that effective April 3, 1978, aircraft crash and rescue crews assigned to duty at the heliport would spend their standby time at Structural Station #2. 2/ However, since sleeping quarter, and eating facilities were not initially available at Structural Station #2 for their use, the crews continued to maintain quarters at Building LP-166 until on or about May 7, 1978, when such facilities became available for them at Structural Station #2. 3/

Chief James testified that he knew in 1976, through conversations with his superiors and the chief of the Structural Fire Department which took place sometime after receiving the Fire Marshal's recommendations, that eventually aircraft crash and rescue crews assigned to the heliport would be transferred to Structural Station #2; however, such a transfer could not be implemented until modifications were made to Structural Station #1 to accommodate the Structural Fire Department equipment which would have to be removed from Structural Station #2 to make room for the aircraft crash and rescue crews and their equipment. Chief James stated that he received the Fire Marshal's report and recommendations in August, 1976, and that he posted a copy of it where the members of his department could read it, and held several meetings with them during which the recommendations were discussed.

Chief James also recalled meetings on several occasions with various union shop stewards during which the Fire Marshal's recommendations were discussed, including a meeting with Vincent J. Lisa, Jr. who was then an acting union shop steward, in February, 1978, during which he was "sure I mentioned the fact that the Chief, Chief Broadway was working on No. 2 Station, but didn't have a timeframe that he'd be able to move out because this is an 85 foot aerial truck they had to make room to get in." Transcript, page 102. Chief James acknowledged that he did not indicate to Lisa that a decision had been made to use Structural Station No. 2, and that he solicited and discussed recommendations offered by Lisa concerning other locations which might be suitable.

2/ Aircraft crash and rescue crews are on duty for 24 hour periods, divided into eight hours of work, eight hours on standby, or waiting to be assigned work, and eight hours for eating and sleeping.

3/ Since May 7, 1978, aircraft crash and rescue crews have been assigned to heliport duty on a 30 day rotating basis, and while on heliport duty, they are provided living quarters in Structural Station #2.

When he received notification from Chief Broadway on or about March 28, 1978, that space was available in Structural Station No. 2, Chief James took immediate measures to notify the personnel under his command that the heliport crews would begin using that location while on standby, effective April 3, 1978. It was Chief James' opinion that assignment of employees was not a matter which management was required to negotiate, and, in any event, the union was generally aware that it would be necessary to relocate the standby location for crews assigned to aircraft crash and rescue duty at the heliport, but they had never requested bargaining on the issue. 4/ According to Chief James, the first negotiations concerning the matter which the union requested came after the change had been implemented, and involved living accommodations at Structural Station No. 2.

Vincent J. Lisa, Jr., the acting union shop steward during March and April, 1978, testified that he first learned on April 4, 1978, that heliport crews would be assigned to Structural Station No. 2, although he was generally aware of the requirement to relocate the heliport crash and rescue crews from reading the Fire Marshal's report in 1976. Lisa testified that he had met with Chief James approximately two weeks previously to discuss the changes which would have to be made concerning the heliport crews, at which time he was asked for and made several recommendations. Chief James told him that"(w)ell, I don't know what we're going to do right now, but I will get back with you later" (Transcript, page 33); however, he did not have any further discussions with Chief James until after the assignment of heliport crews to Structural Station No. 2 had been implemented. Lisa stated that the facilities initially provided for the use of aircraft crash and rescue crews at Structural Station No. 2 were inadequate, that the facility, itself, was in violation of safety regulations, and there was friction between the crash crews and the structural fireman assigned to the building. These and other associated

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4/ John Joseph, who was Crash Fire Captain at the time of the hearing, testified that he was a union shop steward in 1976, and that in the summer of 1976, he learned, from reading the Fire Marshal's report and in a meeting between the Fire Chief and union personnel that heliport crash and rescue crews would be relocated eventually, but he did not know when, and he did not request bargaining on the proposed change.

problems were the subject of several discussions between the union and management, and many of the problems were resolved, in whole or in part. 5/

Findings of Fact

1. Complainant is the exclusive bargaining agent for non-supervisory, graded, Civil Service employees assigned to the Aircraft Fire and Rescue Division, Air Operations Department, Naval Air Station, Norfolk, Virginia, and was so at all times material to this case.

2. At all times material to this case, aircraft crash and rescue personnel employed by the respondent as fire fighters have provided aircraft crash, fire, and rescue services at the Norfolk Naval Air Station.

3. Prior to on or about April 3, 1978, all unit employees employed by the Respondent to provide such services were quartered in Building LP-166, located in close proximity to Chambers Field, which is used for fixed wing aircraft operations, and several miles distant from the heliport, which is used for helicopter air operations.

4. Based upon an inspection conducted between June 1 and June 7, 1976, the Area Fire Marshal, Atlantic Division, Naval Facilities Engineering Command, recommended that the heliport be designated a Category 2 airfield, and that crash and rescue crews assigned to heliport duty be quartered in Structural Fire Department Station No. 2.

5. Officials of the Respondent, including Crash Fire Chief Langley James, made the decision sometime in the latter part of 1976 to relocate heliport crash and rescue crews to Structural Station No. 2 when space in that facility became available, after alterations were made to other Structural Fire Department facilities to accommodate the Structural Fire Department personnel and equipment which would have to be relocated from Structural Station No. 2 to make room for the aircraft crash and rescue crews.

6. Copies of the Fire Marshal's 1976 report were made available for personnel of the Crash Fire Department to read soon after the report was received by Crash Fire Chief Langley James.

5/ The witnesses testifying during the hearing generally agreed that living conditions for the crash crews assigned to Structural Station No. 2 have improved, although complaints persist.

7. Crash Fire Chief James met with the members of the Crash Fire Department on several occasions during 1976 and later years, and discussed generally the contents of the Fire Marshal's 1976 report and recommendations.

8. Sometime in March, 1978, Fire Chief James had a meeting with Acting Union Shop Steward Vincent J. Lisa, Jr. during which Chief James stated that he did not know what changes would be made concerning the heliport crews, and solicited recommendations from Lisa.

9. On or about March 28, 1978, Chief James was notified by the Structural Fire Department Chief that space was available for the use of heliport crash and rescue crews and their equipment at Structural Station No. 2, and contemporaneously, Chief James issued orders to the personnel of his department that effective April 3, 1978, heliport crews would begin using Structural Station No. 2 while on standby.

10. At no time prior to issuing the order relocating heliport crews to Structural Station No. 2 effective April 3, 1978, did Chief James or any officials of the Respondent notify the Complainant or non-supervisory unit personnel, that a decision had been made by management concerning either the location of the new worksite to which heliport crash and rescue crews would be assigned, or when the change would take place.

11. At no time prior to the effective date of the change did the Complainant request bargaining on the impact and implementation of any change in worksite involving unit personnel assigned to heliport duty.

Discussion, Conclusions and Recommendations

In this particular case, the Complainant does not argue that the Respondent was obligated to negotiate the decision to change the worksite of the heliport crews; rather, the Complainant contends that it was entitled to notification of the proposed change and the opportunity to negotiate impact and implementation. The failure of the Respondent to notify it of the proposed change before the change was implemented, the Complainant contends, effectively denied it the right to negotiate impact and implementation, contrary to Sections 19(a)(1) and (6) of the Order. The Respondent, on the other hand, in addition to arguing that it was not obligated to consult with the Complainant concerning the decision to establish a permanent worksite in close proximity to the heliport, contends that the Complainant was well aware of

the proposed change in watch assignment, that meetings were held by management between 1976 and 1978 for the purpose of keeping the Complainant's members informed, and, in any event, the only change was a change in the place where fire fighters assigned to heliport duty were required to sleep. The Respondent further contends that the Complainant had the obligation to request negotiations on the impact and implementation of that decision, if it desired them, but did not do so, and that the issue of the quality of living conditions at Structural Station No. 2 was not raised in the complaint, and, therefore, is barred by Section 203.2(a)(3) of the Assistant Secretary's regulations.

Notwithstanding that a particular management decision is not negotiable under Section 11(b) or 12(b) of the Order, an agency must, nevertheless, afford an exclusive representative reasonable notice and an opportunity to bargain with respect to the impact and implementation of the decision, prior to its implementation, when such decision effects a change in existing personnel policies and practices or working conditions of members of the bargaining unit, provided it does not interfere with the exercise of the reserved rights themselves. Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 934 (1978); U.S. Customs Service, Brookhaven Service Center, 7 A/SLMR 255, A/SLMR No. 814 (1977). Or, as summarized in the decision of the Acting Regional Administrator on April 4, 1977, in U.S. Department of Transportation, Federal Aviation Administration, Case No. 22-07742(CA), affirmed by the Assistant Secretary of Labor on November 11, 1977:

> The Assistant Secretary, in numerous precedential decisions, has firmly established the principle that an Agency or Activity, which is a party to a bargaining relationship with a labor organization as exclusive representative of its employees, is obligated under Section 11(a) of the Order to provide that labor organization with a reasonable opportunity to negotiate, to the extent consonant with law or regulation, over the impact on unit employees and method of implementing any change with respect to personnel policies and practices and matters affecting working conditions, even when the decision itself to effect such a change is reserved to management as non-negotiable under Section 11(b) or 12(b) of the Order
>
> Moreover, this obligation to negotiate in good faith, which is imposed by Section 11(a) of the Order, is not met unless the labor organization is provided with

> reasonable notice of the proposed change prior to its implementation and effectuation; and an Agency failing to so notify the labor organization in advance of effecting a change is deemed to be in derogation of its bargaining obligations and in violation of Sections 19(a)(1) and (6) of the Order.
>
> However, it is equally well established in precedent decisions of the Assistant Secretary and the Federal Labor Relations Council that once an agency provides the exclusive representative with reasonable notice of a planned change, its obligation under Section 11(a) of the Order is fully discharged and no further obligation to bargain over the change arises until the exclusive representative affirmatively acts to make a timely request for negotiation. (Citations Omitted)

There is no question but that the change of worksite for heliport crews effected a change in working conditions of unit employees, in this instance the fire fighters employed by the Respondent. The change directly affected the place where the heliport crews spent their 24 hour tours of duty, when not actually at the heliport during air operations, including the place where they ate, slept, relaxed when on standby, trained, and maintained their equipment. Clearly, the change of worksite to Structural Station No. 2 was one as to which the Respondent was required by Section 11(a) of the Order to afford the Complainant the opportunity to bargain with respect to impact and implementation. The question which remains, therefore, is that of whether or not the Complainant had reasonable notice of the proposed change, so that its failure to request bargaining in a timely fashion amounts to a waiver of the right. 6/

Upon consideration of the entire record, including all testimony and evidentiary exhibits, I conclude, and find, that no steps were taken by the Respondent prior to implementation to notify the Complainant that management proposed to change the worksite of crash and rescue crews assigned to heliport duty from Building LP-166 to Structural Station No. 2, either upon a date certain, or upon some as yet unspecified future date. I further conclude, and find, that although

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6/ Where the exclusive representative has not been afforded reaonsable notice of a proposed change, there is no requirement that a request for bargaining be made after the fact to establish a violation. Department of the Treasury, Internal Revenue Service, Austin Service Center, A/SLMR No. 1142 (1978).

the members of Local 2225, the Complainant, were generally aware since issuance of the Fire Marshal's report and recommendations in 1976 that some change in worksite of heliport crews probably would be made, and that the Fire Marshal had recommended Structural Station No. 2, they did not know in advance of the Respondent's order implementing the change in worksite of heliport crews from Building LP-166 to Structural Station No. 2 effective April 3, 1978, either the location selected by the Respondent or when the worksite would be changed.

The proposal to change the worksite of heliport crews was one which was left pending for almost two years, during which it was the subject of a number of discussions between union and management representatives, but as to which management had seemingly made no decision. 7/ The Complainant had no reason to believe that a decision had been made by management, prior to the time when it was officially announced as part of an implementation order on or about April 3, 1978, or that when management did make a decision, it would necessarily adopt the Fire Marshal's recommendation. Indeed, Chief James' statements to the acting union shop steward in March, 1978, approximately two weeks before he issued the implementation order, served to lull the Complainant into a false sense of security that no decision had been made, when, in fact, Chief James had known since 1976 that, barring some unexpected and unanticipated event, the heliport crews would be relocated to Structural Station No. 2 as soon as space became available. Under these circumstances, the Complainant did not have reasonable advance notice of the proposed change, such as would trigger the requirement that it request bargaining on impact and implementation. In the absence of any knowledge, as opposed to mere speculation or conjecture, of where management planned to relocate the worksite of heliport crews, there was nothing over which to bargain concerning impact and implementation, and no duty upon the Complainant to request bargaining. 8/

7/ As late as two weeks before a decision was announced and implemented, Fire Chief James solicited recommendations from the acting union shop steward and indicated he did not know how the matter would be resolved.

8/ Fire Chief James learned on or about March 28, 1978, that space was available for his use in Structural Station No. 2, and he ordered the change of worksite of heliport crews, effective on April 3, 1978; however, the evidence of record indicates that the crews involved were

[Cont'd on next page]

The issue here is that of whether the Respondent denied to the Complainant the right to bargain over impact and implementation, not one of whether some issues affecting impact and implementation, but not others, were properly raised by the Complainant during proceedings below. Where, as here, the evidence shows that the exclusive representative effectively was denied its right, pursuant to Section 11(a) of the Order, to bargain over impact and implementation of a management decision affecting working conditions, it is irrelevant and immaterial to argue, as does the Respondent, that the Complainant failed to raised specific issue concerning impact and implementation in its complaint. Cf., Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 1176, (1978), in which it was held that there is no requirement that an exclusive representative's request for bargaining on impact set forth its proposals.

Accordingly, I conclude, and find, that the Respondent violated Sections 19(a)(1) and (6) of the Order by failing to give specific advance notice to the Complainant of a change affecting working conditions and the worksite of heliport crews, and affording the Complainant a reasonable opportunity to request bargaining over issues involving the impact and implementation of the change.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, 29 C.F.R. Section 203. 26(b), and Section 2400.2 of the transition rules and regulations, 5 C.F.R. Section 2400.2 (1979), the Authority hereby orders that the Aircraft Fire and Rescue Division, Air Operations Department, Naval Air Station, Norfolk, Virginia, shall:

1. Cease and desist from: .

(a) Instituting any future change in the place of duty or worksite, involving employees represented exclusively

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8/ [Cont'd] not notified of the change until they reported for work on April 3 and April 4, 1978. Thus, there is no evidence that the Complainant had actual notice of the change until at least April 3, 1978, much less that it had reasonable notice sufficiently in advance to request bargaining on impact and implementation. The change of worksite was effective April 3, 1978, and it is of no consequence that the crews did not begin sleeping at Structural Station No. 2 until on or about May 7, 1978, since it was contemplated by management from the start that heliport crews would spend their entire 24 hour tours of duty at Structural Station No. 2, and only the absence of beds until May 7, 1978, delayed full implementation of the plan.

by the American Federation of Government Employees, Local 2225, AFL-CIO, or any other exclusive representative of its employees, without first notifying the exclusive representative of the proposed change, and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing the change of worksite, and on the impact such change of worksite will have on adversely affected unit employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended, or refusing to consult, confer, or negotiate with the exclusive representative of its employees as required by the Order.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request, meet and confer with the American Federation of Government Employees, Local 2225, AFL-CIO, to the extent consonant with law and regulations, concerning the procedures which management observed in implementing a change of place of duty or worksite from Building LP-166 to Structural Station No. 2, Norfolk Naval Air Station, Norfolk, Virginia, involving its employees, and the impact such change of worksite had on adversely affected unit employees.

(b) Post at all Aircraft Fire and Rescue Division, Air Operations Department, Naval Air Station, Norfolk, Virginia, facilities and installations copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Director of the Aircraft Fire and Rescue Division, Air Operations Department, Naval Air Station, Norfolk, Virginia, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations notify the Authority, in writing, within 30 days from the date of this Order, as to the steps taken in compliance herewith.

WILLIAM A. POPE, II
Administrative Law Judge

Dated: 17 SEP 1979
Washington, D.C.

APPENDIX

N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute any future change in the place of duty or worksite, involving employees represented exclusively by the American Federation of Government Employees, Local 2225, AFL-CIO, or any other exclusive representative of our employees, without first notifying the exclusive representative of the proposed change, and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing the change of worksite, and on the impact such change of worksite will have on adversely affected unit employees.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended, or refuse to consult, confer, or negotiate with the exclusive representative of our employees as required by the Order.

WE WILL upon request, meet and confer with the American Federation of Government Employees, Local 2225, AFL-CIO, to the extent consonant with law and regulations, concerning

the procedures which management observed in implementing a change of place of duty or worksite from Building LP-166 to Structural Station No. 2, Norfolk Naval Air Station, Norfolk, Virginia, involving our employees, and the impact such change of worksite had on adversely affected unit employees.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for sixty (60) consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director for Federal Labor Relations Authority whose address is: Room 416, 1111 20th Street, NW., Washington, D.C. 20036.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

THE NATIONAL COUNCIL OF CSA LOCALS,
A.F.G.E., AFL-CIO

(Union)

and

Case No. O-NG-127

THE COMMUNITY SERVICES ADMINISTRATION

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5. U.S.C. Section 7101 et seq.).

Union Proposal

Article 14, Section 12, Merit Promotion - If five in-house employees (including Special Recruitment applicants) within the area of consideration are rated qualified, the area of consideration shall not be extended. If less than five such employees are rated qualified, a selection may be made or the area may be extended, at the option of the selecting official.

Question Here Before The Authority

The question is whether the union's proposal concerning the filling of vacant positions is a matter outside the duty to bargain established by the

Federal Service Labor-Management Relations Statute, or violates section 7106(a)(2)(C) of the Statute, 1/ as alleged by the agency.

Opinion

Conclusion: The union's proposal is not within the agency's duty to bargain under the Statute and violates section 7106(a)(2)(C) thereof. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that the disputed proposal is not within the duty to bargain is sustained.

Reasons: Under the language of section 7106(a)(2)(C) of the Statute management has the right, inter alia, "with respect to filling positions, to make selections. . . ." The agency interprets the intent of the proposal to be "that where management does not select from the referenced certificate, it can not fill the position." The proposal on its face is subject to the interpretation suggested by the agency and, in the absence of any indication in the record that the union intended a different meaning, the agency's interpretation is adopted for the purpose of this decision, i.e., that the proposal would operate to prevent the agency from exercising its right to select within the meaning of section 7106(a)(2)(C) of the Statute. Thus, the proposal would require management to select one of the five qualified applicants from within the minimum area of consideration, and would restrict management's discretion to consider other

1/ Section 7106(a)(2)(C) of the Statute (92 Stat. 1198) provides:

> Section 7106. Management rights
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency --
>
> . . . . . .
>
> (2) in accordance with applicable laws --
>
> . . . . . .
>
> (C) with respect to filling positions, to make selections for appointees from --
>
> (i) among properly ranked and certified candidates for promotion; or
>
> (ii) any other appropriate source. . . .

candidates only to a situation where there are less than five qualified applicants within the area of consideration. Accordingly, the agency's allegation that the proposal is not within the duty to bargain must be sustained. 2/

Issued, Washington, D.C., April 28, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ Compare American Federation of Government Employees, AFL-CIO, Local 331 and Veterans Administration Hospital, Perry Point, Maryland, Case No. O-NG-17, 2 FLRA No. 59 (January 17, 1980), wherein the Authority concluded that a proposal which would require only that consideration be given to employees within the bargaining unit in filling vacant positions but would not prevent management from considering other applicants, or expanding the area of consideration once bargaining unit employees were considered, or using any other appropriate source in filling such vacancies, did not prevent management from exercising its reserved right to select. Compare also, Association of Civilian Technicians, Delaware Chapter, Case No. O-NG-104, 2 FLRA No. 9 (April 14, 1980).

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, LOCAL 1451

(Labor Organization)

and

Case No. O-NG-75

NAVAL TRAINING CENTER, ORLANDO,
FLORIDA

(Activity)

DECISION ON NEGOTIABILITY APPEAL

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

Union Proposal

Each party will have a minimum of three (3) designated representatives for the purpose of negotiations. However, there is no requirement for attendance of all representatives to be present at any specific negotiating session.

Question Here Before the Authority

The question is whether the union's proposal pertains to matters which are outside of the activity's duty to bargain under the Statute.

Opinion

Conclusion: The proposal concerns matters which are outside of the duty to bargain of the activity. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3513 (1980)), the agency's allegation that the union's proposal is not within the duty to bargain is sustained.

Reasons: Section 7103(a)(12) of the Statute defines "collective bargaining" as "the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to . . . bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees . . . ." Thus, the obligation imposed by section 7117 of the Statute to bargain in good faith does not extend beyond matters directly affecting unit employees.

The disputed proposal concerns matters which are beyond those directly affecting unit employees. It would require management to designate a particular number of representatives to negotiations. These representatives would not, themselves, be unit employees.1/ Moreover, the number of representatives management chooses to designate to carry out its duty to bargain under the Statute is not a matter directly related to the conditions of employment of unit employees.2/

Accordingly, insofar as the union's proposal would require management to designate a minimum number of representatives for negotiations, the proposal is

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1/ Under section 7103(a)(2) of the Statute, the definition of "employee" specifically "does not include," inter alia, "a supervisor or a management official."

2/ Section 7103(a)(14) defines "conditions of employment" as follows:

> (14) 'conditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters--
>
> (A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
>
> (B) relating to the classification of any position; or
>
> (C) to the extent such matters are specifically provided for by Federal statute[.]

not within the duty to bargain under the Statute.[3/] Therefore, the agency's allegation to that effect is hereby sustained.

Issued, Washington, D.C., April 28, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ Albeit for different reasons, a management proposal that the union designate a particular number of representatives to negotiations likewise would not be within the duty to bargain under the Statute.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

April 28, 1980

Mr. Phillip R. Kete
Special Representative, AFGE 2578
Gaffney, Anspach, Schember, Klimaski
and Marks
1712 N Street, NW.
Washington, D.C. 20036

Re: American Federation of Government Employees, AFL-CIO, Local 2578 and General Services Administration, National Archives and Records Service, Case No. O-NG-163

Dear Mr. Kete:

This refers to your petition for review of a negotiability issue in the above-entitled case, dated September 12, 1979, on behalf of the American Federation of Government Employees, AFL-CIO, Local 2578.

For the reasons indicated below, your petition does not meet the conditions for review established in the Authority's regulations, and, therefore, the appeal must be dismissed.

The union's original proposal, rejected by the agency as not within its duty to bargain in good faith, was as follows:

> Except as otherwise required by law or executive order, or as may be required by the technology of certain archival work, the temperatures in all work areas will be kept within the range of 68 degrees and 75 degrees and the relative humidity will be kept in the range of 40 percent and 50 percent.

The agency's allegation of nonnegotiability, based principally on its view that the above proposal is contrary to Government-wide regulations, i.e., Standby Conservation Plan No. 2, Emergency Building Temperature Restrictions (44 Fed. Reg. 39354 et seq. (1979)), was appealed to the Authority. Subsequently, in response to the agency's statement of position, you submitted a brief which included a revision of the original union proposal. The revised proposal included the phrase "or binding Government-wide regulation" among those authorities which would permit management to deviate from the temperature and humidity ranges prescribed in the proposal.*/

*/ The revised union proposal provides as follows:

> Except as otherwise required by law, Executive order, or binding Government-wide regulation, or as may be required by the technology of certain archival work, the temperatures in all work areas will be kept within the range of 68 degrees and 75 degrees and the relative humidity will be kept in the range of 40 percent and 50 percent.

Section 2424.1 of the Authority's rules and regulations (45 Fed. Reg. 3511, 3512), pertaining to petitions for review of negotiability issues, provides, in part:

> The Authority will consider a negotiability issue under the conditions prescribed by 5 U.S.C. 7117(b) and (c), namely: If an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter proposed to be bargained because, as proposed, the matter is inconsistent with law, rule or regulation, the exclusive representative may appeal the allegation to the Authority . . . . [Emphasis added.]

In the instant case, the record before the Authority clearly indicates that the revised proposal concerning which you seek a negotiability decision from the Authority was not the subject of an allegation of nonnegotiability. In fact, you state that "The omission of reference to binding Government-wide regulations in the initial proposal was an oversight." Hence, the appeal does not meet the conditions for review of a negotiability issue as set forth in section 2424.1 of the rules and regulations of the Authority in that the agency has not alleged that the revised proposal which you now ask the Authority to consider is outside the duty to bargain. Accordingly, the instant appeal is premature and therefore must be dismissed without a determination by the Authority as to the negotiability of the union's revised proposal.

For the Authority.

Sincerely,

Samuel A. Chaitovitz
Executive Director

cc: Mr. W.M. Paz
GSA

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 39 REPORT OF CASE DECISIONS June 30, 1980

REPRESENTATION CASES

3 FLRA No. 19 (April 25, 1980)

Federal Mediation and Conciliation Service, Region 7, San Francisco, California, Case No. 9-RO-14. The union (Council of Federal Mediators, Region 7) filed a representation petition seeking an election in a unit consisting of all field mediator employees in FMCS Region 7. The Authority found that FMCS mediators are engaged in administering provisions of the Statute and, therefore, pursuant to section 7112(b)(4) of the Statute, could not be included in an appropriate unit. Accordingly, the Authority dismissed the petition. (Decision and Order attached.)

3 FLRA No. 23 (May 8, 1980)

General Services Administration, Region 4, Atlanta, Georgia, Case No. 4-CU-4. The union (NFFE Local 1766) filed a petition under section 7111(b)(2) of the Statute seeking to clarify an existing exclusively recognized unit of guards and Federal Protective Officers (FPO's) employed by the activity to include within the unit 14 employees classified as Supervisory FPO's, GS-6 (Corporals), contending that they are not supervisors within the meaning of section 7103(a)(10) of the Statute. The Authority found that at installations where the Corporals are the senior officers, their additional duties and responsibilities made them supervisors within the meaning of section 7103(a)(10) of the Statute and, therefore, they must be excluded from the unit. The Authority further found, however, that at installations where there are Supervisory FPO's, GS-7 (Sergeants), who act as senior officers, the Corporals are not supervisors and, therefore, are included within the unit. The Authority thereupon issued an order clarifying the unit involved consistent with its findings. (Decision and Order Clarifying Unit attached.)

UNFAIR LABOR PRACTICE CASES

3 FLRA No. 22 (May 8, 1980)

General Services Administration, Region 9, Federal Protective Service Division, San Francisco, California, Assistant Secretary Case No. 70-6535(CA). Upon a complaint filed by the union (International Federation of Federal Police, Local 41) under E.O. 11491, the ALJ found that the activity violated section 19(a)(1) of the Order when it issued a directive which restricted the use of leave-without-pay (LWOP), when requested, for union activity; but did not violate section 19(a)(1) of the Order when it interrogated employees about a supervisor's alleged statements made at a union meeting. The Authority concurred with the ALJ's finding of a section 19(a)(1) violation relating to the activity's restriction on the use of LWOP; but, contrary to the ALJ, found that the activity did violate section 19(a)(1) of the Order by interrogating the employees. Accordingly, the Authority issued an appropriate remedial order. (Decision and Order attached.)

3 FLRA No. 27 (May 12, 1980)

U.S. Department of the Navy, Portsmouth Naval Shipyard, Assistant Secretary Case No. 31-11732(CA). Upon a complaint filed by the union (IFPTE) under E.O. 11491, the ALJ found that the activity violated section 19(a)(1) of the Order when one of its supervisors advised one of a number of grievants (in a pending grievance over the rotation of data processing personnel to a midnight shift) that the activity could settle the grievances by merely abandoning the rotational system and assigning one data processor permanently to that shift; and that the grievant because of her lack of seniority would most likely be that person. The Authority adopted the findings, conclusions, and recommendation of the ALJ and issued an appropriate remedial order. (Decision and Order attached.)

NEGOTIABILITY CASES

3 FLRA No. 20 (May 8, 1980)

National Federation of Federal Employees, Local 1624 and Air Force Contract Management Division, Hagerstown, Maryland, Case No. 0-NG-74. The dispute involved a union proposal of

alternative actions between which the activity must choose when employees are temporarily unable to perform their regularly assigned duties because of illness or injury, but who are capable of returning to or remaining in a duty status: (1) detailed to work compatible with their physical conditions; or (2) tailor their regularly assigned duties to their physical limitations. The Authority found that the union's proposal violated management's right to assign work under section 7106(a)(2)(A) and (B) of the Statute. Accordingly, the Authority sustained the activity's allegation that the disputed proposal was not within the duty to bargain. (Decision attached.)

3 FLRA No. 24 (May 8, 1980)

Federal Union of Scientists and Engineers, National Association of Government Employees, Local R1-144 and Naval Underwater Systems Center, Newport Naval Base, Newport, Rhode Island, Case No. O-NG-140. The union filed a petition for review of a negotiability dispute that arose in connection with a review of grade 13 through 15 positions that the activity had decided to conduct. The activity, in its statement of position filed with the Authority, stated, among other things, that the position review had been completed. The union did not file a response. The Authority concluded that the negotiability issue that was the subject of the union's petition had been rendered moot. Accordingly, without passing upon the timeliness of the union's petition or the merits of the dispute, the Authority dismissed the union's petition. (Decision attached.)

3 FLRA No. 25 (May 8, 1980)

National Federation of Federal Employees, Local 1862 and Department of Health, Education and Welfare, Public Health Service, Indian Health Service, Phoenix, Arizona, Case No. O-NG-195. The dispute involved a number of provisions of the local parties' negotiated agreement executed subject to the agency's approval. The agency's disapproval of a number of provisions in the contract was served on the union by mail at least 79 days after the agreement was executed and submitted for approval. The Authority found that pursuant to section 7114(c)(3) of the Statute the agreement became effective and binding on the parties 31 days after it was executed, without the approval of the agency, subject only to the requirements of the Statute and any other applicable law, rule or regulation. The Authority therefore concluded that the agency's disapproval raised no dispute concerning the

terms of the parties' agreement cognizable under section 7117 of the Statute. Accordingly, the Authority dismissed the union's appeal since, apart from other considerations, it did not meet the conditions for review under section 7117 of the Statute and section 2424.1 of the Authority's rules and regulations. (Decision attached.)

3 FLRA No. 26 (May 8, 1980)

National Association of Government Employees, Local R7-23 and Department of the Air Force, Scott Air Force Base, Illinois, Case No. O-NG-174. The dispute involved a union proposal concerning placement rights for employees downgraded as a result of a nationwide application of Federal Evaluation Factor System Classification standards to clerical employees at the activity. The proposal would require that the activity give any personnel downgraded as a result of reclassification mandatory placement rights to positions for which they qualify in order of their standing on the Reduction-In-Force Retention Roster without consideration of an Outstanding Performance Rating. The Authority held that the union's proposal violated management's right to assign employees under section 7106(a)(2)(A) of the Statute. Therefore, the Authority sustained the agency's allegation that the proposal was outside the duty to bargain. (Decision attached.)

3 FLRA No. 28 (May 12, 1980)

National Federation of Federal Employees, Local 1332 and U.S. Army Materiel Development and Readiness Command (DARCOM), Case No. O-NG-148. The dispute involved two union proposals pertaining to the qualifications of individuals to be assigned as counselors in the activity's alcohol and drug abuse prevention and control program. The Authority found that both proposals violated the agency's right to determine the types and grades of employees assigned to an organizational subdivision or work project under section 7106(b)(1) of the Statute. Accordingly, the Authority sustained the activity's allegation that the proposals were not within the duty to bargain. (Decision attached.)

Appeal withdrawn:	Case No.	Date
	O-NG-288	May 5, 1980

ARBITRATION CASE

3 FLRA No. 21 (May 8, 1980)

American Federation of Government Employees, Local 2814 and Federal Railroad Administration, Department of Transportation (Seidenberg, Arbitrator), FLRC No. 78A-104. The arbitrator found that the grievant's original position had been upgraded through the accretion of additional duties and responsibilities that was not the result of planned management action and that the grievant was entitled to a noncompetitive career promotion, and therefore ordered the grievant retroactively promoted with backpay as of the date his position was officially classified. The agency filed exceptions to the arbitrator's award with the Federal Labor Relations Council under E.O. 11491. The Council accepted the agency's petition for review of those exceptions which alleged that the award violated appropriate regulation (the FPM) and the Back Pay Act of 1966. The Council also granted the agency's request for a stay of the award. In accordance with established practice, the Council then requested from the Civil Service Commission an interpretation of applicable law and Civil Service regulations as they pertained to the arbitrator's award. The case was still pending before the Council on December 31, 1978, and, on January 1, 1979, the Authority became responsible for its further processing and final disposition. Based upon an interpretation rendered by the Office of Personnel Management (the successor agency to the CSC with respect to these matters), the Authority concluded that the arbitrator's award of retroactive promotion with backpay was not violative of applicable law or appropriate regulation. Accordingly, the Authority sustained the award and vacated the stay that previously had been granted. (Decision attached.)

Attachments (10)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL MEDIATION AND CONCILIATION SERVICE
REGION 7
SAN FRANCISCO, CALIFORNIA

Activity

and

Case No. 9-RO-14

COUNCIL OF FEDERAL MEDIATORS
REGION 7

Petitioner

DECISION AND ORDER

Upon a petition duly filed with the Federal Labor Relations Authority under section 7111(b)(2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. secs. 7101-7135, a hearing was held before Hearing Officer Patricia Baran on November 14, 1979. The Authority has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case, including briefs filed by both parties and an amicus curiae brief filed by the Office of Personnel Management (OPM), the Authority finds:

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, Council of Federal Mediators, Region 7 (Council), seeks an election in a unit consisting of all field mediator employees of the Federal Mediation and Conciliation Service, Region 7, excluding all other employees, management officials, supervisors, and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).

The threshhold issue in this case is whether the Authority is precluded from finding the petitioned for unit appropriate because of the section 7112(b)(4) proscription that a unit may not be determined appropriate if it includes an employee engaged in administering the provisions of the Statute. That is, the Authority may not find appropriate the unit sought if it includes employees engaged in administering provisions of the Statute. The question then before the Authority is whether the employees sought are engaged in the administration of provisions of the Statute.

Section 7119(a) of the Statute provides:

> The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what manner it shall provide services and assistance.

Pursuant to section 7134 of the Statute, the Service prescribed rules and regulations to carry out the provisions of the chapter which are applicable to the Service.

The Service is headed by its Director, who is supported by a national office staff located in Washington, D.C. Within the national office of the Service there exists a position of National Coordinator for Federal sector mediation services, which provides oversight, review, and assistance with respect to the Service's Federal sector responsibilities. The field operation of the Service is divided into eight Regional Offices. Within this framework, there are a total of 80 field stations, some of which are manned by a single mediator. The Service employs some 278 field mediators nationwide. Region 7, which is headquartered in San Francisco, California, has 32 mediators assigned to it.

Pursuant to the Service's regulations, a party attempting to amend, modify or terminate any existing labor agreement in the Federal sector is required to give the Service at least 30 days notice. Upon receipt of such a notice, the case is assigned to a mediator. Upon receiving an assignment, the mediator contacts the parties and a determination is then made as to whether the mediator will be actively involved in any particular matter. The mediator coordinates with the Regional Office Federal sector coordinator, as well as the national office Federal sector coordinator, on the extent of the Service's involvement in a particular case. The nature of involvement of course varies with the circumstances, but generally involves traditional mediation and conciliation, sometimes including the making of recommendations on settlement terms.

The Service also provides its Federal sector clients with technical assistance. This could involve, for example, instruction in negotiation or communication techniques in a preventive effort to deter and minimize labor disputes. The Service has also made a preliminary effort in the Federal sector to provide mediators from the Service who serve as mediators pursuant to the parties' agreements in the resolution of particular grievances.

Under the foregoing circumstances, the Authority finds that mediators employed by the Service, including those sought by the petition, are engaged in administering provisions of the Statute and, therefore, pursuant to section 7112(b)(4), may not be included in an appropriate unit. Thus, as discussed above, the Service's mediators implement and carry out section 7119(a) of the Statute by providing mediation and conciliation and technical

assistance services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. They thereby are engaged in administering the provisions of the Statute and the petition herein must be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 9-RO-14 be, and it hereby is, dismissed.

Issued, Washington, D.C., April 25, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

CORRECTED COPY

3 FLRA No. 23

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

GENERAL SERVICES ADMINISTRATION
REGION 4, ATLANTA, GEORGIA

Activity

and

Case No. 4-CU-4

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1766

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under § 7111(b)(2) of the Federal Service Labor-Management Relations Statute, a hearing was held before Hearing Officer Brenda Green. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the subject case, the Authority finds:

The Petitioner seeks to clarify an existing exclusively recognized unit of guards and Federal Protective Officers (FPO's) employed by the Activity */ to include 14 employees currently classified as Supervisory Federal Protective Officers, GS-6 (Corporals), contending that these employees are not supervisors within the meaning of § 7103(a)(10) of the Statute. The Activity contends that the incumbents in the subject classification are supervisors within the meaning of § 7103(a)(10) of the Statute and, on this basis, opposes their inclusion in the certified unit.

The Corporals are assigned to the Federal Protective Service Division (FPSD), which is one of several operating divisions within the Activity. The FPSD is responsible for the security and safety of the property, persons, buildings, and grounds under the charge and control of the Activity. The Guards and FPO's, including the GS-6 Corporals, are stationed throughtout cities in Region 4 which encompasses the states throughout the Deep South and the Southeast.

*/ The Petitioner was certified as the exclusive representative in the unit involved on December 6, 1977.

The record reveals that the Corporals in question fall into two distinct categories; those who are the senior officers on duty at their particular installation, and those who are stationed in installations where a Sergeant is the senior officer. As a consequence, the duties, responsibilities and authority of the Corporals vary upon whether or not they are the senior officer at their installation. Corporals are the senior officers at ten locations and serve under a Sergeant at four others.

All Corporals perform certain duties regardless of the location of their assignments. The record indicates that the major function of all Corporals is the preservation of security and safety at his/her post. In addition, all Corporals carry out certain administrative functions such as the preparation of monthly shift assignments, whether or not they are the senior officer.

The record reveals, however, that significant differences exist in the authority exerted by Corporals serving as senior officers as compared to their counterparts stationed at installations headed by Sergeants. Corporals acting as senior officers consistently exercise independent judgment in performing their work. They have significant impact upon the hiring decisions of the Activity, in that they regularly interview prospective employees, (often traveling to conduct these interviews), and their recommendations effectively determine the final hiring decision of the agency. Senior Corporals are responsible for assigning and directing duties of the FPO's (GS-5) and Guards under their command. They regularly visit other offices within their jurisdiction for the purpose of reviewing ongoing operations. Furthermore, the Senior Corporals have a major role in administering the grievance procedure and the authority to initiate discipline. They have the final authority to implement a settlement of a grievance if the settlement is acceptable to the employee. In addition, the Senior Corporals recommend disciplinary actions directly to the supervisory lieutenants. The record indicates that these recommendations are regularly accepted and followed. They also have a major role in determining promotions. Both their personnel evaluations and recommendations are effective in determining the promotional decisions of the Activity. Accordingly, the Authority finds that Corporals serving as senior officers at their particular installations in General Services Administration, Region 4, are supervisors as defined under § 7103(a)(10) of the Statute, and will thus be excluded from the bargaining unit.

The record futher discloses that the supervisory authority of Corporals situated in installations headed by senior Sergeants is extremely limited. There is no indication that they consistently exercise independent judgment in the performance of their duties. These Corporals have no role in the hiring procedure. Additionally, they have no authority to promote, little if any jurisdiction over assignments, no role in the grievance procedure, and their authority to discipline is limited to making recommendations to the Senior Sergeant. Their administrative duties are few, and are routine and clerical in nature. There is no evidence in the record to indicate whether they conduct training sessions for other FPO's and guards. Moreover, the record reveals that the Activity itself recognizes that the supervisory authority of Corporals serving under Sergeants exists only in the absence of the Senior Sergeant and is not consistently exercised. Accordingly, the Authority finds that Corporals serving at installations in General Services Administration, Region 4, in which a Sergeant is stationed and acts as the senior officer are not supervisors and will be included within the bargaining unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified, in which exclusive recognition was granted to the National Federation of Federal Employees, Local 1766, on December 6, 1977, at the General Services Administration, Region 4, Atlanta, Georgia, be and hereby is, clarified by including in said unit the position of Supervisory Federal Protective Officer, GS-6 (Corporal), who is assigned to a location which also includes a Supervisory Federal Protective Officer, GS-7 (Sergeant). The unit is further clarified by excluding from said unit the position of Supervisory Federal Protective Officer, GS-6 (Corporal), who is assigned to a location where he/she serves as the senior officer in that location.

Issued, Washington, D.C., May 8, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

3 FLRA No. 22

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

GENERAL SERVICES ADMINISTRATION,
REGION 9, FEDERAL PROTECTIVE
SERVICE DIVISION,
SAN FRANCISCO, CALIFORNIA

Respondent

and

Assistant Secretary
Case No. 70-6535(CA)

INTERNATIONAL FEDERATION OF
FEDERAL POLICE, LOCAL 41

Complainant

DECISION AND ORDER

The Administrative Law Judge in the above entitled proceeding, issued his Recommended Decision and Order finding that the Respondent had engaged in certain unfair labor practices in violation of § 19(a)(1) of the Order and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge also found that the Respondent had not engaged in certain other alleged unfair labor practices and recommended that those portions of the complaint be dismissed. Exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under § 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by § 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in § 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to § 2400.2 of the Authority's rules and regulations and § 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions filed by the parties, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation only to the extent consistent herewith.

As more fully set forth in the attached Recommended Decision and Order, the Administrative Law Judge (ALJ) concluded that the Activity did not violate § 19(a)(1) of the Order by interrogating employees concerning alleged statements made by the Activity's supervisor at a union meeting. In this regard, the ALJ

found that the Activity strictly limited the inquiry to the supervisor's statements, and provided sufficient safeguards and adequate assurance to the affected employees that purged the action of any unlawful connotations. However, he found violative of § 19(a)(1) an Activity directive which restricted the use of leave-without-pay when requested for union activity. In this regard, the ALJ concluded that any policy which singled out union activity as an unacceptable reason for granting leave-without-pay constituted an impermissible limitation on the rights provided for and protected by the Order.

Contrary to the conclusion of the ALJ, the Authority finds that the Activity violated § 19(a)(1) of the Order by its action in interrogating employees concerning statements alleged to have been made at a union meeting by a supervisor. It is well established under the Executive Order that interrogation of employees concerning their participation in protected activities 1/ and specifically interrogation of an employee concerning a union meeting is violative of § 19(a)(1) of the Order, Social Security Administration, Bureau of Hearings and Appeals, 7 A/SLMR 1040, A/SLMR No. 945 (1977). An exception to this general rule under the Executive Order was recognized in General Services Administration, Region 10, Auburn, Washington, 8 A/SLMR 192, A/SLMR No. 985 (1978). That exception pertained to employee interrogation as to the unlawful removal and subsequent disclosure at a union meeting of confidential agency documents. In that case the Assistant Secretary held that the interrogation of an employee concerning the identity of those attending a union meeting was lawful where the interrogation was conducted by a representative of the Agency's Office of Investigations pursuant to an administrative investigation to determine how a confidential agency document had been removed from the agency files and disclosed at the union meeting, and the person interrogated was assured that this was the only purpose of the interrogation.

In the subject case, however, the Authority concludes that the statements alleged to have been made by a supervisor at the union meeting are not of such a nature as would justify management's actions herein. The Authority does not intend to belittle the seriousness of the supervisor's alleged statements, or the concern of Activity management with respect to such allegations, nor to indicate condonation merely because they occurred at a union meeting. Rather, it is the Authority's view that only the most serious of circumstances would justify interrogating employees concerning activities at a union meeting. Moreover, it is the Authority's view that in the subject case there were alternative courses of action which could have been taken by the Activity, other than the interrogation of employees, to ascertain whether or not the alleged statements were made, and to correct them if they had been made.

1/ See Vandenburg Air Force Base, 4392 Aerospace Support Group, 4 A/SLMR 272, A/SLMR No. 382 (1974); United States Air Force, Vandenberg Air Force Base, California, 7 A/SLMR 85, A/SLMR No. 786 (1977).

However, in agreement with the ALJ, the Authority concurs that, although the Activity has wide discretion in administering leave-without-pay for the purpose of insuring efficient operations, it cannot prescribe rules which inhibit, restrain or coerce employees in the exercise of protected rights. 2/

ORDER

Pursuant to § 2400.2 of the rules and regulations of the Federal Labor Relations Authority and § 7135(b) of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the General Services Administration, Region 9, Federal Protective Service Division, San Francisco, California shall:

1. Cease and desist from:

(a) Interrogating its employees about statements made and/or events occurring at union meetings.

(b) Utilizing membership in, and/or activities on behalf of, Local 41, International Federation of Federal Police, the exclusive representative of its employees, or any other labor organization, as a factor or criterion in determining whether or not to grant leave without pay.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Order:

(a) Notify Mr. Daniel A. Jaimez, the President of Local 41, International Federation of Federal Police, in writing, that it is rescinding that portion of its memorandum to Mr. Jaimez, dated August 11, 1978, contained in paragraph numbered 2, which states:

> Union activities in conjunction with International Federation of Federal Police will not normally be considered an acceptable reason for granting LWOP.

2/ In conformity with § 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

(b) Notify Mr. Daniel A. Jaimez, in writing, that membership in, and/or activities on behalf of, Local 41, International Federation of Federal Police, or any other labor organization, will not be a factor or criterion in determining whether or not to grant his requests for leave without pay.

(c) Post at its facilities located in San Francisco, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Director, or Acting Director, of the Federal Protective Service Division of Region 9, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to Protective Service employees are customarily posted. The Director, or Acting Director, shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Authority in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 8, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION ANO ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interrogate our employees about statements made and/or events occurring at union meetings.

WE WILL NOT utilize membership in, and/or activities on behalf of, Local 41, International Federation of Federal Police, the exclusive representative of our employees, or any other labor organization as a factor or criterion in determining whether or not to grant leave without pay.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify Mr. Daniel A. Jaimez, the President of Local 41, International Federation of Federal Police, in writing, that we are rescinding that portion of our memorandum to Mr. Jaimez, dated August 11, 1978, contained in paragraph numbered 2, which states:

> Union activities in conjunction with International Federation of Federal Police will not normally be considered an acceptable reason for granting LWOP.

WE WILL notify Mr. Daniel A. Jaimez, in writing, that membership in, and/or activities on behalf of, Local 41, International Federation of Federal Police, or any other labor organization, will not be a factor or criterion in determining whether or not to grant his requests for leave without pay.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, 450 Golden Gate Avenue, Room 11408, P.O. Box 36016, San Francisco, California 94102, whose telephone number is: (415) 556-8105.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of		
GENERAL SERVICES ADMINISTRATION REGION 9 FEDERAL PROTECTIVE SERVICE DIVISION SAN FRANCISCO, CALIFORNIA Respondent	:	Case No. 70-6535(CA)
and		
INTERNATIONAL FEDERATION OF FEDERAL POLICE, LOCAL 41 Complainant		

Vincent A. Harrington, Jr., Esquire
Van Bourg, Allen, Weinberg & Roger
45 Polk Street
San Francisco, California 94102

For the Complainant

Mr. Timothy Loney
Mr. Stephen P. Saunders
GSA Personnel Division
525 Market Street
San Francisco, California 94105

For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding under Executive Order 11491, as amended (hereinafter also referred to as the "Order") was commenced before the Assistant Secretary for Labor-Management Relations, United States Department of Labor; however, pursuant to transition rules and regulations, Federal Register, Vol. 44, No. 1, January 2, 1979 (5 C.F.R. Section 2400.2), all proceedings after January 1, 1979, have been

conducted before the Federal Labor Relations Authority, the Notice of Hearing was issued by a Regional Director of the Authority, and this decision is issued in the name of the authority, in accordance with the transition rules and regulations which have been republished as Subchapter A, Part 2400 or 5 C.F.R. Chapter XIV, Federal Register, Vol. 44, No. 147, July 30, 1979.

Complainant filed a charge on, or about, September 11, 1978, and a complaint on December 11, 1978 (ALJ Exh. 1, 1-a), which alleged violations of Sections 19(a)(1) and (2) of the Order. On May 1, 1979, Complainant filed an amended complaint (ALJ Exh. 2) which deleted the allegation of a violation of Section 19(a)(2), and, on July 17, 1979, the Regional Director issued a Notice of Hearing on the alleged violations of Section 19(a)(1) of the Order (ALJ Exh. 3), a hearing was set for July 24, 1979, and, pursuant thereto, a hearing was duly held before the undersigned on July 24, 1979, in San Francisco, California. Respondent's motion to Dismiss is hereby denied.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. At the conclusion of the hearing, August 24, 1979, was fixed as the date for mailing briefs and each party has timely filed a brief which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommended order.

The Issues

There are two issues. First, did Respondent violate Section 19(a)(1) by asking employees whether a supervisor, who attended as a member, made a statement at a union meeting? The statement, if made by the supervisor, posed a serious labor-management question. Second, did Respondent violate Section 19(a)(1) by advising an employee, not employed in the bargaining unit, in substance that, because his use of leave-without-pay (LWOP) had been excessive, LWOP would be granted in the future only under stated conditions? These conditions were: 1. For purposes of illness, only when vertified and substantiated by a doctor's certificate; 2. For all other purposes, only when justification is submitted in writing at least one week in advance and is accepted. Union activities in conjunction with International Federation of Federal Police will not normally be considered an acceptable reason for granting LWOP. However, any decision will be made on a case by case basis.

Findings and Conclusions

I. Questioning Employees.

An employee came to Mr. Edwin W. Lobess, Acting Director of the Federal Protective Service Division, and complained that Sgt. Alonzo Smith, a conceded supervisor, at a union meeting, which Sgt. Smith attended as a member, had stated that officers trained at the Police Academy think they are coming here to act as policemen but "you don't listen to that; you don't pay attention to that; you do as I tell you." (Tr. 72).

Historically, federal protective officers were, essentially, guards. More recently, their duties have been expanded to include police functions and their training is now that of police officers. Some older officers resisted the change in their function and did not want to work with the young, Academy trained, officers. Accordingly, because Mr. Lobess considered any such statement by a supervisor a serious departure from management policy and a serious labor-management problem, he immediately consulted with Mr. Stephen P. Saunders, a labor relations specialist. Mr. Saunders agreed with Mr. Lobess' evaluation, i.e., that such a statement by a supervisor would have been contrary to management policy; recommended that the allegation be investigated; and, because the statement had been made at a union meeting and any investigation might involve unfair labor practice connotations, it was decided that Mr. Saunders should conduct the investigation.

The employee who had made the complaint to Mr. Lobess, which he repeated to Mr. Saunders, gave the names of employees whom, he asserted, had been present and had heard the statement. Mr. Saunders interviewed each of those persons. He asked two questions: 1. Were you at the meeting?; 2. Did you hear Sgt. Smith make the statement attributed to him? Mr. Saunders testified that he made it clear to each person interviewed that the purpose was to determine whether Sgt. Smith did, or did not, make certain statements; that he was not interested in anything else that went on in the union meeting.

Officer Raymond Ramos, then Secretary-Treasurer of Local 41, was one of the employees interviewed and he fully confirmed Mr. Saunders' testimony, namely that Mr. Saunders told him he was "...investigating concerning the statement that Sgt. Smith had mentioned in the Union meeting and that was all." Although Officer Ramos stated, in answer to the question, "Did he [Mr. Saunders] ask you whether others had been in attendance at

the meeting?", as follows: "I believe, so, yes." (Tr. 57), Mr. Saunders, in answer to the question "Did you ask Mr. Ramos who was in attandance at that Union meeting?", stated, "I don't recall asking that, no." (Tr. 85). Officer Ramos' testimony is equivocal at best and, under all circumstances, I do not find that Mr. Saunders asked him the names of any other person who attended the union meeting. Not only did Mr. Saunders deny any recollection of having asked, but he had been told by the complaining employee the names of the employees asserted to have been present and who heard Sgt. Smith's statement; he interviewed only those individuals; and he testified very positively that he asked only two questions, as noted above, namely, were you present and did you hear Sgt. Smith make a stated statement.

There can be no doubt that, as a general rule, interrogation of employees about internal union matters is an unfair labor practice, Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 945, 7 A/SLMR 1040 (1977); Vandenberg Air Force Base, 4392 Aerospace Support Group, Vandenberg AFB, California, A/SLMR No. 383, 4 A/SLMR 272 (1974); but, as Judge Naimark stated by way of dictum in Social Security Administration, Bureau of Hearings and Appeals, supra, such interrogation may not constitute an unfair labor practice if conducted for a legitimate reason and subject to appropriate assurances that no ill effects would result from such queries. General Services Administration, Region 10, Auburn, Washington, A/SLMR No. 985 (1978), squarely presented the question of interrogation of employees for a legitimate purpose and the Assistant Secretary held that such interrogation was not an unfair labor practice. In the General Services Administration, Region 10, case, supra, an investigator questioned an employee, the Chief Steward, concerning the names of those persons in attendance at a union meeting in order that he could interview them to determine how a bid document had been disclosed from a confidential agency file. The investigator told the Chief Steward that he was not interested in matters discussed at the meeting. In addition, the investigator had interviewed about 25 employees. While the investigator wanted the names of those persons present at the union meeting in order to question them concerning possible violations of GSA Standards of Conduct, the Federal Procurement Regulations, and the United States Code, and not union activity; nevertheless, employees, or at least the person or persons responsible for disclosure of a confidential bid document at a union meeting, questioned or to be questioned, faced possible disciplinary action.

In the present case, as in Region 10, supra, the interrogation

was for a legitimate purpose, namely, to determine whether a supervisor had made a statement attributed to him which, if made, was contrary to management policy. Here, unlike Region 10, supra, Respondent did not ask employees interviewed for the names of persons who attended the union meeting. Here, Respondent asked the employees, reported by the complaining employee to have been present, whether they had been present at the meeting and whether they heard Sgt. Smith make the statement attributed to him. The record shows without contradiction that Mr. Saunders told each employee interviewed that he was investigating concerning the statement that Sgt. Smith was alleged to have made at the meeting and that was all; that he was not interested in anything else that went on at the union meeting. Of the employees interviewed only Officer Ramos testified, but his testimony leaves no doubt that he fully understood that only Sgt. Smith was being investigated. 1/ Accordingly, I conclude that Respondent did give appropriate assurances to each employee interviewed that he would not be subjected to any ill effects as the result of

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1/ The complaint does not concern Sgt. Smith. In actuality, Mr. Lobess testified that the results of the interviews were inconclusive, that one employee asserted that he hadn't heard any statement by Sgt. Smith, another thought he had made the statement in jest, and another stated he was not at the meeting; and Officer Ramos testified that Sgt. Smith said that new employees should follow Regional policy even if such policy was in conflict with what they had been taught at the academy. Accordingly, no disciplinary action was taken against Sgt. Smith except that Capt. Lopez, at Mr. Lobess' instruction, counseled Sgt. Smith that supervisors must not discourage young officers from performing their duties properly.

I expressly decline to make any determination in this proceeding as to whether, or under what circumstances, a supervisor has any right cognizable under Section 19(a) of the Order for the reason that no such issue has been raised by the complaint in this case. The parties must bear in mind the provisions of Sections 1(b), 2(b) and 10(b) of the Order. See, also, Internal Revenue Service, Chicago District, A/SLMR No. 279, 3 A/SLMR 304 (1973). U.S. Department of the Treasury, Internal Revenue Service, Western Service Center, Ogden, Utah, A/SLMR No. 280, 3 A/SLMR 310 (1973); Directorate of Maintenance, Manufacture and Repair Branch (MANPSM), Warner Robins Air Material Area (WRAMA), Robins Air Force Base, Georgia, A/SLMR No. 365, 4 A/SLMR 190 (1974); Department of the Navy, Office of the Secretary, Washington, D.C., A/SLMR No. 393, 4 A/SLMR 341 (1974)

Mr. Saunders' queries to him. 2/

Complainant contends, of course, that any interrogation of employees about anything that occurs at a union meeting constitutes a per se violation of Section 19(a)(1). I find no support in the decisions under the Executive Order for this premise. To the contrary, the decisions, as set forth above, are to the effect that interrogation for a legitimate purpose, with appropriate assurances to the employees that the questions will not subject them to retaliation because of their union activity, and which avoids inquiry into internal union affairs beyond the legitimate purpose of the inquiry, does not violate Section 19(a)(1) of the Order. Respondent had a legitimate purpose, namely, to determine whether a supervisor had made a statement at a union meeting which was in violation of management policy; it limited its inquiry narrowly to two questions, to wit: were you present and did you hear Sgt. Smith make the statement in question; there was no threat to any employee questioned; and appropriate assurances of the purpose of the investigation were given. Accordingly, Respondent's interrogation of employees concerning an alleged statement made by a supervisor at a union meeting was not a violation of Section 19(a)(1) of the Order.

II. LWOP Restriction

Mr. Daniel Anthony Jaimez was hired as a Protection Service

2/ It is recognized that Officer Ramos initially requested that he have a witness present, not because he feared that he faced any possible disciplinary action, but, because Sgt. Smith might, he did not want any statement he made to be misunderstood; that when his request was denied he refused to answer; that, because he refused to cooperate with investigative representatives, Respondent had proposed discipline against Mr. Ramos; and that, at that point, Officer Ramos gave a statement. Nevertheless, the record is clear that Officer Ramos fully recognized that Mr. Saunders' question as to whether Sgt. Smith had, or had not, made the statement attributed to Sgt. Smith posed no possible threat of discipline to him (Ramos). Moreover, inasmuch as the complaint does not allege any violation vis-a-vis the threat of discipline because of Officer Ramos' initial refusal to answer, I expressly make no determination with regard thereto and draw no inference therefrom. See, in this regard, General Service Administration, Region 10, supra, which did involve this contention.

Officer in June 1971. In April 1976, he terminated his employment with Respondent to accept the position of Assistant Regional Director of the International Federation of Federal Police. Subsequently, the International was declared defunct but Local 41 continued as a de facto labor organization and Mr. Jaimez became Assistant Regional Director of Local 41. In March 1977, Mr. Jaimez was reinstated by Respondent as a Federal Protective Officer; on January 5, 1979, Mr. Jaimez was elected President of Local 41; and effective March 8, 1978, Mr. Jaimez was reassigned to a position outside the bargaining unit as security monitor/dispatcher. Mr. Jaimez was advised by letter, dated January 22, 1978, in part, as follows:

> "This is to confirm our telephone conversation of March 21, 1978, in which I informed you that due to your reassignment to the position of Security Monitor-Dispatcher ... effective March 8, 1978, you are no longer entitled to use official time for labor-management relations activities under the Negotiated Agreement. The position to which you have been reassigned is not part of the bargaining unit covered by the Agreement. Since the Agreement is applicable only to the bargaining unit for which IFFP, Local 41, has exclusive recognition, you as the occupant if a non-unit position are not covered by the Agreement ...." (Jt. Exh. 2).

No question of official time is before me. Mr. Jaimez did file a grievance concerning the denial of official time, the grievance was denied and was not further pursued. Captain Louis Lopez, Jr., issued a memorandum, dated August 11, 1978, receipt of which was acknowledged by Mr. Jaimez on August 16, 1978, which stated as follows:

> "I have made a careful review of your use of leave during calendar year 1978. During the period February to date you used 136 hours of leave-without-pay (LWOP) for a variety of reasons, including illness."
>
> "On July 21, 1978 you submitted a request for LWOP to attend an unfair labor practice hearing on July 24-26, 1978. This request was not submitted until after the end of your shift on July 21 and you did not

contact your supervisor to determine if your request had been granted. Moreover, even though the hearing proceedings were completed as of 5:00 P.M. on July 25, 1978, you did not inform your supervisor of this and request that you be granted the day of July 26, 1978 on LWOP for reasons different than you had originally requested. I consider both of these incidents to be in violation of your responsibilities as an employee of this organization and it will not be tolerated in the future."

"Because I consider that your use of leave-without-pay to have been excessive, it will be granted in the future only in the following circumstances:

"1. For purposes of illness, doctor's appointment and the like only when verified and substantiated by a doctor's certificate."

"2. For all other purposes, only when justification is submitted in writing at least one week in advance and is acceptable to me or my designee. Union activities is conjunction with International Federation of Federal Police will not normally be considered an acceptable reason for granting LWOP. However, any decision in this matter will be made on a case by case basis."

"In the meantime, you are cautioned to exercise careful judgment concerning your use of leave and to maintain a satisfactory attendance record. Your failure to do so may result in further action." (Jt. Exh. 1).

Mr. Jaimez testified that from 1978 he had been primarily assigned to the midnight shift (12:00 p.m. to 8:00 a.m.); that his union activities were conducted, for the most part, during the day (8:00 a.m. to 4:00 p.m.); that, so long as he was on the midnight shift, he rarely had occasion to request leave without pay for union activity; but that he was, on some occasions, rotated from one shift to another, including the 8 to

4 shift, and, especially when he worked the day shift, then found it necessary to request leave with pay to conduct union activity.

Capt. Lopez testified that Mr. Jaimez had used all projected annual and sick leave and, in addition, 136 hours of LWOP; that he considered Mr. Jaimez' use of LWOP execessive under any circumstance and especially so since he was in a one year training status as a console operator; that, because of absences, he had not completed his training and the training period had to be extended. The requirement of a doctor's certificate (Par. No. 1 of Jt. Exh. 1) was a standard requirement. Although Paragraph No. 2 of Jt. Exh. 1 states that "For all other purposes" requests for LWOP must be submitted in writing at least one week in advance, Capt. Lopez stated that as to "sick and car trouble, he had no control" which implies that Capt. Lopez did not intend to require prior approval of LWOP in situations where Mr. Jaimez had no control. Indeed, from Capt. Lopez' testimony it is clear that, where Mr. Jaimez had meetings scheduled in advance, he wanted prior notice; however, his memorandum was not so phrased.

Capt. Lopez testified that Mr. Jaimez had made four requests for LWOP during the February-August 11 period for union activity totalling 7 days, including July 24-26, 1978. This meant that 10 days of LWOP had been for reasons other than union activity. As to July 26, 1978, Mr. Jaimez, despite Capt. Lopez' critical comments in the memorandum of August 11, 1978, did receive LWOP for that day. Capt. Lopez' criticism was understandable. Obviously, Mr. Jaimez had not advised Respondent that he was driving to Los Angeles; that the hearing ended early; or that, as seems probable from Mr. Jaimez' testimony, he had driven back to San Francisco the evening or night of July 25. In any event, this issue is largely, if not wholly, immaterial to the more critical question posed by the memorandum of August 11, 1978, as noted hereinafter.

Mr. Jaimez testified that after he received the memorandum of August 11, 1978, Lt. Bolling approved a request for 2 hours of LWOP for a union meeting which Capt. Lopez later rescinded. Capt. Lopez testified that he recalled no such occurrence and, to the contrary, that Mr. Jaimez' request for 2 hours LWOP on August 31, 1978, as shown by his pay records, was approved and that on August 30 Mr. Jaimez received official time to see Congressman Dellums. In view of Capt. Lopez' very clear testimony, fully supported by his reference to Mr. Jaimez' pay records, I fully credit Capt. Lopez' testimony and conclude that the only

request for LWOP by Mr. Jaimez after receipt of the August 11, 1978, memorandum, shown on the record, was granted by Respondent.

Complainant has not shown that Mr. Jaimez was treated in a disparate manner. If it were simply that Respondent had imposed a limitation on Mr. Jaimez' use of LWOP because of his excessive use of LWOP, I would have no difficulty concluding that there was no violation of the Order. Contrary to popular misconception, leave without pay is not without substantial detriment to the Government. Thus, the Government incurs costs and administrative inconveniences including: (a) encumbrance of a position; (b) obligation to provide active employment at the end of approved leave; (c) eligibility for continued coverage (without cost to the employee for up to one year of nonpay status) for life and health insurance coverage; (d) credit of 6 months of each year toward retirement; etc. (Res. Exh. 2, Cl. Exh. 1).

Although the grant of leave without pay is a matter of administrative discretion, one example of a situation which the Federal Personnel Manual and Respondent's Regulations (Res. Exh. 2, Comp. Exh. 1) cite as proper for approval of LWOP is "For the purpose of serving, on a temporary basis, as an officer or representative of a union representing Federal employees" (Federal Personnel Manual 12-2b.(4)(f)(Res. Exh. 2), OAD, Chapter 4(P6010.4), 5e, (Comp. Exh. 1). Respondent's inclusion in its memorandum of August 11, 1978, of the statement:

> "... Union activities in conjunction with International Federation of Federal Police will not normally be considered an acceptable reason for granting LWOP ...." (Jt. Exh. 1).

constitutes the critical question in this case.

It is true that the Regulations, referred to above, relate to "Examples of proper cases for extended leave without pay" (Emphasis supplied), which, obviously, contemplates an extended, but nevertheless temporary, period of service as an officer or representative of a union representing Federal employees, rather than sporadic absences for an hour or two or a day or a few days. Section 1(a) of the Order assures each employee the right to "... assist a labor organization ...." and states that,

> "... the right to assist a labor organization extends to participation in the management of the organization and acting

> for the organization in the capacity of an organization representative ...." (Sec. 1(a), E.O. 11491, as amended).

Although Mr. Jaimez is employed outside the bargaining unit, there is no evidence, or even contention, that he is a supervisor or that his participation or activity would result in a conflict, or apparent conflict, of interest or otherwise be incompatible with law or his official duties within the meaning of Section 1(b) of the Order.

Accordingly, as the Order guarantees the right to assist a labor organization and such right extends to acting as a representative of the organization and as the Regulations recognize participation as a representative of a union representing Federal employees as a program of interest to the Government, Respondent's statement that "Union activities ... will not normally be considered an acceptable reason for granting LWOP" violated Mr. Jaimez' Section 1(a) rights, in violation of Section 19(a)(1) of the Order. Respondent may not single out union activities as not normally being considered an acceptable reason for granting LWOP. This is not to imply that Respondent, or any agency, may not act to prevent abuse of LWOP, that Respondent is without administrative discretion to deny LWOP, or that Respondent may not uniformly require that requests for LWOP be subject to limitations, including submission in writing, prior notice, etc; but any limitation which singles out union activity as an unacceptable reason for granting LWOP constitutes an impermissible limitation in violation of Section 19(a)(1) of the Order. Nor is this conclusion affected by the facts that: (a) Mr. Jaimez is not employed in the bargaining unit; or (b) that Mr. Jaimez' use of LWOP was considered excessive. Assuming, as reasonably appears from the record, that Mr. Jaimez' use of LWOP had been excessive, a requirement that he must request LWOP in advance might have been proper, but Respondent may not denominate union activity as an unacceptable reason for granting LWOP. Nor do I find that the further sentence "However, any decision in this matter will be made on a case by case basis" either standing alone or in conjunction with the fact that the record shows that a request for LWOP was, in fact, granted, sufficient to exculpate the impermissible limitation on use of LWOP for union activity. Accordingly, as Respondent violated Section 19(a)(1) of the Order, I shall recommend an appropriate order to remedy the violation of the Order.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, 29 C.F.R. Section 203.26(b), and Section 2400.2 of the transition rules and regulations (5 C.F.R. Section 2400.2, Fed. Reg., Vol. 44 No. 1, January 2, 1979, and, as republished, Subchapter A, Part 2400 of 5 C.F.R. Chapter XIV, Fed. Reg., Vol. 44, No. 147, July 30, 1979), the Federal Labor Relations Authority hereby orders that General Services Administration Region 9, Federal Protective Service Division, San Francisco, California, shall:

1. Cease and desist from:

(a) Interferring with, restraining, or coercing its employees in the exercise of their rights assured by the Executive Order by denominating union activities as not an acceptable reason for granting leave without pay.

(b) In any like or related manner interferring with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Order:

(a) Rescind, in writing, that portion of its memorandum dated August 11, 1978, contained in paragraph numbered 2, which states:

> "Union activities in conjunction with International Federation of Federal Police will not normally be considered an acceptable reason for granting LWOP. However, any decision in this matter will be made on a case by case basis."

(b) Notify Complainant, International Federation of Federal Police, Local 41, in writing, that any exception from any requirement for advance notice for LWOP shall apply uniformly to all like circumstances, including union activity.

(c) Post at its facilities located in San Francisco, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Director, or Acting Director, of the Federal Protective Service Division of Region 9 and shall

be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to Protective Service employees are customarily posted. The Director, or Acting Director, shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to 29 C.F.R. Section 203.27 and Section 2400.2 of the transition rules and regulations, notify the Authority in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 12, 1979
Washington, D.C.

APPENDIX

N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended, by denominating union activities as not an acceptable reason for granting leave without pay (LWOP).

WE WILL NOT in any like or related manner interfer with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL Rescind, in writing, that portion of our memorandum dated August 11, 1978, which stated:

> "Union activities in conjunction with International Federation of Federal Police will not normally be considered an acceptable reason for granting LWOP. However, any decision in this matter will be made on a case by case basis."

WE WILL NOTIFY Complainant, International Federation of Federal Police, Local 41, in writing, that any exception from any requirement for advance notice for LWOP shall apply uniformly to all like circumstances, including union activity.

_____

Activity

Dated: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, whose address is: Room 534, 211 Main Street, San Francisco, California 94105.

3 FLRA No. 27

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF THE NAVY
PORTSMOUTH NAVAL SHIPYARD

Respondent

and

Assistant Secretary
Case No. 31-11732 (CA)

INTERNATIONAL FEDERATION OF PROFESSIONAL
AND TECHNICAL ENGINEERS, AFL-CIO

Complainant

DECISION AND ORDER

The Administrative Law Judge in the above-entitled proceeding issued his Recommended Decision and Order finding that the Respondent had engaged in the unfair labor practice alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly that no exceptions were filed, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation. */

*/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, shall:

1. Cease and desist from:

(a) Discouraging, by implied threats or other means, Katherine Dowaliby or any other employee from exercising the rights accorded them by the Order to file or process grievances under the contractual grievance procedure.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Post at the Portsmouth Naval Shipyard, Portsmouth, New Hampshire, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of the Portsmouth Naval Shipyard and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Notify the Federal Labor Relations Authority in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 12, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discourage, by means of implied threats or other means, Katherine Dowaliby or any other employee from exercising the rights accorded them by Executive Order 11491, as amended, to file or process grievances under the contractual grievance procedure.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

_____
(Agency or Activity)

Dated:_____ By:_____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, whose address is: 441 Stuart Street, 8th Floor, Boston, Massachusetts 02116, and whose telephone number is: (617)223-0920.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
U.S. DEPARTMENT OF THE NAVY PORTSMOUTH NAVAL SHIPYARD Respondent	
and	Case No. 31-11732(CA)
INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, AFL-CIO Complainant	

A. GENE NIRO, ESQUIRE
Area Representative
Naval Civilian Personnel Command
Northern Field Division
666 Summer Street
Building 113
Boston, Massachusetts
For the Respondent

JAMES LYONS
Director of Public Employee Affairs
International Federation of Professional
and Technical Engineers, AFL-CIO
1126 - 16th Street, NW.
Suite 111
Washington, D.C. 20036
For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

Pursuant to an amended complaint first filed on June 14, 1978, under Executive Order 11491, as amended, by the International Federation of Professional and Technical Engineers, AFL-CIO, (hereinafter called the Union or Complainant), against the U.S. Department of the Navy, Portsmouth Naval Shipyard, (hereinafter

called the Respondent or Activity), a "Second Notice of Hearing on Complaint" was issued by the Regional Director for the Boston, Massachusetts Region of the Federal Labor Relations Authority on August 13, 1979.

The Complaint alleges, in substance, that the Respondent violated Section 19(a)(1) of Executive Order 11491, as amended, by virtue of its actions in attempting to dissuade an employee from pursuing a grievance through arbitration.

A hearing was held in the captioned matter on September 18, 1979, in Boston, Massachusetts. All parties were afforded full opportunity to be heard, adduce evidence and examine and cross-examine witnesses.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and order.

Findings of Fact

The Union is the exclusive representative of some 1000 non-supervisory employees, including a number of data processors, located at the Portsmouth Naval Shipyard. The Union and the Respondent are parties to a collective bargaining agreement which contains a two step grievance procedure culminating in arbitration.

Prior to the spring of 1977, the data processing personnel, which held the Classification 115-12(Data Processing), customarily worked only the morning (7:30 a.m. - 4:00 p.m.) and afternoon (3:45 p.m. - 12:15 a.m.) shifts.

In the spring of 1977, Katherine Dowaliby, classified GS-5 Code 115-12(Data Processing), was informed that Respondent intended to assign her as a "temporary appointment" to the midnight shift. She immediately informed her supervisor Gordon Weeks that she could not emotionally and physically handle the midnight shift and that she was going to have to resign. Mr. Weeks inquired if she would be willing to work the second shift if he could secure a volunteer for the night shift. Although she had been working the first shift, Ms. Dowaliby responded in the affirmative.

During the summer of 1977, Ms. Dowaliby discussed the possibility of filing a grievance over the new midnight shift assignment with both her fellow data processors and her Union Steward, Rusty Callahan. Thereafter, Ms. Dowaliby along with a number of her fellow employees in Classification 115-12(Data Processing) individually signed and filed grievances concerning rotating Code 115 employees to the midnight shift assignment. The grievances alleged that the contract did not give Respondent the right to assign employees to a shift by rotation. Ms. Dowaliby's grievance, which is dated September 28, 1977,

took the position that rotation of Code 115 employees was in violation of the contract and requested as a remedy that all data processors remain on the morning shift (7:30 a.m. - 4:00 p.m.).

In September of 1977, Ms. Dowaliby applied for and received a transfer from Code 115 to Code 105. This transfer removed her from the danger of being involuntarily assigned to the newly created Code 115 position on the midnight shift.

Subsequently, on or about October 18, 1977, Union and Management representatives met for purposes of discussing the grievances concerning the midnight shift assignment. Inasmuch as Ms. Dowaliby had been transferred to Code 105, her union steward informed her that her presence at the meeting was not required. The union steward, in response to an inquiry from Mr. Morton Page, Director of Management Engineering and Data Processing, who was representing management at the October 18th meeting, informed Mr. Page of the reasons for the absence of Ms. Dowaliby from the meeting. According to the uncontradicted testimony of Mr. Page, during the course of the meeting he pointed out that should an arbitrator find merit in the grievances Respondent might well be forced to discontinue its policy of assigning data processors on a rotational basis and instead assign a single data processor to the midnight shift on a permanent basis. Following the meeting, the Union, which was dissatisified with Respondent's position, elected to process the grievances to arbitration.

In early November of 1977, Ms. Dowaliby transferred back to Code or Classification 115. Inasmuch as she then became subject to assignment to the midnight shift, which was then being filled on a rotating basis, she requested the Union to reinstate her grievance and include it in the pending arbitration proceeding. Pursuant to her request, the Union sent a letter dated November 23, 1977, to Mr. D. Holster, Director of Industrial Relations, wherein it was requested that her grievance be reinstated and submitted to arbitration along with the grievances of her fellow employees in Code 115.

On December 6, 1977, at about 7:50 a.m. Ms. Dowaliby was told by Ms. Marlene Young, Administrative Assistant of Mr. Page, that Mr. Page was on the telephone and wanted to talk to her. Upon picking up the telephone, Ms. Dowaliby was told by Mr. Page that he had just been informed that she had refiled her grievance about the midnight shift. Mr. Page then proceeded to explain to Ms. Dowaliby that Respondent could settle the grievances by merely abandoning the rotational system and assigning one person on a permanent basis to the midnight shift. Inasmuch as she was the junior employee in Code 115, she would most likely get the permanent assignment. Ms. Dowaliby replied that employee Helen Rogers was leaving Respondent's employ in the near future and that Ms. Roger's replacement would then be the junior employee in Code 115. The conversation ended when Ms. Dowaliby

declined the opportunity to think the matter over and made it clear that she did not want to withdraw her grievance.

According to Mr. Page, the reason that he telephoned Ms. Dowaliby was to make sure that she was acquainted with the discussions which took place at the October 18th meeting with respect to the possible consequences of an arbitration award in favor of the grievants. Namely, that the most junior employee might be assigned to the midnight shift on a permanent basis. Mr. Page felt that rotation was the best system and did not want to be forced to put anyone on the midnight shift on a permanent basis. It was for this reason that he had attempted to dissuade Ms. Dowaliby as well as the other grievants from proceeding with their grievances to arbitration.

Discussion and Conclusions

It is well settled that the right to file and process grievances under a contractual grievance procedure falls within the ambit of Section 1(a) of the Executive Order which provides that employees have the "right, freely and without fear of penalty or reprisal, to form, join and assist a labor organization". Accordingly, it has been held that interference by an Activity with the filing and/or processing of a grievance constitutes a violation of Section 19(a)(1) of the Executive Order. 1/

In the instant case Mr. Page, Respondent's representative, for reasons unrelated to the mechanics of the contractual grievance procedure, saw fit to personally contract Ms. Dowaliby concerning the possible consequences of her reinstated grievance. During the ensuing unsolicited discussion Mr. Page made it clear that he could unilaterally settle Ms. Dowaliby's grievance and those of her four fellow employees by unilaterally abandoning the rotational shift policy and assigning one person on a permanent basis to the midnight shift. Mr. Page further stated that if such action was taken Ms. Dowaliby, by reason of her low seniority standing, would be the person assigned to the midnight shift. Mr. Page admitted that he was of the opinion that rotation was the most equitable method and for this reason sought to dissuade the employees from proceeding further with their respective grievances.

Viewing the conversation of December 6th in its entirety and the circumstances surrounding same, i.e. the absence of the Ms. Dowaliby's

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1/ Cf. Federal Aviation Administration, Air Traffic Control Tower Greater Pittsburgh Airport, Pittsburgh, Pa., A/SLMR 920; Dept. of Defense, Arkansas National Guard, A/SLMR 53; Dept. of Navy, Puget Sound Naval Shipyard, Bremerton, Washington, A/SLMR 582; NLRB, Region 17, Ft. Note 3, A/SLMR 295; U.S. Dept. of the Army, Fort Polk, Louisiana, A/SLMR 1100.

appointed union representative, I conclude that Mr. Page, irrespective of any altruistic intentions he may have had, interfered with the rights accorded Ms. Dowaliby under Section 1(a) of the Order to freely and without fear of penalty or reprisal file and/or process grievances. While it might well be true that the outcome of the grievances, either by unilateral management action or an adverse decision of the arbitrator, would be the cancellation of the policy of rotation and the assignment of an employee on a permanent basis to the midnight shift, the fact remains that no such action had been effected. In such circumstances, Mr. Page's gratuitous remarks constituted an implied threat to Ms. Dowaliby that irrespective of the merits of her grievance, if she continued to pursue same, she, by virtue of her low seniority standing, would be assigned to the midnight shift. This is particularly true in view of the fact that Respondent had been put on notice that Ms. Dowaliby would resign rather than work the midnight shift.

Accordingly, based upon the foregoing considerations, I find that Respondent coerced, restrained and interfered with Ms. Dowaliby in exercise of her Section 1(a) rights in violation of Section 19(a)(1) of the Executive Order.

RECOMMENDED ORDER

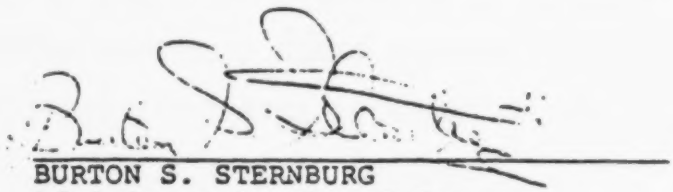
Pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.26(b) of the Regulations, the Federal Labor Relations Authority hereby orders that the Portsmouth Naval Shipyard, Portsmouth, New Hamsphire, shall:

1. Cease and desist from discouraging, by implied threats or other means, Katherine Dowaliby or any other employee from exercising the rights accorded them by the Order to file or process grievances under the contractual grievance procedure.

2. Take the following affirmative action in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Post at the Portsmouth Naval Shipyard, Portsmouth, New Hampshire, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of the Portsmouth Naval Shipyard and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 203.27 of the Regulations, notify the Federal Labor Relations Authority, in writing, within 30 days from date of this order as to what steps have been taken to comply herewith.



BURTON S. STERNBURG
Administrative Law Judge

Dated: November 2, 1979
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discourage, by means of implied threats or other means, Katherine Dowaliby or any other employee from exercising the rights accorded them by Executive Order 11491, as amended, to file or process grievances under the contractual grievance procedure.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, whose address is: 441 Stuart Street, 8th Floor, Boston, Massachusetts 02116, and whose telephone number is: 617-223-0920.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, LOCAL 1624

(Labor Organization)

and

Case No. 0-NG-74

AIR FORCE CONTRACT MANAGEMENT
DIVISION, HAGERSTOWN, MARYLAND

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

Union Proposal

Employees who are temporarily unable to perform their regularly assigned duties because of illness or injury, but who are capable of returning to or remaining in a duty status, will be detailed to work assignments compatible with their physical conditions or their regularly assigned duties will be tailored to their physical limitations.

Question Here Before the Authority

The question is whether the union's proposal would violate management's rights under section 7106 of the Statute, as alleged by the agency and is therefore not within the duty to bargain.1/

1/ Section 7106 of the Statute provides, in relevant part, as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws--
(A) to hire, assign, . . . and retain employees . . . ;
(B) to assign work . . . .

Conclusion: The proposal would violate management's right to assign employees and to assign work under section 7106(a)(2)(A) and (B) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3513 (1980)), the agency's allegation that the disputed proposal is not within the duty to bargain is sustained.

Reasons: The proposal in dispute essentially states two alternative actions between which management must choose for employees who are temporarily unable to perform their regularly assigned duties because of illness or injury, but who are capable of returning to or remaining in a duty status: 1) They will be detailed to work assignments compatible with their physical conditions; or 2) their regularly assigned duties will be tailored to their physical limitations.

In American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2/ the Authority generally stated with respect to management's right to assign employees under section 7106(a)(2)(A) of the Statute that "the right to assign an employee to a position includes the discretion to determine which employee will be assigned."3/

In that case the Authority also stated the following with reference to management's right to assign work under section 7106(a)(2)(B) of the Statute:4/

> The assignment of work to employees or positions is a right reserved to management under section 7106(a) of the Statute. The redesign of a position or a job requires, among other things, a determination of the work which will be assigned to the position or employee involved. Thus, a proposal to redesign a position or job in a particular manner would conflict with management's right to assign work by prescribing the work to be assigned.

Based upon the above, the first alternative provided by the proposal in dispute, namely, that management must detail the subject employees to particular types of positions or work assignments, would violate management's right to assign employees under section 7106(a)(2)(A) of the Statute. The second and only other alternative provided under the proposal, namely, that management must "tailor," or redesign, the duties of a position specifically for the subject employees, would violate management's right to assign work under section 7106(a)(2)(B) of the Statute.

The union contends that the proposal is negotiable as a health and safety measure. This characterization does not affect the requirements, pursuant to section 7117 of the Statute, that such proposals are negotiable only insofar as they are not inconsistent with Federal law, Government-wide

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2/ Case No. 0-NG-40, 2 FLRA No. 77 (Jan. 31, 1980).

3/ Id. at p. 10 of decision.

4/ Id. at p. 18 of decision.

rule or regulation, or agency rule or regulation for which a compelling need exists. As stated above, it is the Authority's determination that the instant proposal would violate section 7106(a)(2)(A) and (B) of the Statute and, therefore, that it is not within the duty to bargain.

Issued, Washington, D.C., May 8, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL UNION OF SCIENTISTS
AND ENGINEERS, NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES, LOCAL R1-144

Union

and

Case No. O-NG-140

NAVAL UNDERWATER SYSTEMS CENTER,
NEWPORT NAVAL BASE,
NEWPORT, RHODE ISLAND

Activity

DECISION ON NEGOTIABILITY APPEAL

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. §§ 7101-7135).

The Naval Underwater Systems Center, Newport Naval Base (the Activity), decided to conduct a position review of its grade 13 through 15 positions. Federal Union of Scientists and Engineers, National Association of Government Employees, Local R1-144 (the union), requested the activity to provide information about the position review and to delay implementation of the review until the union had an opportunity to review the information. The parties discussed the position review at which time the union was told that the review would be conducted by employees of the activity and an independent contractor and that the positions to be reviewed would be selected by a random process.

The union followed the meeting with a memorandum stating that the activity had not responded to a request for information about the review and requested to negotiate about the impact of the review on employees. The activity supplied the union with information about the random selection process but denied the request to negotiate. The union sent another memorandum recommending two methods for randomly selecting positions for review and stating that negotiation about the random selection method would be requested if neither union recommendation were acceptable. The activity stated that it would use its previously developed random selection method and that the method used to divide work assignments between outside contract personnel and activity personnel is not negotiable. The union responded two days later with a request that the activity state in writing whether it would negotiate about the method for randomly selecting positions for review, not the personnel by whom the review was to be performed. The activity did not respond.

The union filed the instant negotiability appeal with the Authority, emphasizing that the request to negotiate did not concern the personnel by whom the activity conducted its position review. In its statement of position, filed with the Authority the activity states, inter alia, that the position review has been completed and that the union's appeal has therefore become moot. The union has not responded to the activity's statement.

Under the circumstances set forth, it is concluded, as the agency contended without objection by the union, that the negotiability issue which was the subject of the instant appeal was rendered moot by the completion of the position review. Accordingly, without passing on the timeliness of the appeal or the merits of the dispute, the appeal is dismissed.

Issued, Washington, D.C., May 8, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1862

(Union)

and

Case No. 0-NG-195

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, PUBLIC HEALTH SERVICE,
INDIAN HEALTH SERVICE, PHOENIX, ARIZONA

(Activity)

DECISION ON NEGOTIABILITY APPEAL

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

The basic facts, as set forth in the record, are that the local parties executed a negotiated agreement on July 17, 1979, and submitted it to the agency for review and approval in accordance with section 7114(c) of the Statute; and that by letter of October 4, 1979, the agency notified the union that it had disapproved a number of provisions of that agreement as being inconsistent with applicable law, rule or regulation. Thus, the agreement was executed by the local parties on July 17, 1979, and the agency's disapproval was served on the union by mail on October 4, 1979, or at least 79 days after the agreement was executed.

Section 7114(c) of the Statute provides in pertinent part:

(c) (1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of an agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

Thus, under section 7114(c)(3) of the Statute, an agreement which has not been approved or disapproved by the agency involved within 30 days after its execution becomes effective and binding on the parties on the 31st day, without the approval of the agency, subject only to the requirements of the Statute and any other applicable law, rule or regulation.

In this case, as previously indicated, the parties' negotiated agreement was executed on July 17, 1979, and submitted for agency review and approval. However, the agency's disapproval was not served on the union until October 4, 1979, or at least 79 days after the agreement was executed and submitted for approval. Therefore, under section 7114(c)(3) of the Statute, the parties' agreement went into effect no later than August 17, 1979, and is binding on the parties, subject only to the requirements of the Statute and any other applicable law, rule or regulation.

Consequently, since the entire agreement, as negotiated and executed by the parties, became effective no later than August 17, 1979, the agency's subsequent disapproval raises no dispute concerning the terms of such agreement which is cognizable under section 7117 of the Statute.

Our conclusion that the propriety of the agency's disapproval of a number of the agreement provisions is not cognizable in the present proceeding does not, of course, mean that any provisions in the agreement which are contrary to the Statute or any other applicable law, rule or regulation, are thereby enforceable. Rather, a question as to the validity of such provisions may be raised in other appropriate proceedings (such as grievance arbitration and unfair labor practice proceedings) and, if the agreement provisions are there found to be violative of the Statute or any other applicable law, rule or regulation, they would not be enforceable but would be deemed void and unenforceable.

Accordingly, since the union's appeal does not meet the conditions for review under section 7117 of the Statute and section 2424.1 of the Authority's rules and regulations, and apart from other considerations, the appeal is dismissed.

Issued, Washington, D.C., May 8, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, LOCAL R7-23

(Labor Organization)

and

Case No. O-NG-174

DEPARTMENT OF THE AIR FORCE,
SCOTT AIR FORCE BASE, ILLINOIS

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

Union Proposal

Any personnel downgraded as a result of the reclassification be given mandatory placement rights into a position for which they qualify in order of their standing on the Reduction-In-Force Retention Roster without consideration of an Outstanding Performance Rating.

Question Here Before the Authority

The question is whether the union's proposal violates the right of the agency to assign employees under section 7106(a) of the Statute,[1/] as alleged by the agency.

1/ Section 7106(a) of the Statute provides, in relevant part:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(Continued)

Opinion

Conclusion: The union proposal violates the agency's right to assign employees under section 7106(a)(2)(A) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that the proposal is not within the agency's duty to bargain is sustained.2/

Reasons: The union's proposal essentially concerns placement rights for employees downgraded as a result of a nationwide application of Federal Evaluation Factor System classification standards to clerical employees at the activity. The purpose of the proposal, according to the union, is to establish seniority as the criterion for filling positions by downgraded personnel.

The Authority recently considered whether proposals which compel the selection of a particular employee for assignment violate the right of an agency to assign employees under section 7106(a)(2)(A) of the Statute. In considering such proposals, which concerned selection of employees for temporary assignments on the basis of seniority as well as assignment of employees subject to a reduction-in-force, the Authority stated:

> [T]he right to assign an employee to a position includes the discretion to determine which employee will be assigned. . . . A procedure for selecting an employee for assignment solely on the basis of seniority removes from the agency that discretion which . . . is an essential part of the decision to assign. . . . Proposals . . . [which] compel the choice of the particular employee to receive an assignment solely on the basis of seniority . . . thereby directly interfere with the discretion to determine which employee to assign, in violation of section 7106(a)(2)(A) of the Statute. [American Federation of Government Employees, AFL-CIO and

(Continued)

> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
> (2) in accordance with applicable laws--
> (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
>
> . . . . . .
>
> (C) with respect to filling positions, to make selections for appointments from--
> (i) among properly ranked and certified candidates for promotion; or
> (ii) any other appropriate source[.]

2/ The agency also alleges that the union's proposal violates sections 7106(a)(1) and 7106(a)(2)(C) of the Statute (note 1 supra) and Federal Personnel Manual chapter 335. In view of our decision herein, it is unnecessary to address these additional agency contentions.

Federal Service Impasses Panel

1730 K Street, NW. **Washington, D.C. 20006**

Release No. 161 August 7, 1980

FINAL-OFFER SELECTION PROCEDURE RESOLVES THREE IMPASSES; ANOTHER ALSO RESOLVED THROUGH WRITTEN SUBMISSIONS

The Federal Service Impasses Panel has used a final-offer selection procedure to resolve negotiation impasses in three cases. In each situation the Panel determined that the impasse should be resolved pursuant to written submissions from the parties--their proposals, statements of position with supporting evidence and argument, and rebuttal briefs. Submissions were made pursuant to these proposals. Thereafter, the Panel issued brief Decisions and Orders in which it ordered, without providing any discussion, the adoption of certain final proposals.

In Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island and Local R1-144, Federal Union of Scientists and Engineers, National Association of Government Employees (Case No. 80 FSIP 14, August 7, 1980), the Panel selected the Employer's proposal concerning the issues of merit promotion and temperature reductions.

The issue of a flexitime experiment was resolved in Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island

and Tri-Union Negotiating Committee (Case No. 80 FSIP 28, August 7, 1980), when the Panel again selected the Employer's proposal.

In Department of the Army, U.S. Army Health Services Command, Medical-Dental Department Activity, Ft. Huachuca, Arizona and Local 1662, American Federation of Government Employees, AFL-CIO (Case No. 80 FSIP 18, August 7, 1980), where the issue at impasse concerned registering complaints with a third party, the Panel ordered the adoption of the Union's proposal.

In a fourth case, the Panel advised the parties that it would take whatever action it deemed appropriate to resolve a dispute following receipt of their written submissions. Thereafter, the Panel issued a brief Decision and Order in which it told the parties to adopt the Employer's proposal, as modified by the Panel, regarding the use of written tests and an interview panel for in-service placement actions (Department of the Air Force, Air Force Systems Command, Space Division, Los Angeles, California and Local 2429, American Federation of Government Employees, AFL-CIO (Case No. 80 FSIP 11, August 7, 1980).

(Copies of the Decisions and Orders are attached.)

For further information,
telephone (202) 653-7078.

Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, Case No. O-NG-40, 2 FLRA No. 77 (Jan. 31, 1980) at 10 of the Authority's decision. See also 24 of the decision where the Authority applied the same reasoning.]

The stated purpose of the instant proposal is not materially different from the purpose of the proposals in the cited case, as discussed above. Accordingly, for the reasons more fully set forth in the above-cited decision, the union proposal herein violates the agency's right to assign employees under section 7106(a)(2)(A) of the Statute and is outside the duty to bargain.3/

Issued, Washington, D.C., May 8, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ The union raises the issue of whether the agency's statement of position was timely filed with the Authority. In this regard, the agency asserts, uncontroverted by the union, that it received the union's completed petition on November 14, 1979. The agency's statement was filed with the Authority on December 12, 1979. Thus, based upon the date of receipt of the completed petition as asserted by the agency, it would appear that the agency's statement was filed within the time limits set forth in section 2424.6 of the Authority's rules. The union's request, in effect, that the Authority not consider the agency's statement, is therefore denied.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1332

Union

and

Case No. O-NG-148

U. S. ARMY MATERIEL DEVELOPMENT
AND READINESS COMMAND (DARCOM)

Activity

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. §§ 7101-7135).

Union Proposals

The union seeks negotiability determinations as to both of its alternative proposals. In the Authority's view the proposals raise the same issues, and they will be considered together herein for convenience sake.

The original union proposal was as follows:

> SECTION E. COUNSELOR. The program counselor shall be an individual with training and experience in treating persons suffering from alcoholism, drug abuse, depression, and other medical/behavioral problems. He or she should have a working knowledge of the techniques of counseling and of diverse treatment and rehabilitation methods. He or she should establish rapport with employees in order to instill confidence that assistance is available and in order that rehabilitation efforts will be successful.

Management advised the union, during negotiations, that it considered that the proposal was not within its duty to bargain, and the union made the following proposal:

> SECTION E. COUNSELOR. The program counselor shall be qualified in accordance with current X-118, 101 Series.

Management once again advised the union that this proposal was not within its duty to bargain.

Question Here Before the Authority

The question is whether under § 7106 (b)(1) of the Statute, the union proposals concern a matter pertaining to the types and grades of employees assigned to an organizational subdivision or work project are negotiable solely at the election of the agency. 1/

Opinion

Conclusion: The union's proposals concerning the qualifications of individuals to be assigned as Alcohol and Drug Abuse Counselors, violate the agency's right to determine the types and grades of employees assigned to an organizational subdivision or work project under § 7106 (b)(1) of the Statute. Accordingly, pursuant to § 2424.10 of the Authority's Rules and Regulations, 45 F. R. 3482 et seq. (1980), the agency's allegation that the proposals are not within the duty to bargain is sustained.

Reasons: The record reveals that Alcohol and Drug Abuse Counselor positions exist pursuant to the Alcohol and Drug Abuse Prevention and Control Program and the incumbents in such positions perform a variety of duties and responsibilities including counseling of employees concerning alcohol and drug related matters.

It is clear from the language of the union's first proposal that the agency could only assign Alcohol and Drug Abuse Counselors who possessed training and experience in treating persons suffering from alcoholism, drug abuse, depression and other medical/behavioral problems, and who had a working knowledge of the techniques of counseling and of diverse treatment and rehabilitation methods.

The second proposal, equally specific, limits agency assignment of Counselors to those who meet the precise education, experience, and physical requirements of Office of Personnel Management's Qualification Standards for Positions under the General Schedule (Handbook X-118), 101 Series (Social Science).

The clear intent and effect of the union's proposals is to determine by bargaining the "types" of employees who could be assigned by the agency as Counselors. That is, only employees possessing precise backgrounds of

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1/ Section 7106 (b)(1) of the Statute provides, in relevant part, as follows:
§ 7106. Management rights

. . . . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--
(1) at the election of the agency, on the . . . types and grades of employees or positions assigned to any organizational subdivision, work project, ...

education and experience, explicit in the terms of the first proposal, and by reference to a particular series described in the OPM Handbook in the second, could be assigned. Moreover, as a practical matter, the nature of the qualifications prescribed by the proposals would impact on the grade levels the agency must assign to the positions involved. Indeed, the OPM Handbook referred to in the union's second proposal contains its own grade structure based upon the very requirements of experience and education that the Union seeks to require. Thus, the proposals would affect both the types and grades of employees or positions engaged in such counseling.

Section 7106 (b)(1) establishes that union proposals which directly affect or are integrally related to the numbers, types, and/or grades of employees which management may assign to any work project or tour of duty are negotiable only at the election of the agency. In this case, the agency has elected not to negotiate on such matters and, thus, the agency's allegation that the proposals are not within the duty to bargain is sustained. 2/

Issued, Washington, D.C., May 12, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ Cf. National Treasury Employees Union, Chapter 66 and Internal Revenue Service, Kansas City Service Center, Case No. O-NG-19, 1 FLRA No. 106, (Sept.13, 1979), Report No. 16.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2814

Union

and

FLRC No. 78A-104

FEDERAL RAILROAD ADMINISTRATION,
DEPARTMENT OF TRANSPORTATION

Activity

DECISION

This matter is before the Authority on the agency's petition for review of the award of Arbitrator Jacob Seidenberg filed with the Federal Labor Relations Council.1/

According to the award, the grievant was hired as a management analyst at the grade level of GS-13. Thereafter, he received additional duties and responsibilities and requested that his position description be amended to reflect these additional duties. As a result of this request, a desk audit was conducted of the grievant's position from which it was found that the grievant was performing duties at a grade level of GS-14. The activity determined that a new position at the GS-14 grade level existed. The activity also determined that this new position had resulted from planned management action and consequently was required to be filled through competitive procedures. Although the grievant was temporarily promoted to the position during the selection process, he was not selected for the position and thereafter was reassigned to another position at GS-13.

The grievant filed a grievance protesting the filling of the GS-14 position under competitive procedures. He contended that he was entitled to a noncompetitive career promotion under the Federal Personnel Manual because the

1/ The functions of the Federal Labor Relations Council, in matters such as here involved, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 Fed. Reg. 36040), which transfer of functions is implemented by section 2400.5 of the Authority's transition rules and regulations (44 Fed. Reg. 44741). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7135(b)).

GS-14 position was the result of an accretion of additional duties and responsibilities that was not the result of planned management action. The grievance was ultimately submitted to arbitration on the following stipulated issue:

> Was the position of GS-14 Management Analyst advertised under FRA Announcement No. 77-212MM the result of planned management action?

In its post-hearing brief submitted to the arbitrator, the activity elaborated on this issue. It explained that the arbitrator was to resolve "whether or not the set of circumstances presented by the parties fits into the category of 'accretion' or 'planned management action.'" The activity also stated that:

> If the arbitrator resolves the issue in favor of "accretion," then the grievant was due career promotion. If the arbitrator finds in favor of "planned management action," then management was correct in using competitive promotion procedures.

The arbitrator found that the grievant's original position had been upgraded through the accretion of additional duties and responsibilities that was not the result of planned management action and that the grievant was entitled to a noncompetitive career promotion. Therefore, he ordered the grievant retroactively promoted with backpay to the GS-14 Management Analyst position as of the date that it was officially classified.

As previously stated, the agency filed a petition for review of the arbitrator's award with the Federal Labor Relations Council. The Council accepted the agency's petition for review on the agency's exceptions that the award violates appropriate regulation, specifically the Federal Personnel Manual, and violates the Back Pay Act of 1966 (5 U.S.C. §5596). The Council also granted the agency's request for a stay of the award pending determination of the appeal. This case was pending before the Council on December 31, 1978.

In accordance with section 2400.5 of the transition rules and regulations of the Authority (44 Fed. Reg. 44741) and section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215), the rules of procedure of the Federal Labor Relations Council, 5 C.F.R. part 2411 (1978), remain operative with respect to this case except that the word "Authority" is substituted, as appropriate, wherever the word "Council" appears in such rules. Section 2411.37(a) of the amended rules provides:

> (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

In accordance with established practice, the Council had requested from the Civil Service Commission its interpretation of applicable law and civil service regulations as they pertain to the arbitrator's award in this case. The Office of Personnel Management (OPM) (the successor agency to the Civil Service Commission with respect to these matters) replied in relevant part as follows:

The basic facts in this case are as follows: the grievant had been hired in 1975 as a GS-13 Management Analyst. The grievant later received additional duties and responsibilities for which he requested an amendment of his original position description. A desk audit of the grievant's position was conducted in 1977 which revealed that he was performing duties at the GS-14 level. The agency subsequently decided to fill the GS-14 position under competitive promotion procedures. Meanwhile, the grievant was reassigned to a new GS-13 Management Analyst position, although he was temporarily promoted to the GS-14 position until it was permanently filled.

At the arbitration, the grievant alleged that the agency improperly denied him a career promotion to the position of GS-14 Management Analyst as required by the Federal Personnel Manual*/ and applicable agency regulations. Specifically, the grievant and the union alleged that since his former GS-13 position had been reconstituted in the higher grade due to the accretion of additional duties and not due to planned management action, he was entitled to a noncompetitive career promotion to the position of GS-14 Management Analyst pursuant to FPM Chapter 335, Subchapter 4-2.

The arbitrator found that the grievant's original position had been upgraded through the accretion of additional duties and responsibilities, rather than as the result of planned management action. The arbitrator concluded that the agency had improperly denied the grievant a noncompetitive career promotion to which he was entitled by FPM Chapter 335, Subchapter 4-2d. Acordingly, he ordered the grievant promoted to the position of GS-14 Management Analyst retroactive to the date of the desk audit, with appropriate backpay.

If, as the grievant claims, he was entitled to a noncompetitive promotion, his reassignment by the agency to another GS-13 position, other than for reasons unrelated to the upgrading of the position, would constitute a reduction-in-rank. However, unlike the Council's decision in Scott AFB,**/ this case did not involve an upgrading which occurred without a significant change in duties and responsibilities for which an agency must provide an exception to competitive promotion procedures to allow a promotion under FPM Chapter 335, Subchapter 4-3b. Rather, FPM Supplement 752-1, S-1-4c(2) provides that a reduction-in-rank does not include:

> Reassignment from a position which is known to warrant upgrading . . . when the upgrading is the result of the addition of new duties--i.e., when there is a significant change in job content.

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*/ All references to FPM materials discussed in this letter pertain to provisions of the FPM in effect at the time of the action giving rise to this grievance as well as the arbitrator's award.

**/ Defense Commercial Communications Office and 1400 Air Base Wing, Scott Air Force Base, and National Association of Government Employees, Local Union No. R7-23 (Roberts, Arbitrator), FLRC No. 75A-87, Council Report No. 121.

In this case, the arbitrator specifically found that the grievant's original GS-13 position had been upgraded by the addition of new duties. Thus, it was not a reduction in rank for the agency to reassign the grievant to another GS-13 position for which he was qualified.

FPM Chapter 335, Subchapter 4-2d., on which the arbitrator relied in his opinion and award in this case, provides in pertinent part, as follows:

> (1) An agency may make a career promotion of an employee whose position is reconstituted in a higher grade because of the accretion of additional duties and responsibilities if the accretion was not the result of planned management action. (emphasis added)

As a general rule, this provision of the FPM cannot be the basis for a requirement that an agency promote an individual to a higher level position through noncompetitive career promotion. Thus, management retains the right to assign an individual from a position which is known to warrant upgrading as the result of an addition of new duties. However, an agency is not precluded from promoting an individual noncompetitively if, as the arbitrator determined in this case, there was a significant change in job content due to an accretion of duties which was not the result of planned management action.

The only circumstance under which an agency may be required to promote a particular person and to accord that person backpay is when a finding has been made by an arbitrator or other competent authority that the individual would have been promoted at a certain time but for an administrative error, or the violation of a Commission or agency regulation, or of a provision in a negotiated agreement. This principle has been set forth in a series of Comptroller General decisions dealing with retroactive promotion, all numbered B-180010, and issued on and after October 31, 1974. Thus, even though the arbitrator factually determined that the higher graded position had been reconstituted at the higher grade as a result of an accretion of higher level duties and not as a result of planned management action, the agency's right to select or nonselect a particular person cannot be abridged unless the arbitrator found a direct causal connection between the agency's violation(s) and the failure to select that employee.***/

In this case, it is not clear whether the required "but for" relationship exists. While it may be inferred from his award that the arbitrator believed the grievant would have been promoted to the higher graded position noncompetitively, he did not address this issue directly in his opinion. The agency maintains on page 5 of its petition for review and stay of the arbitrator's award that "[m]anagement does not, nor has it ever, conceded that the grievant would have been promoted under the

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***/ See, e.g., the Council's decision in Tooele Army Depot, Tooele, Utah and American Federation of Government Employees, AFL-CIO, Local 2185 (Linn, Arbitrator), FLRC No. 75A-104, Council Report No. 108.

circumstances presented in this case." In support of this contention, the agency noted that management chose to reassign the grievant to another position once it was determined he was performing higher graded duties, and that the grievant was not selected for the position when it was advertised under competitive promotion procedures. However, the parties jointly stipulated at the arbitration hearing that the issue before the arbitrator was whether the GS-14 Management Analyst position was the result of planned management action. Moreover, the agency's contention that it would not have promoted the grievant in any case is contradicted by its own statement on page 1 of its post-hearing brief, which provides as follows:

> "What is, therefore, before the arbitrator to resolve is whether or not the set of circumstances presented by the parties fits into the category of 'accretion' or 'planned management action.' If the arbitrator resolves the issue in favor of 'accretion' then the grievant was due career promotion. If the arbitrator finds in favor of 'planned management action' then management was correct in using competitive promotion procedures" (emphasis added).

In view of the arbitrator's failure to make a specific "but for" finding, and the discrepancy in the stated position of the agency in this regard, we are unable to determine whether or not there was a direct, causal connection between the error or violation found by the arbitrator and the agency's failure to promote the grievant noncompetitively to the higher graded position. If, in the circumstances of this case, it is determined that the necessary "but for" relationship does exist, implementation of the arbitrator's award of retroactive promotion with backpay would not violate applicable law and Commission regulations.

In accordance with this interpretation by OPM of applicable law and civil service regulations and pursuant to section 2411.37(a) of the rules, the Authority concludes that in the circumstances of this case, the arbitrator's award of retroactive promotion with backpay to the grievant is not violative of applicable law or Commission regulations. As noted by OPM,

> [i]f, in the circumstances of this case, it is determined that the necessary "but for" relationship does exist, implementation of the arbitrator's award of retroactive promotion with backpay would not violate applicable law and Commission regulations.

In the particular circumstances of this case, the Authority finds that the arbitrator made the necessary determination that, but for the activity's unwarranted action of proceeding as if the accretion of duties were the result of planned management action, the activity would have granted the grievant a noncompetitive career promotion. In this respect the Authority notes the context and parameters of the issue stipulated and submitted to the arbitrator. The issue submitted to the arbitrator questioned whether the GS-14 position was the result of planned management action. As emphasized by OPM in its response and as previously noted, the activity explained to the arbitrator in its post-hearing brief that central to the disposition of the grievance was the arbitrator's determination of whether this was an accretion of duties and

responsibilities that was or was not the result of planned management action. In that brief, the activity went on to make the clear statement that "if the arbitrator resolves the issue in favor of 'accretion,' the grievant was due career promotion," thus conceding that it would have granted the grievant noncompetitive career promotion in a case of an accretion of duties and responsibilities that was not the result of planned management action. With these stipulations by the parties, once the arbitrator determined that the GS-14 position was the result of an accretion of duties and responsibilities that was not the result of planned management action, the disposition of the grievance had been specified to the effect that the grievant was entitled to a noncompetitive career promotion. In ordering the grievant retroactively promoted with backpay to the GS-14 position in these circumstances, it is manifest that the arbitrator found that but for the activity's unwarranted action of proceeding in this case as if the position accretion had been the result of planned management action, the activity would have granted the grievant a noncompetitive career promotion to the GS-14 position.

For these reasons, the arbitrator's award does not violate applicable law or Commission regulations. Accordingly, pursuant to section 2411.37(b) of the amended rules, the arbitrator's award is sustained and the stay of the award previously granted is vacated.2/

Issued, Washington, D.C., May 8, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the instant case was decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision does not prejudge in any manner either the meaning or application of related provisions of the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Order.

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of	)	
	)	
DEPARTMENT OF THE NAVY NAVAL UNDERWATER SYSTEMS CENTER NEWPORT, RHODE ISLAND	)	
	)	
and	)	Case No. 80 FSIP 14
	)	
LOCAL R1-144, FEDERAL UNION OF SCIENTISTS AND ENGINEERS/ NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES	)	

DECISION AND ORDER

Local R1-144, Federal Union of Scientists and Engineers/ National Association of Government Employees (Union), filed a request with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under section 7119 of the Federal Service Labor-Management Relations Statute (Statute) between the Union and the Department of the Navy, Naval Underwater Systems Center (Employer).

Subsequently, the Panel determined that the impasse should be resolved pursuant to written submissions from the parties with the Panel to select either of the final proposals on a package basis after considering the entire record. Written submissions were made to the Panel pursuant to these procedures.

THE ISSUES AT IMPASSE

This dispute arose after the parties negotiated over the impact and implementation of Employer proposals to: (1) Modify the Center's instruction concerning merit promotion; and (2) comply with the President's Emergency Building Temperature Restrictions program.

MERIT PROMOTION

The Employer proposes that: "The Selecting Official will interview all eligibles referred for selection." The Union would add the following: "Eligibles may request a representative to accompany them to interviews."

Supervisory interviews of all eligible employees, asserts the Employer, will promote their equitable treatment and permit them to explain fully their qualifications. Union representation during the interviews, it argues, is unnecessary and will make the interview atmosphere more combative.

The Union, however, notes that in the past bargaining unit members have had problems with promises made in private sessions which were not fulfilled. Its proposal, it posits, would protect an employee from a recurrence of this problem.

TEMPERATURE RESTRICTIONS

Both parties agree that the Union may appoint employees to monitor building temperatures. The Employer proposes that such appointments be forwarded to it within 2 weeks of the date of the agreement, and be made from employees who reside in the area to be monitored. The Union, on the other hand, proposes that appointments be forwarded within 15 days of request and be made from employees who reside in the building, or, when possible, from the area to be monitored. With respect to temperature levels, the Employer's proposal requires an on-the-spot determination by the officer-in-charge in the event of potential safety and health problems. The Union's proposal requires the determination to be made within ½ hour of notification of the potential problem. Finally, the Employer proposes that any complaints about the program be limited to the agency grievance procedure with no recourse to arbitration. Under the Union's proposal, complaints which remain unresolved after agency procedures are exhausted would be subject to arbitration. The costs of the arbitration procedure would be shared equally by the Employer and the employee.

With respect to the three parts of its proposal, the Employer argues, in essence, that: (1) The 2-week forwarding period gives the Union sufficient time to respond, and requiring monitors to be responsible for their work area creates a cooperative attitude towards compliance with the program; (2) implicit in its proposal is that on-the-spot determinations be made with the utmost dispatch, whereas the time restraint proposed by the Union is unrealistic; and (3) the agency grievance procedure is adequate

to resolve any complaints; moreover, the application of a separate arbitration procedure to the program will cause confusion and inefficiency in that the parties have been unable to reach agreement on such a procedure in their negotiations for a full-scale contract.

The Union counters that: (1) Anything less than a 15-day forwarding period will work a hardship because representatives are granted very little official time, and requiring monitors to be responsible for their work areas is unnecessary since monitoring is usually performed by employees in a particular area; (2) a requirement that officers respond within ½ hour is needed because, in the past, the Employer has not acted rapidly in similar situations; and (3) an arbitration procedure is necessary to resolve disputes, but frivolous claims will not be made because the employee will share the expenses of any arbitration. The Employer asserts that the latter proposal violates existing law which does not provide for employees to dictate the submission of grievances to arbitration or require contributions by employees toward arbitration expenses.

We conclude that the dispute should be resolved on the basis of the Employer's proposals.

ORDER

Pursuant to the authority vested in it by section 7119 of the Federal Service Labor-Management Relations Statute and because of the failure of the parties to resolve their dispute during the course of proceedings instituted pursuant to section 2471.6(a)(2) of the Panel's regulations, the Federal Service Impasses Panel under section 2471.11(a) of its regulations hereby orders the following:

The parties shall adopt the Employer's proposals on merit promotion and temperature restrictions.

By direction of the Panel.

Howard W. Solomon
Executive Director

August 7, 1980
Washington, D.C.

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of	)	
DEPARTMENT OF THE NAVY NAVAL UNDERWATER SYSTEMS CENTER NEWPORT, RHODE ISLAND	)	
and	)	Case No. 80 FSIP 28
TRI-UNION NEGOTIATING COMMITTEE	)	

DECISION AND ORDER

Locals R1-134 and R1-144 of the National Association of Government Employees and Local 119, International Association of Machinists and Aerospace Workers, AFL-CIO, otherwise known as the Tri-Union Negotiating Committee (Union), filed a request with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under section 7119 of the Federal Service Labor-Management Relations Statute (Statute) between the Union and the Department of the Navy, Naval Underwater Systems Center (Center or Employer).

Subsequently, the Panel determined that the impasse should be resolved pursuant to written submissions from the parties with the Panel to make a final and binding decision by selecting either of the parties' final proposals after considering the entire record. Written submissions were made to the Panel pursuant to these procedures.

THE ISSUE AT IMPASSE

The parties differ over these aspects of a flexitour experiment: (1) Procedures for denying participation, (2) the basic work requirements, (3) core time, (4) credit hours, and (5) lunch period.

The Employer proposes that denials of participation in the flexitour plan be made orally unless the employee requests that they be in writing while the Union asks that all denials be in writing. The Employer also proposes that the basic work requirement be 40 hours per week with each workday beginning at 6:30 a.m. and a 4-hour per day core time (9:00 to 11:00 a.m. and 1:00 to 3:00 p.m.). The Union prefers a basic work requirement of 80 hours every 2 weeks with each workday beginning at 6:00 a.m. and a core time of 3 hours per day (9:30 to 11:00 a.m. and 1:00 to 2:30 p.m.).

The Employer proposes that the maximum number of credit hours to be earned or used in a week be 5, subject to the maximum use of 4 in any day, and the maximum that may be carried over to a subsequent week be 10. An employee may accumulate up to 10 credit hours under the Union's proposal which can be carried over from one bi-weekly pay period to another.

The final aspect of the dispute involves the Employer's proposal that deviations in the standard ½-hour lunch period be approved by the supervisors and that lunch periods not be scheduled for employees in certain types of jobs. The Union would omit the requirement for such supervisory approval and would have work schedules requiring certain employees to work during the lunch period be subject to the approval of the employee. The Employer proposes that all employees sign time cards indicating when they leave for and return from lunch. The Union prefers that only those employees taking more than ½ hour for lunch be required to follow such procedures.

The Employer argues that the 80-hour basic requirement proposed by the Union, by allowing employees to use credit hours to be absent from work 1 or more days a week, would not allow the Center to conduct its business in a successful manner. It also asserts that all naval installations have 4-hours-per-day core time; there is no need to provide written justification for denials of participation in the experiment; and requiring employees to sign time cards would curb abuses of the lunch period.

The Union argues that although its proposal offers considerable flexibility, it is in keeping with the purpose of Public Law 95-390 in that it encourages experimentation with different types of work schedules. Thus, the Employer would be afforded an opportunity to compare the effectiveness of the schedules at its Newport and New London locations. The Union also asserts that its proposal reduces leave usage by employees, increases access to public services, and eases child care burdens. Further, the Union points out that employees have never been required to sign time cards in the past. Finally, it argues

that its proposal would not cause agency inefficiency because a supervisor can refuse to approve an employee's schedule if it would cause an adverse effect on the conduct of business.

We conclude that the dispute should be resolved on the basis of the Employer's proposal.

ORDER

Pursuant to the authority vested in it by section 7119 of the Federal Service Labor-Management Relations Statute and because of the failure of the parties to resolve their dispute during the course of proceedings instituted pursuant to section 2471.6(a)(2) of the Panel's regulations, the Federal Service Impasses Panel under section 2471.11(a) of its regulations hereby orders the following:

The parties shall adopt the Employer's proposal for a flexitour experiment.

By direction of the Panel.

Howard W. Solomon
Executive Director

August 7, 1980
Washington, D.C.

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of	)	
DEPARTMENT OF THE AIR FORCE AIR FORCE SYSTEMS COMMAND SPACE DIVISION LOS ANGELES, CALIFORNIA	)	
and	)	Case No. 80 FSIP 11
LOCAL 2429 AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO	)	

DECISION AND ORDER

Local 2429, American Federation of Government Employees, AFL-CIO (Union), filed a request with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under section 7119 of the Federal Service Labor-Management Relations Statute (Statute). The request arose from negotiations between the Union and Department of the Air Force, Air Force Systems Command, Space Division, Los Angeles, California (Employer).

Subsequently, the Panel determined that the impasse should be resolved pursuant to written submissions from the parties with the Panel to take whatever action it deems appropriate to resolve the impasse after considering the entire record. Written submissions were made to the Panel pursuant to these procedures.

THE ISSUE AT IMPASSE

The dispute is over the use of written tests and an interview panel for in-service placement actions.*/

*/ Additional issues concerning union representation, merit promotion, and performance warning letters were submitted by the Employer for Panel determination. The Union contends that these Employer proposals were never presented to it for negotiation. Accordingly, we do not address those issues on their merits.

The Employer proposes to use written tests and interview assessment techniques for in-service placement actions and to consider in-house personnel for trainee positions filled through merit promotion. The Union proposal does not allow written tests and interviews for such actions unless they are mandated by Office of Personnel Management (OPM) regulations. It also states that in-house personnel be considered for all trainee positions including those filled through merit promotion.

The Employer argues, essentially, that valid written tests should be used only when approved by OPM and that interviews, on an individual and group basis, are valuable because they indicate the candidate's composure, originality, and objectivity. Furthermore, it contends that its proposal would enable it to comply with Federal Equal Opportunity Recruitment Program minority requirements.

The Union contends that if a written test is necessary, OPM should design one and make it a mandatory qualifying standard. It notes that since the prohibition of interviews in 1976, there has been no detrimental impact on the Employer's mission, no misallocation of funds, and no discipline and performance problems with employees who have not been before an interview panel.

We conclude that the issue at impasse should be resolved on the basis of the Employer's proposal as modified to insure that only validated tests are used. We also conclude that the parties should resume negotiations with respect to the issues of union representation, merit promotion, and performance warning letters.

ORDER

Pursuant to the authority vested in it by section 7119 of the Federal Service Labor-Management Relations Statute and because of the failure of the parties to resolve their dispute during the course of proceedings instituted pursuant to section 2471.6(a)(2) of the Panel's regulations, the Federal Service Impasses Panel under section 2471.11(a) of its regulations hereby orders that the following language be adopted by the parties:

Placement and Promotion

* * * * * * *

Section D - Testing.

a. In-house personnel will be considered for trainee positions filled through merit promotion. For

in-service placement actions, validated written tests may be used when authorized by Public Law, OPM, DOD, Air Force or AFSC Regulation. Ranking factors for trainee positions will comprise supervisory appraisal, education, training, experience, awards, and tests when applicable. Selection procedures for trainee positions may include assessment techniques to evaluate candidates referred to Interview Panels.

Section D(d) - Testing. Contracting Officer Proficiency.

d. Contracting Officer Warrants will be based on justification of need, supervisory evaluation of job performance and review of contracts or dealings with the Contracting Officer. Retention of warrants by bargaining unit members will not be based on proficiency reviews in the form of written and oral tests.

Regarding the issues of union representation, merit promotion, and performance warning letters which were also submitted by the Employer, the Panel orders the parties to resume negotiations on these issues, with mediation assistance as necessary, since voluntary efforts have not been exhausted with respect to them.

By direction of the Panel.

Howard W. Solomon
Executive Director

August 7, 1980
Washington, D.C.

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of	
DEPARTMENT OF THE ARMY U.S. ARMY HEALTH SERVICES COMMAND, MEDICAL-DENTAL DEPARTMENT ACTIVITY FORT HUACHUCA, ARIZONA	
and	Case No. 80 FSIP 18
LOCAL 1662 AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO	

DECISION AND ORDER

Local 1662, American Federation of Government Employees, AFL-CIO (Union), filed a request with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under section 7119 of the Federal Service Labor-Management Relations Statute (Statute). The request arose from negotiations between the Union and Department of the Army, U.S. Army Health Services Command, Medical-Dental Department Activity, Fort Huachuca, Arizona (Employer).

Subsequently, the Panel determined that the impasse should be resolved pursuant to written submissions from the parties with the Panel to make a final and binding decision by selecting either of the parties' final proposals after considering the entire record. Written submissions were made to the Panel pursuant to these procedures.

THE ISSUE AT IMPASSE

The article in dispute concerns withholding complaints or charges against the other party for 5 working days before registering a "complaint with someone outside the bargaining unit." The Union's proposal does not preclude contacts by either

party with the news media or Congress, or other Government agencies in normal appeals procedures or whistle-blowing reporting. The proposal of the Employer permits such contacts only if they do not contain a complaint or charge against the other party.

The Union argues, essentially, that fair comment and criticism of public figures is an inalienable right of Americans protected by the First Amendment to the U.S. Constitution. In practical terms, it asserts that the Employer's proposal is a gag rule limiting the Union's right to comment on concerns of public interest. It contends that a party can only register a complaint or grievance with someone who has authority to take remedial action; news media representatives and Congressmen do not have such authority.

The Employer notes that virtually identical provisions in agreements for other units at the post facilitate timely problem-solving. Failure to include the provision, it argues, will have an adverse impact on problem-solving because of needless third-party involvement. The Employer further states that the language it proposes contributes to the establishment of cooperative labor-management relationships in other situations.

We conclude that the dispute should be resolved on the basis of the Union's proposal.

ORDER

Pursuant to the authority vested in it by section 7119 of the Federal Service Labor-Management Relations Statute and because of the failure of the parties to resolve their dispute during the course of proceedings instituted pursuant to section 2471.6(a)(2) of the Panel's regulations, the Federal Service Impasses Panel under section 2471.11(a) of its regulations hereby orders the following:

The parties shall adopt the Union's proposal on complaints.

By direction of the Panel.

Howard W. Solomon
Executive Director

August 7, 1980
Washington, D.C.

Federal Service Impasses Panel

1730 K Street, NW. Washington, D.C. 20006

Release No. 162 August 8, 1980

PANEL ISSUES DECISION AND ORDER FOLLOWING A FACTFINDING HEARING

Pursuant to its authority under section 7119 of the Federal Service Labor-Management Relations Statute, the Federal Service Impasses Panel has issued a Decision and Order to resolve a negotiation impasse in Department of Defense, Defense Mapping Agency, Hydrographic/Topographic Center, Washington, D.C. and Local 3407, American Federation of Government Employees, AFL-CIO (Case Nos. 80 FSIP 12 and 17, August 7, 1980). The Union had filed two different requests for Panel assistance on issues concerning parking and hours of work. The cases were consolidated for purposes of a factfinding hearing. After the Panel received Factfinder Jules A. Balkin's report, however, the parties resolved the parking issue.

With respect to hours of work, the Union had proposed a compressed workweek schedule for the approximately 950 non-professional employees involved in this dispute who are a part of the 3,200 member workforce at the Employer's Brookmont, Maryland, facility. The Employer sought to retain the current flexitime program. After considering the entire record, the Panel

decided to take appropriate action by ordering the Union to withdraw its proposal. In so doing the Panel found that the current flexitime system had been working satisfactorily and that there was no justification in the record for changing it. Moreover, the Panel concluded that the adoption of the proposed compressed workweek schedule would prevent the Employer from operating efficiently. (A copy of the Decision and Order is attached.)

For further information,
telephone (202) 653-7078.

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of	
DEPARTMENT OF DEFENSE DEFENSE MAPPING AGENCY HYDROGRAPHIC/TOPOGRAPHIC CENTER WASHINGTON, D.C.	
and	Case No. 80 FSIP 12 Case No. 80 FSIP 17
LOCAL 3407 AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO	

DECISION AND ORDER

Local 3407, American Federation of Government Employees, AFL-CIO (Union), filed two requests with the Federal Service Impasses Panel (Panel) to consider negotiation impasses under section 7119 of the Federal Service Labor-Management Relations Statute (Statute) between the Union and the Department of Defense, Defense Mapping Agency, Hydrographic/Topographic Center (Employer). The cases were consolidated for purpose of hearing with Jules A. Balkin being appointed by the Panel as factfinder on issues concerning parking and alternative work schedules. The Employer filed prehearing briefs on both issues. At the hearing a stenographic record was taken, testimony and argument were presented, and the parties submitted documentary evidence. The Panel has now considered the Factfinder's Report and the record in this case.1/

1/ On July 18, 1980, the parties notified the Panel that the parking issue had been resolved based on an exemption from the paid parking requirement which the Employer received from the Department of Defense. Accordingly, we do not address the subject of parking here.

BACKGROUND

The Employer provides topographic, hydrographic, navigational, and geodetic data for the Department of Defense. On September 30, 1978, the agency consolidated the production center at Suitland, Maryland, with the facilities at Brookmont, Maryland, to create the Hydrographic/Topographic Center. The total workforce consists of approximately 3,200 employees.

In 1979 the Union gained recognition as exclusive representative of the approximately 950 nonprofessional employees involved in this dispute. They are primarily engaged in the production and maintenance of maps and charts for the Department of Defense. There are seven other bargaining units composed of employees in the lithographic processes, guards, carpenters, electricians, and other wage grade employees in the facilities and engineering office. In addition, approximately 1,000 professional employees are not represented by any labor organization.

THE ISSUE AT IMPASSE

The Employer proposes to maintain the status quo under which employees can report at any time between 6:30 a.m. and 8:30 a.m., work during the core periods (8:30 a.m. to 11:30 a.m. and 1:30 p.m. to 3:00 p.m.), and then leave any time after 8½ hours in a duty status. The Union originally proposed that: "Employees will be allowed to schedule their worktime as any 80 hours between 0600 and 1800, within the pay period." It later amended its proposal to provide for an optional "5-4-9 plan" which states:

Flexitime

A. Employees be given the option of working up to 9 hours per day and be allowed to carry forward up to 10 hours of accumulated time.

B. Employees in the following categories may be precluded from any or all flexitime coverage.

a. shift workers

b. interdependent teams or crews

c. those whose presence is critical during regular working hours to carry out the HTC mission.

C. Present core hours will be maintained.

D. 8 to 9 hours will normally be worked between 0600 and 1800 hours - Monday to Friday.

E. HTC may establish a core day on Tuesday, Wednesday or Thursday.

F. The scheduling of less than a 5-day week may be required in the pay period preceeding that of the shortened week.

G. The contractual heating and cooling limits will only be enforceable between 0630 and 1700, Monday through Friday.

According to the Union, adoption of its proposal would improve the morale of employees who reside at a geographically remote distance from the workplace[2/] and give employees an opportunity to conserve gasoline by taking one less trip per 2-week pay period. It makes reference to a similar facility, the National Ocean Survey (NOS), in Rockville, Maryland, where employees may work up to 10 hours per day under a compressed workweek formula. Such a system, the Union contends, provides employees with greater freedom and control in their personal and work environments.

It contends that the purpose of the Federal Employee Flexible and Compressed Work Schedule Act of 1978 is "to see what can be done to make the lot of the Federal workers more productive and the work more bearable." The Employer's claims to the contrary, the Union maintains that any harmful effect on productivity would be minimal.

According to the Employer, most supervisors and unit employees are satisfied with the present system. Under the Union's proposal, it argues, there would be administrative problems relating to increased supervision, scheduling of work, time and attendance, increased security control, and utility costs. Furthermore, extended workdays would cause fatigue, use of carpools would diminish, and there would be a tremendous spill-over effect on non-unit employees. The Employer maintains that the facility is a production-oriented unit which is not conducive to any form of compressed workweek.

2/ The Union cites an agency consolidation study of June 28, 1977, which states that the transfer of many employees 2 years ago from Suitland, Maryland, to the Brookmont, Maryland, location added up to 45 minutes of travel time each way, and from $200 to $350 per year in additional gasoline costs for each employee.

Furthermore, the Employer argues that the Union's proposal would: (1) Increase the amount of overtime at the facility; (2) make the interfacing of unit and non-unit employees more difficult, creating serious problems for an activity that requires coordination to carry out its mission; and (3) require more guards and safety checks to maintain the security of the operation.

DISCUSSION

While the Union has described the potential benefits of its proposals for a compressed workweek schedule, it has done so only in the most general terms. Moreover, there is little evidence in the record relating to problems arising out of the current hours of work or otherwise demonstrating a need to change them. The Employer, on the other hand, has pointed to the difficult nature of its production-oriented operations which require a constant interfacing of unit and non-unit employees. It argues persuasively that adoption of the work schedules proposed by the Union would prevent it from operating in an efficient manner. Moreover, we note that under the present flexitime system the Employer has already permitted employees to adjust work schedules in order to avoid rush-hour traffic. Accordingly, we find that the evidence in this case warrants the adoption of the Employer's proposal.

ORDER

Pursuant to the authority vested in it by section 7119 of the Federal Service Labor-Management Relations Statute and because of the failure of the parties to resolve their dispute during the course of proceedings instituted pursuant to section 2471.6(a)(2) of the Panel's regulations, the Federal Service Impasses Panel under section 2471.11(a) of its regulations hereby orders the following:

The Union shall withdraw its proposal for alternative work schedules.

By direction of the Panel.

Howard W. Solomon
Executive Director

August 7, 1980
Washington, D.C.

Federal Service Impasses Panel

1730 K Street, NW. Washington, D.C. 20006

Release No. 163 August 8, 1980

PANEL ACTIONS TAKEN RECENTLY

The Federal Service Impasses Panel has taken a number of actions in recent weeks to assist Federal agencies and their labor organizations in the resolution of negotiation impasses.

The parties in General Services Administration, National Archives and Records Service, Washington, D.C. and Local 2578, American Federation of Government Employees, AFL-CIO (Case No. 80 FSIP 49, August 5, 1980), filed a joint request for Panel approval of a binding arbitration procedure to resolve an impasse concerning temporary promotion and the handling of classification errors. After a Panel inquiry determined that the parties had met the requirements set forth in section 2471.3(b) of the Panel's regulations, the procedure was approved.

The Panel declined to assert jurisdiction in two cases in which a threshold question concerning the Employer's obligation to bargain further cast doubt on whether an impasse, as defined by the Statute, in fact existed. The cases were:

- Department of the Air Force, 375 Air Base Group/CC, Scott Air Force Base, Illinois and Local R7-23, National Association of Government Employees (Case No. 80 FSIP 32, July 22, 1980).

- Alaska Native Medical Center, Anchorage, Alaska and Local 3028, American Federation of Government Employees, AFL-CIO (Case No. 80 FSIP 46, August 1, 1980).

In three cases the Panel determined that voluntary efforts had not been exhausted and directed the parties to resume negotiations with mediation assistance as necessary. The issues involved were:

- Rights of the Union, hours of work, health and safety and others in Indiana Air National Guard, Hulman Field, Terre Haute, Indiana and Local 3098, American Federation of Government Employees, AFL-CIO (Case No. 80 FSIP 39, July 8, 1980).

- Wearing of the uniform in Minnesota Army National Guard, St. Paul, Minnesota and Tony Kempenich Memorial Chapter, Association of Civilian Technicians, Inc. (Case No. 78 FSIP 59(a), July 29, 1980). The Panel had declined to assert jurisdiction in an earlier case involving the same parties and issue.

- Timeliness as well as grievability and arbitrability in Department of Defense, Defense Nuclear Agency, Field Command, Kirtland AFB, New Mexico and Local 2263, American Federation of Government Employees, AFL-CIO (Case No. 79 FSIP 121, July 30, 1980).

The parties in the following two cases reached a settlement before the Panel took action:

- Department of the Army, Fort Polk, Fort Polk, Louisiana and National Association of Government Employees (Case No. 80 FSIP 25, July 1, 1980).

- Department of the Interior, Bureau of Land Management, Richfield, Utah and Local 3790, American Federation of Government Employees, AFL-CIO (Case No. 79 FSIP 87(a), July 25, 1980).

In two other cases the Panel granted the parties' requests for its assistance to be withdrawn:

- Department of the Treasury, Internal Revenue Service, Washington, D.C. and National Treasury Employees Union (Case No. 80 FSIP 47, July 28, 1980).

- Federal Energy Regulatory Commission, Washington, D.C. and Local 421, American Federation of Government Employees, AFL-CIO (Case No 79 FSIP 41(a), July 29, 1980).

For further information.
telephone (202) 653-7078.

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FLRA Report of Case Decisions and FSIP Releases

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Contents of Package

This package should include the following items:

FIRA Report of Case Decision Number 40

FIRA Report of Case Decision Number 41

If any of the above items are not included, please contact the Administrative Office, Federal Labor Relations Authority, 1900 E Street, NW., Room 7469, Washington, D. C. 20424 - telephone 202- 653-8040.

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Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 40 REPORT OF CASE DECISIONS July 8, 1980

REPRESENTATION CASES

3 FLRA No. 29 (May 12, 1980)

Office of Personnel Management, Southeast Region, Atlanta, Georgia, Assistant Secretary Case No. 40-9000(RO). The union (Association of Civil Service Commission Advisors) filed a petition under E.O. 11491 seeking to represent a unit of nonprofessional employees in a region of the agency who performed Civil Service Commission functions under section 25(a) of the Order. The Authority found that it would not promote the purposes and policies of the Order or the Statute to decide the appropriate unit and related issues in the case by application of the Order. Accordingly, the Authority dismissed the union's petition without prejudice to the right of the union to file under the Statute. (Decision and Order attached.)

3 FLRA No. 41 (May 23, 1980)

U.S. Department of Labor, Civil Service Commission Case Nos. 114 and 132. In CSC Case No. 114, the agency filed a petition under E.O. 11491 seeking to clarify the status of a unit represented by AFGE Local 12 by accreting to that unit headquarters employees of the Mine Safety and Health Administration (MSHA). In CSC Case No. 132, AFGE's National Council of Field Labor Locals (NCFLL) filed a petition under the Order seeking to clarify the unit of agency employees it represented by accreting to that unit the field employees of MSHA. The Authority found that units as clarified to include the accretions sought satisfied the appropriate unit criteria set forth in section 10(b) of the Order. Accordingly, the Authority ordered that the units be clarified as requested. (Decision and Order attached.)

UNFAIR LABOR PRACTICE CASE

3 FLRA No. 30 (May 21, 1980)

Department of the Air Force, Headquarters, San Antonio Air Logistics Center, Kelly Air Force Base, Texas, Assistant Secretary Case No. 63-8791(CA). Upon a complaint filed by the union (AFGE Local 1617) under E.O. 11491, the ALJ concluded that the activity did not violate section 19(a)(1) and (6) of the Order, as the union had alleged, when it issued a directive (that its Chief EEO Counselor and other full time counselors be rotated out of their EEO positions on a periodic basis) without prior notice to or negotiation with the union. In reaching that conclusion, the ALJ found that management was not obligated to negotiate with the union concerning the decision to rotate the counselors since the decision constituted a management right under section 12(b)(2) of the Order; that the EEO counselors were engaged in non-clerical Federal personnel work within the meaning of section 10(b)(2) of the Order and, consequently, were not within the unit; and that the directive did not effect a change in existing personnel policies and practices or working conditions for unit employees. The Authority adopted the findings, conclusions and recommendation of the ALJ and, accordingly, dismissed the union's complaint. (Decision and Order attached.)

NEGOTIABILITY CASE

3 FLRA No. 37 (May 21, 1980)

American Federation of Government Employees, AFL-CIO, Local 2151 and General Services Administration, National Capital Region, Washington, D.C., Case No. 0-NG-193. The dispute involved a union proposal that the activity may terminate a program implementing the Federal Employees Flexible and Compressed Work Schedules Act of 1978 only under certain circumstances. The Authority found that under section 302(a) of the Work Schedules Act Congress clearly intended that both the establishment and the limitation or termination of any flexible or compressed work schedule experiments were subject to collective bargaining. The Authority therefore rejected the agency's contention that the union's proposal was contrary to the Work Schedules Act and its further allegation that the proposal conflicted with management's rights under section 7106(a) of the Statute. Accordingly, the Authority held that the disputed proposal was within the duty to bargain under the Statute and set aside the activity's allegation to the contrary. (Decision attached.)

ARBITRATION CASES

3 FLRA No. 31 (May 21, 1980)

National Association of Government Employees, Local R4-6 and Headquarters, U.S. Army Transportation Center and Fort Eustis (Merrifield, Arbitrator), Case No. 0-AR-39. The arbitrator found that the activity had not violated the parties' agreement when it failed to select the grievant for any of three positions established due to reorganization, but rather selected three employees who had been performing the duties involved in the new positions pending their classification. The union filed an exception to the award with the Authority contending that the award was contrary to law, rule or regulation. The Authority found that the union did not demonstrate in its exception how the award was so violative and therefore held that the union's exception provided no basis for finding the award deficient under section 7122 of the Statute and section 2425.3 of the Authority's interim rules of procedure. Accordingly, the Authority sustained the arbitrator's award. (Decision attached.)

3 FLRA No. 32 (May 21, 1980)

Red River Army Depot and National Association of Government Employees, Local R14-52 (Morgan, Arbitrator), Case No. 0-AR-38. The arbitrator concluded that the union had filed the grievance to secure safer working conditions and had already secured them and therefore denied the grievance. The union filed exceptions to the award with the Authority contending that the award did not draw its essence from the parties' agreement and was based on a non-fact. The Authority found that the union had failed to demonstrate in its exceptions how the award was deficient under section 7122(a) of the Statute and section 2425.3 of the Authority's interim rules. Accordingly, the Authority sustained the arbitrator's award. (Decision attached.)

3 FLRA No. 34 (May 21, 1980)

Veterans Administration Hospital, Perry Point, Maryland and Local 331, American Federation of Government Employees (Bernhardt, Arbitrator), Case No. 0-AR-55. The arbitrator found that the activity had adequate grounds to terminate the grievant, a probationary employee (for using obscene language and destroying activity property), and therefore denied the grievance. The union filed an exception to the award with the Authority. The Authority found that the union was attempting to

relitigate the merits of the case and that the exception constituted disagreement with the arbitrator's reasoning and conclusions. The Authority therefore held that the union's exception provided no basis for finding the award deficient under section 7122(a) of the Statute and section 2425.3 of the Authority's interim rules. Accordingly, the Authority sustained the arbitrator's award. (Decision attached.)

3 FLRA No. 35 (May 21, 1980)

National Aeronautics and Space Administration and American Federation of Government Employees, Local 2284 (Bailey, Arbitrator), Case No. 0-AR-10. The arbitrator concluded that the grievant, a repromotion eligible, was given special consideration for repromotion for the positions in question but was denied repromotion because he was not well-qualified, and not because of his union activities. The arbitrator therefore denied the grievance and the union filed exceptions to the arbitrator's award with the Authority pursuant to 5 C.F.R. Part 2411 (1978), contending that the award was contrary to regulation, and ignored the parties' contract. The Authority found that the union's petition failed to meet the requirements for review under the applicable rules of procedure and therefore denied the union's petition. (Decision attached.)

3 FLRA No. 38 (May 23, 1980)

Department of the Air Force, McGuire Air Force Base and Local 1778, American Federation of Government Employees (Malkin, Arbitrator), Case No. 0-AR-3. The arbitrator, on a grievance that arose and was before him under E.O. 11491, found that the issue in dispute (the entitlement of the grievant to compensation for a number of hours on 2 days alleged to constitute standby time) was a claim for compensation under the Fair Labor Standards Act and, therefore, was not arbitrable under the Order because it involved a matter for which a statutory appeal procedure existed. The arbitrator therefore dismissed the grievance. The union filed exceptions to the arbitrator's award, alleging, among other things, that the arbitrator exceeded his authority. The Authority held that the union's petition did not meet the requirements for review under the applicable rules and therefore denied the appeal. (Decision attached.)

3 FLRA No. 39 (May 23, 1980)

Department of Defense, Dependents Schools and Overseas Education Association, Inc. (Kleeb, Arbitrator), Case No. 0-AR-51. The Authority dismissed the union's petition as untimely filed under the Statute. (Decision letter attached.)

3 FLRA No. 40 (May 23, 1980)

Department of Defense, Dependent Schools and Overseas Education Association, Inc. (Kleeb, Arbitrator), Case No. 0-AR-28. The arbitrator determined that the activity had not paid the grievant properly under P.L. 86-91; directed that the grievant be compensated appropriately; retained jurisdiction to allow either party a further opportunity to argue their positions after having reviewed his Discussion and Conclusions; and denied the union's request for attorney fees subject to further consideration. In response to motions subsequently filed by the parties, the arbitrator in a supplemental opinion and award granted the activity's motion to reconvene the hearing and denied the union's motion for payment of attorney's fees. Prior to the reconvened hearing, the union filed the instant petition for review with the Authority, taking exception to the arbitrator's denial of its request for attorney's fees. Following the reconvened hearing, the arbitrator issued a second supplemental opinion and award stating that upon reconsideration he found that the agency had paid the grievant properly and therefore denied the union's grievance. (The union's exceptions to the arbitrator's second supplemental opinion and award were separately denied by the Authority as untimely filed, Case No. 0-AR-51, 3 FLRA No. 39 (reported above).) In its instant exception, the union claimed that the arbitrator's denial of attorney's fees violated the Back Pay Act of 1966, as amended. The Authority denied the union's petition because it failed to meet the requirements for review under the applicable rules of procedure. (Decision attached.)

GENERAL STATEMENTS OF POLICY OR GUIDANCE

3 FLRA No. 33 (May 21, 1980)

National Federation of Federal Employees, Case No. 0-PS-14. NFFE requested that the Authority issue a major policy determination prohibiting the refunding of union dues erroneously deducted from a supervisor's pay and prohibiting the recoupment of the dues from the local union. In addition, NFFE requested that agencies be required to refund to local unions any such monies recouped since the passage of the Statute. The Authority determined that NFFE's request did not satisfy the standards governing issuances of general statements of policy or guidance set forth in section 2427.5 of the Authority's rules and therefore denied NFFE"s request. (Decision attached.)

3 FLRA No. 36 (May 23, 1980)

National Federation of Federal Employees, Case No. 0-PS-12. NFFE requested clarification by the Authority of Case No. 0-PS-1, April 19, 1979 (Report No. 1), regarding the revocation of written dues assignments under section 7115(a) of the Statute. The Authority determined that the request did not satisfy the standards governing the issuance of general statements of policy and guidance set forth in section 2427.5 of the Authority's rules. The Authority therefore denied NFFE's request. (Decision attached.)

Attachments (13)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

OFFICE OF PERSONNEL MANAGEMENT,
SOUTHEAST REGION, 1/
ATLANTA, GEORGIA

Activity

and

Assistant Secretary
Case No. 40-9000(RO)

ASSOCIATION OF CIVIL SERVICE
COMMISSION ADVISORS

Petitioner

DECISION AND ORDER

Upon a petition duly filed under § 6 of Executive Order 11491, as amended, an initial hearing on this matter was held before Hearing Officer Robert Woodland, Jr. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 2/

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under § 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040),

1/ The name of the Agency and Activity, formerly Civil Service Commission and Atlanta Region respectively, appear as amended pursuant to a motion, unopposed, and granted by the Hearing Officer at the hearing.

2/ The Activity's Motion for a continuance of the hearing based on the reorganization of the Civil Service Commision as a result of the Civil Service Reform Act of 1978 was denied by the Hearing Officer. The Office of Personnel Management (OPM) requested that this case, then pending before the Authority, be reopened to obtain evidence relating to the present organization and functions of OPM as a result of changes involving OPM which occurred pursuant to Reorganization Plan No. 2 of 1978 and the Civil Service Reform Act of 1978. The Authority granted that request and issued its Decision and Remand in which it ordered the Regional Director to take appropriate action to cause the record in this case to be reopened to develop evidence and arguments concerning the present organizational structure and functions of the Activity, and the currrent duties and functions of the claimed employees as compared with those previously performed when they were employed by the Civil Service Commission. A supplemental hearing for that purpose was conducted before Hearing Officer Adam J. Conti. The Hearing Officer's rulings made at that hearing are likewise free from prejudicial error and are hereby affirmed.

which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in § 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Upon the entire record in this case, including briefs filed by the Activity and the Petitioner, Association of Civil Service Commission Advisors, and briefs filed subsequent to the supplemental hearing following the Authority's Decision and Remand 3/ the Authority finds:

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner seeks an election in a unit limited to those nonprofessional employees, except clericals, in the Southeast Region of the Office of Personnel Management (OPM) who perform Civil Service Commission (CSC) functions pursuant to § 25(a) of the Executive Order. 4/ Specifically, it seeks only such employees in the Personnel Management and Evaluation Division, the Office of Labor-Management Relations, the Personnel Management and Labor Relations Training Institute, and certain Area Offices. 5/ The Activity contends that the Petitioner does not qualify as a labor organization pursuant to § 1(b) and 2(e)(1) of the Order 6/ because its principal officers are either supervisors or perform

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3/ The Authority received a supplemental brief from the Activity after the due date. No reason having been advanced by the Activity for the untimeliness of its brief, the Authority has not considered it.

4/ Section 25(a) of the Order provides, in pertinent part:

> The Civil Service Commission shall continuously review the operation of the Federal labor-management relations program to assist in assuring adherence to its provisions and merit system requirements; implement technical advice and information programs for the agencies; assist in the development of programs for training agency personnel and management officials in labor-management relations; . . .

5/ The record, as reopened pursuant to the Authority's Decision and Remand, reveals that there has been no significant change in the organizational structure of the Activity, and the categories of employees sought by the Petitioner remain in the same organizational framework and perform tasks similar to those performed before the reorganization.

6/ Section 1(b) of the Order provides, in pertinent part, that § 1(a) of the Order:

> . . . does not authorize participation in the management of a labor organization or acting as a representative of such an organization by a supervisor, . . . or by an employee when the participation or activity would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee.

(Continued)

work which would result in a conflict of interest or otherwise be incompatible with their official duties. It also contends that the unit sought would lead to fragmentation and would not promote effective dealings and efficiency of agency operations. Further, the Activity argues that certain classifications of employees should be excluded from the proposed unit. The Petitioner, on the other hand, contends that it qualifies as a labor organization as its principal officers are neither supervisors nor management officials. It also contends that the unit sought is an appropriate unit as it contains all employees in the Southeast Region who perform work pursuant to § 25(a) of the Order.

In the Authority's view, apart from other consideration, it would not promote the purposes and policies of the Order or the Federal Labor-Management Relations Statute to decide the appropriate unit and related issues raised in this case by application of the provisions of Executive Order 11491.

As stated above, the Petitioner filed a petition pursuant to provisions of Executive Order 11491 seeking an election in a unit of employees who perform Civil Service Commission functions pursuant to § 25(a) of the Order; specifically, employees who provided guidance to agencies on the Executive Order labor-management relations program, who continuously reviewed that program for certain specified purposes. Finally, § 25(a) provided that from time-to-time, the Civil Service Commission would report to the Federal Labor Relations Council on the state of the Executive Order program with any recommendation for its improvement.

Effective January 11, 1979, labor-management relations in the Federal service is governed by the Federal Service Labor-Management Relations Statute rather than Executive Order 11491. While the Office of Personnel Management now performs many of the functions previously performed by the Civil Service Commission, the Statute has substantially modified the Federal service labor-management relations program from that which existed under the Order. The employees sought by the petition are not carrying out functions under the Executive Order program, e.g., giving guidance under such a program or reporting to the Federal Labor Relations Council, which no longer exists.

As a result of these changes in the program, in the Authority's view, the issues presented by this case, primarily the viability of the unit sought, are not litigable under the Executive Order. Rather, they should more appropriately be addressed under the provisions of the Federal Labor-Management Relations Statute. Accordingly, the Authority will dismiss the petition herein without prejudice to the right of the petitioner to file under the Statute.

(Continued)

Section 2(e)(1) of the Order provides, in pertinent part, that:

> "Labor organization" . . . does not include an organization which . . . consists of management officials or supervisors, . . .

ORDER

The petition in Case No. 40-9000(RO) is hereby dismissed.

Issued, Washington, D.C., May 12, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF LABOR

Agency/Petitioner

and

Civil Service Commission
Case No. 114

LOCAL 12, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Labor Organization

U.S. DEPARTMENT OF LABOR

Agency

and

Civil Service Commission
Case No. 132

NATIONAL COUNCIL OF FIELD LABOR
LOCALS, AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Labor Organization/Petitioner

and

COUNCIL 208, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Labor Organization

DECISION AND ORDER

Upon petitions duly filed under section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Nancy Anderson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, in a matter such as here involved, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented

by section 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Upon the entire record in these cases, including briefs filed by the parties, the Authority finds: 1/

In Case No. CSC 114, the Department of Labor (DOL) seeks to clarify the status of the unit represented exclusively by Local 12 of the American Federation of Government Employees (Local 12) by accreting to it the headquarters employees of the Mine Safety and Health Administration (MSHA) of the DOL. In Case No. CSC 132, the National Council of Field Labor Locals of the American Federation of Government Employees (the Council) seeks to clarify the unit of DOL employees which it represents exclusively by accreting to that unit the field employees of the MSHA. The parties to both cases fully support the accretions sought in the two petitions.

On November 9, 1977, the functions of mine safety and inspection were transferred along with approximately 3500 employees performing the functions from the Department of Interior to DOL, pursuant to the Federal Mine Safety and Health Amendments Act of 1977, Public Law 95-164. The reasoning behind the transfer was a Congressionally perceived conflict of interest within the Department of Interior, which also has the responsibility of maximizing mining production. It was felt that the functions were more compatible with the DOL's mission of protection of workers and the insuring of safe and healthful working conditions. See, Senate Report No. 95-181 to the Federal Mine Safety and Health Amendments Act of 1977.

Prior to the transfer, the functions of mine safety and inspection were performed by the Mining Enforcement Safety Administration (MESA) of the Department of Interior. The MESA's objectives were to administer the provisions of the Federal Metal and Nonmetallic Mine Safety Act and the Federal Coal Mine Health and Safety Act. The MESA organization included a headquarters office in the Washington, D.C., metropolitan area, and various field offices concentrated in the Northeast which reported through assistant administrators to the Administrator of MESA. The Assistant Administrators for Assessments, Coal Mine Health and Safety, Metal and Nonmetal Mine Health and Safety, Education and Training, and Technical Support each had their own field offices. 2/

1/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present cases are decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the cases had arisen under the Statute rather than the Executive Order.

2/ The Superintendent of the National Mine Health and Safety Academy, located in Beckley, West Virginia, also appeared on the organization chart at the assistant administrator level. However, neither he, nor the Academy, was involved in the transfer to the DOL.

Four certified exclusive units represented by three different locals of the American Federation of Government Employees (AFGE) were in existence at the time of the transfer. None of the AFGE locals expressed an objection to the accretions sought herein. More than fifty percent of the MESA employees were in these AFGE units. Among the unrepresented MESA employees were all of its headquarters employees and less than half of the field employees.

The structure of DOL prior to the transfer included seven assistant secretary level organizations with approximately 20,000 employees. Each organization has its own operational field structure, and operates separately, while being administratered through 10 regional offices which service all of their field activities. All of the DOL's organizational elements are responsible for promoting the welfare of the American worker. All of the DOL's eligible employees (with the exception of approximately 800 employees of the Labor-Management Services Administration who are in a separate bargaining unit) were, and continue to be, represented exclusively by Local 12 in what is essentially a headquarters unit and by the Council in a field unit. 3/

At the time of the transfer of the approximately 3500 MESA employees to the Department of Labor to form the nucleus of the MSHA, the DOL decided, in order to minimize the disruption of services to the public, to transfer the MESA organization and personnel essentially intact and to integrate the MSHA into the DOL both administratively and organizationally in phases. An Assistant Secretary of Labor for Mine Safety and Health Administration was appointed. He made certain organizational changes based on the requirements of the 1977 Amendments and to improve the organizational structure. Chiefs of the inspection functions for both coal mines and metal and nonmetal mines were established at the administrator level, and chiefs of the support functions of assessment, education and training, technical support, and administration and management were established at the director level. In October of 1978, the MSHA was converted to the DOL integrated personnel, payroll, and budget system, and between January and February of 1979, the MSHA field offices were integrated into the DOL's regional system for personnel management. The MSHA field offices are serviced by only 7 of the 10 DOL Regional offices due to the makeup of the MSHA field structure. These two actions necessitated the closing of offices in Denver and Pittsburgh which had formerly performed personnel and administrative services for all MSHA field employees as a carry-over from the MESA. In July, 1979, the MSHA's mission and function statements were incorporated into the DOL's Manual Series and the MSHA became subject to most of the DOL's personnel and administrative policies, although the MSHA retains its own merit promotion

3/ A dispute is pending before the Authority over the unit status of the Washington, D.C., metropolitan area field employees of the DOL which both Local 12 and the Council claim to represent. The parties stipulated at the hearing, however, that as there are no field employees of the MSHA in the Washington, D.C., metropolitan area, the dispute should not serve as a barrier to resolution of the unit status of the employees in question herein.

plan and different work hours for its field inspectors. In view of the foregoing, it is found that the MSHA has become administratively and organizationally integrated within the DOL.

The DOL's internal labor-management relations program is administered by its Office of Labor-Management Relations. The responsibility for administering the existing agreements between the MESA and the AFGE Locals which held exclusive recognition prior to the transfer has been temporarily delegated to a labor relations officer in the MSHA headquarters. However, the DOL's Director of Labor-Management Relations retains the responsibility for negotiating any new agreements.

The record establishes that the number of units and corresponding negotiated agreements for which the Director of Labor-Management Relations would be responsible would be limited to three, rather than the present seven, if a finding were made that the MSHA employees accreted to the AFGE units as sought in these petitions. The Director of Labor-Management Relations testified that if accretions were not found, the hiring of additional personnel would be required to properly service the increased number of units and agreements. He also testified that negotiating the last agreement between the Council and DOL consumed over 4,000 man hours, and cost $63,000 in per diem, travel, meeting room rental, and printing expenses. It was estimated the negotiations of separate agreements for the four units existing in MESA prior to the transfer would involve a similar cost in time and money due to the necessity of travel and per diem costs between Washington, D.C., and their field locations. In addition, it was noted that a great deal of additional supervisory training would be required due to the different scope of bargaining in each unit and the different terms and conditions of employment negotiated in each unit.

The Federal Labor Relations Council has held appropriate unit determinations under the Executive Order must equally satisfy each of the 10(b) criteria (i.e., community of interest among the employees, effective dealings and efficiency of agency operations) in a manner fully consistent with the purposes of the Order, including the dual objectives of preventing further fragmentation of bargaining units as well as reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure. Department of the Army, Fort McPherson, Georgia, 5 FLRC 398, FLRC NO. 76A-82 (1977). 4/ It is the conclusion of the Authority that the accretions sought in the instant cases satisfy the three criteria of section 10(b) under the rationale adopted in Fort McPherson.

4/ For application of such precedent under the Authority, see Norfolk Naval Shipyard, Portsmouth, Virginia, and U.S. Department of the Navy, 1 FLRA No. 109 (September 20, 1979).

Thus, in view of the foregoing and noting especially the above finding that the MSHA has been organizationally and administratively integrated within the Department of Labor, and that the employees of the MSHA share with all DOL employees a common mission, essentially the same personnel and administrative policies and practices as administered by the DOL regional offices, and the same payroll, leave and other accounting practices, a community of interest is found to exist between the employees sought to be accreted and those in units already established at the DOL. Further underscoring this community of interest, it is noted the underlying reason for the Congressionally directed transfer was to place the function of mine safety and inspection in an agency with a mission more compatible to that function, a goal accomplished when the function was tranferred to the DOL. In satisfaction of the other criteria of section 10(b), it is noted the accretions sought will substantially reduce the number of units, and avoid the potential for further fragmentation within the DOL. Findings of accretions herein also will promote more comprehensive bargaining at the same level to which the DOL has delegated its labor relations responsibility. Therefore, the accretions will clearly promote both effective dealings and efficiency of agency operations. Accordingly, it shall be ordered that the MSHA headquarters employees be accreted into the unit represented exclusively by Local 12 and that the MSHA field employees be accreted into the unit represented exclusively by the Council.

ORDER

IT IS HEREBY ORDERED that the unit at the Department of Labor sought to be clarified herein, for which Local 12, American Federation of Government Employees, AFL-CIO, was recognized on August 29, 1962, be, and it hereby is, clarified by including in said unit all eligible employees of the Mine Safety and Health Administration, Department of Labor.

IT IS HEREBY ORDERED that the unit at the Department of Labor sought to be clarified herein, for which the National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO, was recognized on November 5, 1965, be, and it hereby is, clarified by including in said unit all eligible employees of the Mine Safety and Health Administration, Department of Labor.

Issued, Washington, D.C., May 23, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE,
HEADQUARTERS, SAN ANTONIO AIR
LOGISTICS CENTER, KELLY AIR FORCE BASE, TEXAS

Respondent

and

Assistant Secretary
Case No. 63-8791(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1617, AFL-CIO

Complainant

DECISION AND ORDER

The Administrative Law Judge issued his Recommended Decision and Order in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions to the Administrative Law Judge's Recommended Decision and Order, and the Respondent filed an opposition to the Complainant's exceptions.

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (44 F.R. 44741, July 30, 1979). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the Complainant's exceptions and

the Respondent's opposition thereto, the Authority hereby adopts the Administrative Law Judge's findings, conclusions 1/ and recommendation. 2/

ORDER

IT IS HEREBY ORDERED that the complaint in Assistant Secretary Case No. 63-8791(CA) be, and it hereby is, dismissed.

ISSUED, Washington, D.C., May 21, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier, III Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

1/ Cf. Social Security Administration, Bureau of Hearings and Appeals, 2 FLRA No. 27 (1979).

2/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700, 1111-20th Street, NW.
Washington, D.C. 20036

In the Matter of	:	
DEPARTMENT OF THE AIR FORCE, HEADQUARTERS, SAN ANTONIO AIR LOGISTICS CENTER, KELLY AIR FORCE BASE, TEXAS Respondent	:	Case No. 63-8791(CA)
and	:	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1617, AFL-CIO Complainant	:	

CHARLES L. WIEST, JR., Major, USAF
LEWIS G. BREWER, Major, USAF
Labor Counsel
Office of the Staff Judge Advocate
San Antonio Air Logistics Center
Kelly Air Force Base, Texas 78241

For the Respondent

ALFONSO GARCIA
National Representative
American Federation of Government Employees
6061 Northwest Expressway
San Antonio, Texas 78201

For the Complainant

Before: GARVIN LEE OLIVER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arose pursuant to Executive Order 11491, as amended, as a result of an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1617, AFL-CIO (hereinafter called the Complainant or Union), against the Department of the Air Force, Headquarters, San Antonio Air Logistics Center, Kelly Air Force Base, Texas (hereinafter called the Respondent).

The complaint alleged, in substance, that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by issuing San Antonio Air Logistics Center (SA-ALC) Regulation 500-4 on January 4, 1978, providing that the Chief Equal Employment Opportunity (EEO) Counselor and all EEO counselors shall be rotated out of the EEO program on a periodic basis, without bargaining with the Union and without notifying the Union and giving it an opportunity to bargain concerning the impact on unit employees.

A hearing was held in this matter before the undersigned in San Antonio, Texas. Both parties were represented and afforded full opportunity to be heard, to adduce relevant evidence, and to examine and cross-examine witnesses. Post-hearing briefs have been received from both parties and duly considered.

Based on the entire record herein, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, and the briefs, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Union is the exclusive representative for all employees of the Respondent in certain Wage Grade and General Schedule (GS) units which comprise approximately 14,500 employees. As pertinent here, the GS unit includes all classification act employees except supervisors, management officials, professional employees, and employees engaged in civilian personnel work in other than a purely clerical capacity.

The Respondent and the Complainant were parties to two negotiated agreements which were in effect at times material herein. Neither agreement contains specific reference to the

selection, appointment, or rotation of full-time EEO counselors. 1/ The use of part-time EEO counselors were discontinued in 1971 or 1972.

From approximately 1967 Respondent had a general policy of periodically rotating EEO personnel out of the EEO program after a three year assignment. However, this was more of a goal than a firm requirement or practice. If personnel were promoted in the EEO office, they were not rotated. Rotation also depended upon the availability of other comparable positions to which they could be assigned. The evidence established that several Chief EEO counselors, other supervisory counselors, and a key EEO management advisor (Special Assistant) were rotated out of the EEO program.

The evidence as to the rotation of non-supervisory counselors under any such policy was vague and inconclusive. It was not established whether any transfer out of the EEO office by nonsupervisory counselors was pursuant to a policy or at their instigation and request. Many counselors have remained in the EEO program beyond a three year period. There was no evidence that during the period 1967 to 1978 individuals entering the positions of EEO counselor did so under an agreement providing for periodic rotation or required mobility, or that the Director of Personnel monitored these positions to insure that periodic rotation would be carried out.

At a staff party in December 1977 Major General Lynwood E. Clark, Commander, San Antonio Air Logistics Center, advised at least two EEO counselors that it was necessary to bring "new blood" into the EEO program, and EEO counselors would be rotated back into their previous field after a period of service.

On January 4, 1978 Major General Clark issued San Antonio ALC Regulation 500-4 which provided as follows:

Commander's Special Interest

ROTATION OF EQUAL EMPLOYMENT OPPORTUNITY OFFICERS

1/ The 1977 agreement contains a lengthly Article IV dealing with equal employment opportunity. This article sets forth the agreement of the parties "to work cooperatively" to assure equal employment opportunity, discusses Air Force policy and program objectives, sets forth the responsibilities of supervisors and employees, provides for Union representation on the EEO Committee, and Union proposals for the SA-ALC EEO plan of action. (Res. Ex. 1).

1. Individuals who are continuously responsible for the resolution and processing of complaints work under a type of stress that can, after a prolonged period, lead to "burn out." To preclude this phenomena and to assure a creative and agressive Equal Employment Opportunity (EEO) Program, it is my policy that the Chief Equal Employment Opportunity Counselor and his EEO counselors rotate out of EEO on a periodic basis.

2. Individuals entering the positions will do so under an agreement providing for required mobility within the San Antonio ALC work force. The tenure for the positions will ordinarily be three years. However, as members of the Commander's Staff, the incumbents may be rotated earlier if it is deemed in the best interest of the Kelly AFB work force and/or the US Air Force. Reassignment out of one of these positions will not normally be considered an adverse action. Reassignments which are adverse in nature will not be taken under the provisions of this policy, but will be accomplished under applicable regulations on an individual basis as circumstances warrant. The Director of Personnel will monitor these positions to insure this policy is being following.

LYNWOOD E. CLARK, Major General, USAF
Commander

The regulation was issued without prior notice to, or negotiation with, the Union either as to the policy stated in the regulation or as to matters relating to the impact and implementation of the policy.

Commander's Special Interest regulations are a small group of regulations distributed only to senior management officials. They are not distributed generally to employees. The Union obtained a copy of ALC Regulation 500-4 by making a request under the Freedom of Information Act.

Major General Clark took over command of the SA-ALC on July 1, 1977. He testified that the regulation was a confirmation of the unwritten policy he perceived at the time. He issued the regulation to insure strict enforcement of the tenure of

counselors as he felt unwritten policies were likely to be forgotten, waived, or overlooked.

I find that the regulation did change existing policy. A preponderance of the evidence shows that if there was any policy prior to the memorandum requiring the rotation of non-supervisory EEO counselors, the Respondent's attempts to enforce such "policy" were irregular and ambiguous. A reasonable reading of the January 4, 1978 regulation shows that it was intended to establish, and result in the strict enforcement of, a periodic rotation policy. The regulation clearly establishes the policy and states that individuals entering the positions will do so under an agreement providing for mobility. The regulation also calls for the Director of Personnel to monitor positions to insure that the policy is being followed. This strict enforcement of the rotation of counselors out of the EEO program represented a significant shift from past practices.

The rotation policy stated in the regulation will apply to all EEO counselors in the GS-160 classification series who presently, or will in the future, occupy such positions. Only one individual, the Chief EEO counselor, who occupied a supervisory position over all other counselors from 1972 to 1978, has been rotated out of the EEO office and transferred to another position pursuant to ALC Regulation 500-4. Respondent acknowledges, however, that "fuller implementation without negotiation with the Union will occur when circumstances warrant." (R.A. Ex. 2, p.5). Additional implementation has been deferred pending resolution of this complaint.

In early 1978 the Respondent's Chief of Labor Relations advised the Chief EEO counselor that EEO counselors were not part of the bargaining unit.

There currently are nine EEO counselors assigned to the office of the Chief EEO counselor. This office reports directly to the Commander, San Antonio Air Logistics Center. The Chief EEO counselor is a Supervisory Equal Opportunity Specialist, GS-160-13. Among other things, he is responsible for the overall program planning, directing, and supervision of eight or more full time EEO counselors.

There are two Equal Opportunity Specialist, GS-160-12. Among other things, they assist the Chief EEO counselor in the overall program planning, directing, and coordinating of subordinate counselors. They receive formal complaints and make

recommendations regarding acceptance or rejection of the complaint to the Chief EEO counselor, Commander, and the Air Force Logistics Command. They coordinate with the affirmative action employees in the civilian personnel division to identify problem areas and secure full involvement in the EEO program from all segments of the management structure.

There are four GS-160-11 and two GS-160-9 Equal Opportunity Specialists. The primary function of these counselors is to counsel employees in the precomplaint stage; develop factual information concerning the case through discussions with the complainants' supervisors, management officials, and other employees; conduct research into confidential personnel records, including employment history, promotion registers, adverse actions, and medical records; attempt informal resolutions of complaints by providing advice and counsel to complainants and management officials; provide final narrative reports of counseling to the Chief EEO counselor; and assist the complainant in preparing and filing formal complaints as required. The GS-11 counselor handles more complex cases, including class actions, has access to broader records, including disciplinary actions, and has contact and offers advice to all levels of management up to the Directorate level in the attempted informal resolution of complaints.

There is one GS-160-07 Equal Opportunity Specialist in the Chief EEO counselor's office. This employee functions as an administrative assistant to the Chief counselor. The incumbent has access to confidential personnel files and investigative reports and arranges and schedules investigations and hearings. This employee compiles status reports on all formal and informal complaints, and keeps the Chief EEO counselor informed of any new or revised policies and procedures affecting office operations. The employee also serves on occasion as a counselor.

The GS-7, 9, and 11 counselors are not involved in the formulation of the Respondent's affirmative action plan, monitoring of personnel actions, or training concerning EEO matters. These matters are generally handled by Equal Employment Opportunity Officers and Specialists assigned to the civilian personnel office and reporting to the Chief of Civilian Personnel. This office is separate from the case processing function of the Chief EEO counselor. As noted, the primary function of the EEO counselors in question is to serve as a bridge between the complainant and management and attempt to impartially resolve matters in an informal manner, where possible. Most complaints involve issues relating to personnel practices.

Two EEO counselors, a GS-7 and 11, and the former Chief EEO counselor, testified, in effect, that they believed the SA-ALC Regulation 500-4 will adversely affect the careers of EEO counselors, since counselors will be rotated out of the office in three years or less and will be unable to obtain promotions in the EEO field and make EEO counseling a career.

One of these counselors filed a complaint under the discrimination procedures of FPM Chapter 713 and AFR 40-713 alleging, in part, that the regulation discriminated against Mexican-Americans. During the Federal Employees Appeal Authority hearing into these allegations, the Union steward representing the employee alleged that a further indication of the discriminatory intent was the fact that the regulation was issued without prior consultation with the Union.

Three members of the bargaining unit testified that they had been interested in obtaining EEO counselor positions for sometime, and two of them had previously appeared in a profile for a vacancy, but that they were unaware of any rotation policy among counselors at that time, and would no longer be interested in obtaining such a position in view of the policy.

Discussion, Conclusions, and Recommendations

Section 11(a) of Executive Order 11491, as amended, establishes upon an agency the obligation to bargain concerning personnel policies and practices affecting the bargaining unit and matters affecting bargaining unit working conditions.

While it has previously been held that the procedures and factors involved in the method of selection of EEO counselors is a negotiable matter under the Order, 2/ the regulation here does not deal with the procedures and factors involved in the method of selection of EEO counselors, but with their tenure in that position.

2/ Social Security Administration, Department of Health, Education and Welfare, Wilkes-Barre Operations Branch, Wilkes-Barre, Pennsylvania, 7 A/SLMR 730, A/SLMR No. 889 (1977); American Federation of Government Employees, Local 2928 and General Services Administration, National Personnel Records Center, FLRC No. 78A-7 (Dec. 29, 1978).

Section 12(b)(2) of the Order reserves to management decision and action authority to hire, promote, transfer, assign, and retain employees in positions within the agency. Since the authority to place and retain, or transfer employees is a reserved right of management under Section 12(b)(2), I conclude that management was not required to negotiate with Complainant concerning the decision to rotate EEO counselors as outlined in SA-ALC Regulation 500-4, out of their positions on a periodic basis, although this decision was a significant shift from past practice insofar as the decision to strictly enforce the rotation of counselors, other than the Chief Counsel, is concerned.

Notwithstanding the fact that a particular management decision is non-negotiable because it falls within the ambit of Section 11(b) or 12(b) of the Order, management must, nevertheless, afford an exclusive representative reasonable notice and an opportunity to bargain with respect to the impact and implementation of such action, prior to its implementation, when such action effects a change in existing personnel policies and practices or working conditions of unit employees, provided it does not interfere with the exercise of the reserved rights themselves. Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 984 (1978); U.S. Customs Service, Region VII, Los Angeles, California, A/SLMR No. 1066 (1978); Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, 7 A/SLMR 255, A/SLMR No. 814 (1977).

Respondent contends that this action is barred by Section 19(d) inasmuch as a counselor filed a discrimination complaint under FPM Chapter 713 concerning the regulation and alleged, in part, that the regulation was issued without prior consultation with the Union. This action is not barred by Section 19(d) of the order. Section 19(d) states that "Issues which can properly be raised under an appeals procedure may not be raised under this section." It has previously been held that the appeals procedure provided by 5 CFR Part 713 and the corresponding FPM sections is not one in which unfair labor practice issues can properly be raised. Veterans Administration, Veterans Benefits Office, 3 A/SLMR 444, A/SLMR No. 296 (1973).

Respondent also contends that since consultation is required only as to changes affecting unit personnel, there was no obligation to bargain with the Union. Respondent asserts that the regulation only directly affects EEO counselors, and these counselors are outside the bargaining unit pursuant to Section 10(b)(2) of the Order, because they are engaged in Federal personnel work in other than a clerical capacity.

It is well established that when an agency unilaterally determines the unit status of employees, it acts at its peril, and an erroneous determination could support a violation of the Order. U.S. Marine Corps Air Station, El Toro, A/SLMR No. 560, 4 FLRC 218, FLRC No. 75A-115 (1976). Thus, the refusal to meet and confer on the impact and implementation of the change herein on EEO counselors would be violative of the Order if the EEO counselors, in fact, were members of the bargaining unit. Cf. Environmental Protection Agency, Region III, A/SLMR No. 999 (March 3, 1978).

I conclude that the two Equal Opportunity Specialists GS-160-12 are engaged in Federal personnel work in other than a purely clerical capacity. The record reflects that they, in part, receive formal complaints and make effective recommendations regarding dispositions of the complaints. They also coordinate with affirmative action employees in the civilian personnel division to identify problem areas and secure full involvement in the EEO program from all segments of the management structure. These duties are substantially similar to those of positions which have been excluded in the past as involving Federal personnel work in other than a clerical capacity. See Department of Health, Education, and Welfare, U.S. Office of Education, Headquarters, A/SLMR No. 803, 7 A/SLMR 190 (1977).

The four GS-160-11s, two GS-160-9s, and one GS-160-07 Equal Opportunity Specialists present a more difficult question. Union members or members of an exclusive bargaining unit are not precluded from being selected as EEO counselors. Federal Personnel Manual Letter No. 713-29, Part II(B)(5)(a)(2), dated September 12, 1974. It has been held that there is no conflict of interest under Section 1(b) of the Order when a part-time EEO counselor serves simultaneously as a union officer, where the part-time counselor's duties as a union officer involve only internal management of the union and does not require that the counselor be an adversary of management and an advocate for employees. General Services Administration, National Personnel Records Center, A/SLMR No. 1174 (Dec. 29, 1978).

The EEO counselors in the present case are full-time counselors. However, they are not involved in the formulation or coordination of the Respondent's affirmative action plan, monitoring of personnel actions, or training concerning EEO matters which have been key considerations regarding the exclusion of some employees from the bargaining unit in the past. See Department of Health, Education, and Welfare, U.S. Office of Education, Headquarters, supra; U.S. Naval Weapons Station,

Seal Beach, California, Department of the Navy, 7 A/SLMR 331, A/SLMR No. 827 (1977); U.S. Department of Health, Education and Welfare, Regional Office, VI, 3 A/SLMR 224, A/SLMR No. 266 (1973); Portland Area Office, Department of Housing and Urban Development, 1 A/SLMR 522, A/SLMR No. 111 (1971). They are also not involved in activity normally associated with personnel work, such as the preparation and processing of personnel actions involving hirings, promotions, reassignments, demotions, pay increases, transfers, adverse actions, training and employee development. Cf. Defense Supply Agency, Defense Department, Tracy, California, 4 A/SLMR 302, A/SLMR NO. 386 (1974). Nor is mere access to personnel or statistical information alone sufficient to warrant the exclusion of an employee from an exclusively recognized unit. Virginia National Guard, Headquarters, 4th Battalion, 111th Artillery, 1 A/SLMR 332, A/SLMR No. 69 (1971).

The record reflects that the full-time role of these EEO counselors is to serve as a bridge between employees and management and attempt to impartially resolve EEO discrimination complaints in an informal manner, where possible. Most of the complaints these employees receive involve issues relating to personnel practices. Indeed, part of the policy and program objective of the Air Force EEO program under Executive Order 11478 and the Equal Employment Opportunity Act of 1972 is to ensure that "total personnel management ... be ... free from discrimination and ... provide equal opportunity," and that the "Air Force continues to seek out and correct (or eliminate) any personnel management policy, procedure, or practice that may ... deny equality of opportunity ..." (Respondent's Ex. 3). In order to properly perform their duties in handling complaints relating to such matters EEO counselors must receive training in personnel management and in basic and advanced counseling. FPM Letter 713-40(8), Aug. 17, 1977. The counseling which they accord to complainants, supervisors, and management officials in individual cases is closely akin to that performed by other non-clerical personnel employees. Cf. U.S. Patent and Trademark Office, 7 A/SLMR 512 at 516, A/SLMR No. 856 (1977).

They also become privy to essentially the same confidential personnel files and other confidential information to which other personnel specialists have access, although their access must generally relate to pending cases and is not as open-ended or "unrestricted" as that given personnel specialists.

In my view, the pervasive involvement of these full-time counselors in personnel matters warrants the conclusion that they are engaged in non-clerical Federal personnel work under

Section 10(b)(2) of the Act, which precludes their inclusion within the exclusively recognized unit.

The determination that these full-time counselors are outside the bargaining unit does not end the matter, however, if the regulation dealing with the required rotation of EEO counselors effects a change in existing personnel policies and practices or working conditions of represented employees.

Although the record indicates that some bargaining unit employees would not now be interested in applying for EEO counselor positions because of the rotation policy, there is no evidence that the policy made any change in the actual eligibility of bargaining unit employees to be considered for such positions, or that it affected provisions of the negotiated agreement dealing with promotions. The regulation may indirectly affect bargaining unit employees by having some impact on the effectiveness of the EEO program. However, it has been held that the bargaining obligation contemplated by Section 11(a) of the Order does not embrace every issue which is of interest and which indirectly may affect employees. Department of Defense, Air National Guard, Texas Air National Guard, Camp Malry, Austin, Texas, 6 A/SLMR 591, A/SLMR No. 738 (1976).

Accordingly, I find insufficient basis to conclude that SA-ALC Regulation 500-4 effected a change in existing personnel policies and practices or working conditions of the unit employees. In the circumstances here disclosed, a preponderance of the evidence does not support a violation of Sections 19(a)(1) and (6) of the Executive Order, as alleged.

Recommendation

Having found that Respondents have not engaged in conduct prohibited by Sections 19(a)(1) and (6) of the Executive Order, it is hereby recommended that the complaint herein be dismissed in its entirety.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: July 24, 1979
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2151

(Union)

and

Case No. 0-NG-193

GENERAL SERVICES ADMINISTRATION,
NATIONAL CAPITAL REGION,
WASHINGTON, D.C.

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. 7101 et seq.).

In the course of negotiating a memorandum of agreement to implement the Federal Employees Flexible and Compressed Work Schedules Act of 1978, Pub. L. No. 95-390, 92 Stat. 755 (1978) [hereinafter referred to as the Work Schedules Act], the union submitted the following proposal to the activity:

Union Proposal

Section 4. The program may be terminated by the Employer for any employee or group of employees when the following condition is met:

A. A finding of fact by an arbitrator appointed by the Federal Mediation and Conciliation Service that one of the following conditions have been met:

(1) The continuation of the program would substantially disrupt the Agency in carrying out its functions; or

(2) The Agency is incurring additional costs because of its participation in the program.

Question Here Before The Authority

The question is whether the union's proposal concerning flexible work schedules is within the duty to bargain under the Statute or is inconsistent with Federal law, as alleged by the agency.

Opinion

Conclusion: The union's proposal is within the duty to bargain under the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, 45 F. R. 3513, the agency's allegation that the proposal is not within the duty to bargain is set aside. 1/

Reasons: Insofar as relevant to the instant dispute, the Work Schedules Act requires each agency of the executive branch, unless exempted by the Civil Service Commission (now the Office of Personnel Management), to establish a flexible or compressed work schedule experiment for its employees; and further provides that, where employees are in a unit for which a labor organization holds exclusive recognition, the introduction of any flexible or compressed work schedule experiment shall be subject to collective bargaining. 2/ In the latter regard, section 302(a) of the Work Schedules Act provides that employees in units of exclusive recognition cannot be included in flexible or compressed work schedule experiments except to the extent expressly provided under a written agreement between the agency and the exclusive representative. 3/ The legislative history of section 302(a) states as follows: 4/

1/ In so deciding that the subject proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

2/ H.R. REP. No. 95-912, 95th Cong., 2d Sess. 3, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 1894, 1896.

3/ Section 302(a) of the Work Schedules Act provides as follows:

> Employees within a unit with respect to which an organization of Government employees has been accorded exclusive recognition shall not be included within any experiment under title I or II of this Act except to the extent expressly provided under a written agreement between the agency and such organization.

4/ H.R. REP. No. 95-912, 95th Cong., 2nd Sess. 22, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 1894, 1914.

The committee intends this section to preserve the provisions of negotiated agreements which are otherwise proper under labor-management Executive orders, which deal with the establishment of hours of work, and to permit any party to such a contract to enter into negotiations in order to take advantage of any of the new alternative work schedules under an experimental program.

Where a labor organization has exclusive recognition, it is the intent of the committee that the parties to the contract negotiate the introduction of any experimental program provided for under the bill, in accordance with labor-management relations, Executive orders, or any other applicable collective bargaining agreement. Where a labor organization has exclusive recognition, whether or not the existing agreement contains a clause dealing with hours of work, the committee believes that the establishment of flexible or compressed schedules is an appropriate area for negotiation between the agency and the labor organization. [Emphasis added.]

Accordingly, it is clear from the language and legislative history of the Work Schedules Act that Congress intended the matter of flexible or compressed work schedules to be negotiated between the parties to existing collective bargaining relationships.

In its statement of position herein, the agency "does not question that the procedures for implementing an alternative work schedule experiment . . . are negotiable," but asserts that the union's proposal "deprives management of the ability to cancel the alternative work schedule for bargaining unit employees" and therefore is in direct conflict with sections 102(b)(2) 5/ and 202(c) 6/ of the Work Schedules Act. The agency also asserts, without further

5/ Section 102(b)(2) of the Work Schedules Act provides as follows:

(b) Notwithstanding any other provision of this Act, but subject to the terms of any written agreement under section 302(a)--

. . . . .

(2) if the head of an agency determines that any organization within the agency which is participating in an experiment under subsection (a) is being substantially disrupted in carrying out its functions or is incurring additional costs because of such participation, such agency head may--

(A) restrict the employees' choice of arrival and departure time,

(B) restrict the use of credit hours, or

(C) exclude from such experiment any employee or group of employees.

6/ Section 202(c) of the Work Schedules Act states:

(c) Notwithstanding any other provision of this Act, but subject to the terms of any written agreement under section 302(a), any experiment under subsection (a) may be terminated by the Commission, or the agency, if it determines that the experiment is not in the best interest of the public, the Government, or the employees.

elaboration, that if it were to agree to the union's proposal, it would be shirking the managerial responsibilities entrusted to each agency as set forth in section 7106(a) of the Statute.

The agency's assertion that the instant proposal is inconsistent with sections 102(b)(2) and 202(c) of the Work Schedules Act is unsupported by the language and legislative history of those provisions. While both sections refer to the circumstances under which an agency may limit or terminate a flexible or compressed work schedule experiment, an agency's authority to take any such action is expressly made "subject to the terms of any written agreement under section 302(a)." That is, Congress clearly intended that both the establishment and the limitation or termination of flexible and compressed work schedule experiments be subject to negotiation. 7/ Accordingly, the agency's contention that the union's proposal is contrary to the Work Schedules Act must be rejected. Moreover, the record fails to establish and it does not otherwise appear that the subject proposal conflicts with management's reserved rights under section 7106(a) of the Statute, as alleged.

Based on the foregoing, the disputed proposal is within the duty to bargain under the Statute, and the agency's allegation that such proposal is not within the duty to bargain is set aside.

Issued, Washington, D.C., May 23, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

7/ Supra p. 3. See also H.R. REP. No. 95-912, 95th Cong., 2d Sess. 14-15, 20, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 1894, 1907, 1912.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, LOCAL
R4-6

Union

and

Case No. 0-AR-39

HEADQUARTERS, U.S. ARMY
TRANSPORTATION CENTER AND
FORT EUSTIS

Activity

DECISION

This case is before the Authority on an exception to the award of Arbitrator Leroy S. Merrifield filed by the union under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)).

According to the arbitrator, the dispute in this case arose when the grievant was not selected for any of three positions established as a result of a reorganization of the Directorate of Training at the U.S. Army Transportation School. Instead, the employee selected for each position was an employee who had been performing the duties of the position pending its classification. The union filed a grievance on behalf of the grievant alleging that the activity had violated the negotiated agreement by preselecting employees for permanent positions and by noncompetitively detailing employees to positions with "known promotion potential." The union asserted that the activity violated Sections 1 through 4 of Article XXII and Section 8 of Article XXIII. As cited by the arbitrator, these sections state in pertinent part:

Article XXII

> Section 1. A detail is the temporary assignment of an employee to a different position or set of duties for a specified period . . . .
>
> Section 2. Verbal details are defined as details of any duration up to 30 days . . . . Verbal details to a higher grade position or a position with known promotion potential will not be given repeatedly to one employee to the exclusion of other eligible employees . . . .
>
> Section 3. Supervisors are responsible for selecting employees for detail on an impartial basis . . . .

> Section 4. . . . If a detail of more than 60 days is made to a higher grade position, or to a position with known promotion potential, it must be made under competitive promotion procedures.

Article XXIII

> Section 8. If an employee fails to receive proper consideration in a promotion action and the erroneous promotion is allowed to stand, the employee will be given priority consideration for the next appropriate vacancy before candidates under a new promotion or other placement action are considered.

Unable to resolve the dispute, the parties ultimately submitted the grievance to arbitration. The issues addressed by the arbitrator, as stated in his award, were:

(1) Was there a contractual violation of Sections 1 through 4 of Article XXII and Section 8 of Article XXIII of the Negotiated Agreement?

(2) Was the Grievant denied proper consideration and therefore not selected for the vacancies in question due to the alleged violations of Sections 1 through 4 of Article XXII and Section 8 of Article XXIII?

The arbitrator concluded that the activity had not violated the negotiated agreement. In the opinion accompanying his award, the arbitrator first determined that the provisional sets of duties to which the employees were originally assigned were not "positions of known promotion potential." He concluded the positions did not become such until they were classified, at which time the activity proceeded to advertise them and fill them through the regular competitive selection procedures.

Additionally, the arbitrator held that "the grievant was not denied proper consideration for the vacancies involved in this case." He found she was placed on the "Best Qualified List" for all three positions and was considered in light of her general education, training, and overall experience. According to evidence proffered by the agency and accepted by the arbitrator, the grievant was given proper consideration for each position. Finding no evidence to support the union's contentions, the arbitrator denied the grievance.

The union filed an exception to the arbitrator's award under section 7122(a) of the Federal Service Labor-Management Relations Statute*/ and part 2425 of the Authority's interim rules and regulations, 44 F. R. 44766. The agency filed an opposition.

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*/ 5 U.S.C. §7122(a) provides:

> (a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section

(Continued)

The question before the Authority is whether, on the basis of the union's exception, the arbitrator's award is deficient because it is contrary to any law, rule, or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its exception the union contends that the award is contrary to law, rule, or regulation. In support of this exception the union asserts that the negotiated agreement "clearly provides for the regulation of details." The union refers to the negotiated agreement provisions which were before the arbitrator and states the purpose of these provisions is to insure that all employees will be treated fairly, which, according to the union, did not occur in this case. The union also states the award violates "the most basic regulations" surrounding the merit system principles, and disagrees with the arbitrator's findings on "the issue of whether or not the positions had known promotional potential within the meaning of the Negotiated Agreement."

On its face, the union's exception that the award is contrary to law, rule, or regulation states a ground on which the Authority will find an award deficient under section 7122(a)(1) of the Statute. American Federation of Government Employees, AFL-CIO, Local 2094 and Veterans Administration Hospital, Case No. 0-AR-24, 2 FLRA No. 88 (Feb. 22, 1980). However, in this case the union does not demonstrate in its exception that this award is contrary to law, rule, or regulation. The union does not state what "law, rule, or regulation" the award allegedly violates, or how the arbitrator's award, in which he answered the question before him and found no violation of the collective bargaining agreement, violates a "law, rule, or regulation." Rather, the union's assertions in support of its exception constitute disagreement with the arbitrator's interpretation and application of the collective bargaining agreement provisions in question. The union is seeking to have its own interpretation of Articles XXII and XXIII substituted for that of the arbitrator. It is a well established principle that the arbitrator's construction of the contract is not subject to review. United States Army Missile Materiel Readiness Command (USAMIRCOM) and American Federation of Government Employees, Local 1858, AFL-CIO, Case No. 0-AR-7, 2 FLRA No. 60 (Jan. 17, 1980). See Federal Aviation Science and Technological Association and Federal Aviation Administration, Albuquerque Airway Facilities Sector, Southwest Region, Case No. 0-AR-20, 2 FLRA No. 85 (Feb. 21, 1980), and the private sector cases cited therein. Therefore, the union's exception provides

(Continued)

7121(f) of this title). If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

no basis for finding the award deficient under 5 U.S.C. §7122(a) and section 2425.3 of the Authority's interim rules and regulations.

For the foregoing reasons and pursuant to section 2425.4 of the Authority's interim rules and regulations, we hereby sustain the arbitrator's award.

Issued, Washington, D.C., May 21, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

RED RIVER ARMY DEPOT

Activity

and

Case No. 0-AR-38

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R14-52

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Lawrence S. Morgan filed by the union under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)).

According to the arbitrator, the dispute in this matter arose when the activity began using large flat-bed trailers (called "missile trailers") pulled by a small motor vehicle (called a "towmotor") to transport materials and supplies between points on the activity. Contending that the missile trailers and towmotors lacked adequate safety equipment,[1/] the union filed a grievance alleging that the activity was violating the parties' negotiated agreement by not providing and maintaining safe working conditions. No settlement could be reached, and the grievance was ultimately submitted to arbitration.

The arbitrator set forth Article XXII, Section 2 as one of the "Applicable Contract Provisions" pertinent to the matter before him:

1/ The union contended in its grievance that:

(1) The use of the missile trailers with the towmotors created unsafe working conditions because the towmotor operator had almost no rear vision when pulling a loaded trailer and because the trailers were not equipped with either brakes or lights, and

(2) The towmotors should not be operated in the rain until they were made safe by the installation on them of cabs, rear view mirrors and speedometers.

ARTICLE XXII - Safety and Industrial Hygiene.

Section 2. The employer will exert every effort to provide and maintain safe working conditions and industrial health protection for the employees, using applicable rules, regulations and directives. The union will cooperate to achieve that end and will encourage all employees to work in a safe manner.

In the opinion accompanying his award, the arbitrator stated:

> [T]his grievance was filed to secure safer working conditions, and the question before the arbitrator is not so much whether the Employer was, prior to the filing of the grievance, remiss in its performance of its obligations under Article XXII, Section 2, but whether under existent circumstances, the Union has reasonable cause to complain that the Employer is not providing and maintaining "safe working conditions."

The arbitrator noted that following the filing of the grievance the activity had taken certain steps with respect to the safety of the equipment, including making technical inspections of the equipment; equipping the towmotors and trailers with tail lights, stop lights and reflectors; issuing gloves to the towmotor operators; installing "governors" to limit the towmotors' speed to 5 miles per hour; and ordering cabs for the towmotors. Therefore, the arbitrator found:

> [T]he Employer has made, and within the limits of its ability is making, such improvements to lessen the likelihood of injury in the operation of the towmotor-missile trailer combination that the union no longer has any reasonable ground to complain.

Concluding that the union had filed the grievance to secure safer working conditions and that it had already secured them, the arbitrator denied the grievance.

The union filed exceptions to the arbitrator's award under section 7122(a) of the Federal Service Labor-Management Relations Statute[2/] and part 2425 of the Authority's interim rules and regulations, 44 F.R. 44766. The agency filed an opposition.

2/ 5 U.S.C. §7122(a) provides:

> (a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient--
>
> (1) because it is contrary to any law, rule, or regulation; or

(Continued)

The question before the Authority is whether, on the basis of the union's exceptions, the arbitrator's award is deficient because it is contrary to any law, rule, or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its first exception the union contends that the award does not draw its essence from the collective bargaining agreement. In support of this exception the union refers to certain protective equipment which has been ordered by the activity, but has not been received and installed, and argues that because the equipment is not yet installed, the activity is not providing and maintaining safe working conditions as required by the collective bargaining agreement. Additionally, the union argues that because the equipment has not been received and installed, the award is contradictory to an agency directive and an agency handbook, and for these reasons the award does not draw its essence from the collective bargaining agreement.

The union's first exception states a ground on which the Authority will find an award deficient under section 7122(a)(2) of the Statute. United States Army Missile Materiel Readiness Command (USAMIRCOM) and American Federation of Government Employees, Local 1858, AFL-CIO, Case No. 0-AR-7, 2 FLRA No. 60 (Jan. 17, 1980). However, in this case the union does not demonstrate in its exception that this award fails to draw its essence from the collective bargaining agreement. Thus, the union has not demonstrated that the arbitrator's award cannot in any rational way be derived from the agreement; or is so unfounded in reason and fact, so unconnected with the wording and purpose of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; or that it evidences a manifest disregard of the agreement; or that, on its face, the award does not represent a plausible interpretation of the contract. See United States Army Missile Materiel Readiness Command, supra, and private sector cases cited therein. Instead, the union's arguments in support of its exception that the award does not draw its essence from the agreement constitute disagreement with the arbitrator's interpretation and application of the agreement provision before him. That is, the union is seeking to have its own interpretation of the words "provide and maintain" as used in Article XXII, Section 2 substituted for the arbitrator's interpretation of those words and his application thereof to the matter before him. This does not constitute a basis for finding an award deficient. United States Army Missile Materiel Readiness Command, supra. Therefore, the union's first exception provides no basis for finding the award deficient under 5 U.S.C. §7122(a) and section 2425.3 of the Authority's interim rules and regulations.

In its second exception the union contends that the award is based on a nonfact. In support of this exception the union again refers to the words "provide" and "maintain" as used in Article XXII, Section 2 of the collective

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(Continued)

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

bargaining agreement, and to certain of the arbitrator's findings, and concludes that the award "is based on the nonfacts that the Employer is providing and maintaining safe working conditions and that the Employer has made improvements to lessen the likelihood of injury in the operation of the towmotor-missile combination."

The union's second exception states a ground on which the Authority will find an award deficient under section 7122(a)(2) of the Statute. United States Army Missile Materiel Readiness Command, supra. However, the union does not demonstrate that the award is based on a nonfact. Again, the thrust of the union's exception is its disagreement with the arbitrator's interpretation of the negotiated agreement. In addition, the union is disagreeing with the arbitrator's findings of fact. As in the private sector, this does not constitute a basis for review of arbitration awards. United States Army Missile Materiel Readiness Command, supra, and the private sector case cited therein. Therefore, the union's second exception provides no basis for finding the award deficient under 5 U.S.C. §7122(a) and section 2425.3 of the Authority's interim rules and regulations.

For the foregoing reasons, and pursuant to section 2425.4 of the Authority's interim rules and regulations, we hereby sustain the arbitrator's award.

Issued, Washington, D.C., May 21, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION HOSPITAL,
PERRY POINT, MARYLAND

Activity

and

Case No. 0-AR-55

LOCAL 331, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES

Union

DECISION

This matter is before the Authority on an exception to the award of Arbitrator Herbert N. Bernhardt filed by the union under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)).

According to the arbitrator, the grievant, a Vietnam veteran under treatment as a patient at the activity, was also employed by the activity as a Nursing Assistant under a Veterans Readjustment Appointment. The grievant was terminated from his employment prior to the completion of his one year probationary period because of an incident in which he used obscene language with a supervisor and destroyed hospital property.

The grievant grieved his termination and the matter was ultimately submitted to arbitration. The arbitrator denied the grievance, finding that the activity had "adequate grounds to terminate the Grievant as a probationary employee."

The union filed an exception to the arbitrator's award under section 7122(a) of the Federal Service Labor-Management Relations Statute*/ and

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*/ 5 U.S.C. §7122(a) provides:

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

part 2425 of the Authority's interim rules of procedure, 44 F.R. 44766. The agency did not file an opposition.

The question before the Authority is whether, on the basis of the union's exception, the arbitrator's award is deficient because it is contrary to any law, rule, or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its exception to the award, the union contends the award is deficient because the arbitrator "omits any and all evidence presented on circumstance." In support of its exception, the union asserts the grievant was terminated on the same day of the issuance of the "Removal" and that the decision to terminate was made by one person on the basis of a charge by the Veterans Administration police. Further, the union argues that the grievant's Veterans Readjustment Appointment entitled him to more consideration and counseling than an ordinary probationer. Finally, the union asserts the grievant suffered from "Psychomotor Seizure."

It is clear from the union's exception the union is attempting to relitigate the merits of the case before the Authority and its exception actually constitutes disagreement with the arbitrator's reasoning and conclusions.

The Authority will not review an arbitrator's award where, as in this case, it appears that the exception constitutes disagreement with the reasoning employed by the arbitrator on the merits of the issue before him. Federal Aviation Science and Technological Association and Federal Aviation Administration, Albuquerque Airway Facilities Sector, Southwest Region, Case No. 0-AR-20, 2 FLRA No. 85 (Feb. 21, 1980). Therefore, the union's exception to the arbitrator's award provides no basis for finding the award deficient under 5 U.S.C. §7122(a) and section 2425.3 of the Authority's interim rules and regulations.

For the foregoing reasons, and pursuant to section 2425.4 of the Authority's interim rules and regulations, we hereby sustain the arbitrator's award.

Issued, Washington, D.C., May 21, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

Agency

and

Case No. 0-AR-10

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 2284

Union

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator John Bailey filed by the union under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)).

According to the arbitrator, the grievant, a quality engineer, GS-12, at the Lyndon B. Johnson Space Center, Houston, Texas, had been demoted from a GS-13 position due to a reduction in force and thus became a repromotion eligible entitled to special consideration for repromotion. Two grievances were filed alleging that: (1) the grievant was not given special consideration when several vacant GS-13 positions were filled, and (2) the grievant was not given special consideration for a position that was "created . . . for the express purpose of placing a specific individual . . . in the position . . . ." The grievances were ultimately submitted to arbitration.

The arbitrator stated the issues before him to be:

> (1) Whether the grievant . . . was denied the "special consideration" for repromotion to which he was entitled as a "re-promotion eligible" in July and September 1977.
>
> (2) If so, whether such denial of "special consideration" was motivated in part by the grievant's membership in and activities in behalf of the union.
>
> (3) If so, whether but for any such anti-union discrimination against him because of his membership and activities in behalf of the union, the grievant would have been promoted to fill a vacancy on either of the following dates:
>
> (a) July 10, 1977, or
> (b) September 1, 1977.

The arbitrator cited the following provisions of the parties' agreement as pertinent to the case herein:

ARTICLE 3

RIGHTS OF EMPLOYEES

Section 1. Employees have the right, freely and without fear of penalty or reprisal, to join and assist the UNION or to refrain from such activity. The freedom of such employees shall be recognized as extending to participation in the management of the UNION and acting for the UNION in the capacity of a representative, including presentation of its views to officials of the Executive Branch, the Congress, or other appropriate authority. This Section does not authorize participation in the management of the UNION, or acting as a UNION representative, when the participation or activity would result in a conflict or apparent conflict of duties of the employee. The EMPLOYER agrees to take action by once-a-year Center-wide announcement to assure that employees are apprised of their rights under this Section. It is further agreed that no interference, restraint, coercion, or discrimination will be practiced by the EMPLOYER or the UNION to encourage or discourage membership in the labor organization.

. . . . . .

Section 5. It is understood and agreed that neither Management nor the UNION shall interfere with, restrain, or coerce an employee in the exercise of his rights as assured by Executive Order 11491, as amended.

. . . . . .

ARTICLE 29

REDUCTION IN FORCE

. . . . . .

Section 7. Any employee demoted in NASA in a reduction in force will be given special consideration for repromotion to any vacancy for which he is qualified and in the area of consideration at his former grade (or any intervening grade) before any attempt is made to fill the position by other means.

In the opinion accompanying his award, the arbitrator noted that, under the provisions of the parties' agreement, a repromotion eligible merely has to be "qualified" in order to receive special consideration for repromotion but, in accordance with the Federal Personnel Manual, Chapter 335, section 4-3(c)(2), he must be "well qualified" to be promoted. Federal Personnel Manual Chapter 335, section 4-3(c)(2) provided at the time involved herein:

c. Repromotion to grades or positions from which demoted without personal cause.

. . . . . .

(2) Special consideration for repromotion. An employee demoted without personal cause is entitled to special consideration for repromotion in the agency in which he was demoted. Although he is not guaranteed repromotion, ordinarily he should be repromoted when a vacancy occurs in a position at his former grade (or any intervening grade) for which he has demonstrated that he is well-qualified, unless there are persuasive reasons for not doing so. Consideration of an employee entitled to special consideration for repromotion must precede efforts to fill the vacancy by other means, including competitive promotion procedures, except when another employee has a statutory or regulatory right to be placed in or considered for the position. If a selecting official considers an employee entitled to special consideration for repromotion under this paragraph but decides not to select him for promotion and then the employee is certified to the official as one of the best-qualified under competitive promotion procedures for the same position, the official must state his reasons for the record if he does not then select the employee.

The arbitrator noted further that although the FPM guarantees that a repromotion eligible will receive special consideration for repromotion, it does not guarantee repromotion. The arbitrator then concluded that, based upon the evidence before him, the grievant was given special consideration for repromotion for the positions in question but was denied repromotion because he was not well-qualified. The arbitrator also found that the grievant was not denied repromotion because of his union activities. The arbitrator therefore denied the grievances.

The union filed a petition for review of the arbitrator's award pursuant to the rules of procedure set forth in 5 C.F.R. part 2411 (1978), which, to the extent consistent with the provisions of section 7122(a) of the Federal Service Labor Management Relations Statute (5 U.S.C. §7122(a)) and as amended by section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority (44 Fed. Reg. 44741), remain operative with respect to this case. The union seeks Authority acceptance of its petition on the basis of the exceptions discussed below. The agency filed an opposition.

Pursuant to section 2411.32 of the amended rules and section 7122(a) of the Statute, the Authority will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award is deficient because it is contrary to law or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its first exception, the union contends that the award is contrary to regulation. In support of this exception, the union states that in order to permit the award to stand, the regulations pertaining to special consideration for promotion would have to be interpreted as ordinarily barring all employees demoted without personal cause, save those that are well qualified. The union states that such an interpretation would be an unjustified "serious and far-reaching departure from established practice."

The Authority will grant a petition for review of an arbitration award when it appears, based upon the facts and circumstances described in the

petition, that the award violates regulation. However, in this case the union has not presented sufficient facts and circumstances to support its exception.

The union does not demonstrate in its petition in what manner the arbitrator's award is contrary to the cited regulation. The union has not shown that the arbitrator's reference to the words "well-qualified" in FPM Chapter 335, section 4-3(c)(2), or his award denying the grievances, in any manner violates the Federal Personnel Manual. It is noted that the arbitrator specifically found, based on the evidence before him, that the grievant was given special consideration for repromotion. The arbitrator also specifically referred to the language of FPM Chapter 335, section 4-3(c)(2), and, applying it to the facts of this case, noted that the regulation only guarantees that a repromotion eligible will receive "special consideration" for repromotion, and that it does not guarantee actual repromotion. Therefore, the union's first exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules.

In its second exception, the union contends that the award ignores the contract. In support of this exception the union states that the parties' agreement requires that repromotion eligibles be given special consideration before any other method is used to fill a vacancy and that management created GS-13 positions for four downgraded employees in violation of the grievant's rights under the agreement.

In its second exception the union is merely arguing, as it did before the arbitrator, that the agency violated the agreement. Thus the union is attempting to relitigate the merits of the grievance before the Authority. As in the private sector, this does not constitute a basis for reviewing an arbitration award in the Federal sector. See Federal Aviation Science and Technological Association and Federal Aviation Administration, Albuquerque Airway Facilities Sector, Southwest Region, Case No. 0-AR-20, 2 FLRA No. 85 (February 21, 1980). Therefore, this exception provides no basis for acceptance of the union's petition under section 2411.32 of the amended rules.

Accordingly, the union's petition for review is denied because it fails to meet the the requirements for review set forth in section 2411.32 of the amended rules of procedure.

Issued, Washington, D.C., May 21, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE,
MCGUIRE AIR FORCE BASE

Activity

and

Case No. 0-AR-3

LOCAL 1778, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES

Union

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator John M. Malkin filed by the union after January 11, 1979, and hence under section 7122(a) of the Federal Labor-Management Relations Statute (5 U.S.C. §7122(a)).

According to the arbitrator's award, the issues in dispute before the arbitrator were as follows:

1. Is the 4.5 hours on August 13, 1977, and the 3.5 hours on August 14, 1977, standby time for which Grievant . . . is entitled to compensation under Article 11, Section 3, of the Memorandum of Agreement between Local 1778 and McGuire Air Force Base?1/ [Footnote added.]

2. Is the matter arbitrable?

The arbitrator first considered the question of arbitrability and observed that the activity's position essentially was that the denial of overtime pay in a claim payable under the Fair Labor Standards Act is not arbitrable because it is a matter for which a statutory appeal procedure exists. This matter arose and was before the arbitrator under the provisions of Executive Order 11491, as amended. With respect to grievance and arbitration procedures, section 13(a) of the Order provides in part:

1/ According to the arbitrator, Article 11, Section 3 pertinently provides: "Employees will not be obligated to a standby status unless placed in a pay status."

> The coverage and scope of the procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists . . . .

In this respect the arbitrator, citing Federal Personnel Manual (FPM) letter 551-9, March 30, 1976,[2/] and a decision of the Federal Labor Relations Council,[3/] noted that claims for compensation under the Fair Labor Standards Act, such as the one before him, were subject to a statutory appeals procedure. Accordingly, the arbitrator concluded that under section 13(a) of the Order and under the parties' Memorandum of Agreement, the grievance could not be arbitrated. Therefore, in pertinent part, his award was as follows:

> For the reasons set forth in the Opinion herein, the Arbitrator finds not arbitrable the issue of whether or not the 4.5 hours on August 13, 1977, and the 3.5 hours on August 14, 1977, are standby time entitling Grievant to compensation under Article 11, Section 3, of the Memorandum of Agreement between McGuire Air Force Base and AFGE Local 1778. The grievance is dismissed.

The union filed a petition for review of the arbitrator's award and requests that the Authority accept its petition on the basis of its exception which is discussed below. The agency did not file an opposition. This appeal must be resolved under the rules of procedure set forth in 5 C.F.R. part 2411 (1978), to the extent consistent with the provisions of section 7122(a) of the Statute and as amended by section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority, 44 F.R. 44741, because those were the rules of procedure in effect at the time this appeal was filed.

Pursuant to section 2411.32 of those rules as amended by the transition rules, and pursuant to section 7122(a) of the Statute, the Authority will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award is deficient because it is contrary to law or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its exception, the union asserts that the arbitrator exceeded his authority by ruling on a question of arbitrability concerning the existence of a statutory appeal procedure. In support of its exception, the union argues that the arbitrator exceeded his authority in this case because the parties' Memorandum of Agreement, section 13(a) of the Order, and Federal regulations[4/]

2/ Civil Service Commission System for Administering the Fair Labor Standards Act (FLSA) Compliance and Complaint System.

3/ U.S. Marine Corps Supply Center, Albany, Georgia and American Federation of Government Employees, AFL-CIO (King, Arbitrator), 5 FLRC 181 [FLRC No. 75A-98 (Mar. 8, 1977), Report No. 122].

4/ The "Federal regulations" cited by the union are those of the Assistant Secretary of Labor for Labor-Management Relations implementing section 13(d) of the Order.

all precluded the arbitrator from ruling on the arbitrability of a matter for which a statutory appeal procedure assertedly exists.

The Authority will grant a petition for review of an arbitration award where it appears, based on the facts and circumstances described in the petition, that an exception presents a ground for review similar to those applied by Federal courts in private sector labor-management relations cases. Federal courts in private sector cases will find an arbitration award deficient on the ground that the arbitrator exceeded his or her authority.5/ For example, Federal courts in private sector cases will find an arbitrator's award deficient when it is demonstrated that the arbitrator rendered the award in disregard of a plain and specific limitation on his or her authority.6/ Therefore, the Federal Labor Relations Authority will grant a petition for review of an arbitrator's award where it appears, based on the facts and circumstances described in the petition for review, that the exception presents the ground that the arbitrator exceeded his or her authority by rendering an award in disregard of a plain and specific limitation on that authority.

In this case, however, although the union's exception states a ground on which review is granted, the union's petition fails to describe the facts and circumstances necessary to support its exception that in rendering the award that he did, the arbitrator exceeded a limitation on his authority. The arbitrator determined that the provision of the parties' agreement restating section 13(a) of the Order, as well as section 13(a) of the Order itself, the provisions of FPM letter 551-9, and the cited decision of the Federal Labor Relations Council precluded arbitration of a grievance claim which, at the arbitration hearing, the union maintained was payable under the Fair Labor Standards Act. In light of the union's contention before the arbitrator that the activity's refusal to pay the standby time was a violation of the Fair Labor Standards Act, the arbitrator correctly noted that Fair Labor Standards Act questions are subject to statutory appeal procedures, and (at the time the matter was before the arbitrator) thus not subject to arbitration, and he dismissed the grievance. The union has failed to present facts and circumstances to demonstrate in what manner the arbitrator exceeded any limitation on his authority when in observance of the clear limitations of the law in existence at the time involved herein, he dismissed a grievance which he had no authority to arbitrate. Therefore, the union's exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules.

5/ E.g., Local 791, International Union of Electrical, Radio & Machine Workers, AFL-CIO v. Magnavox Company, 286 F.2d 465 (6th Cir. 1961).

6/ Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Company, 330 F.2d 562 (8th Cir. 1964).

Accordingly, the union's petition for review of the arbitrator's award is denied because it fails to meet the requirements of section 2411.32 of the amended rules for acceptance by the Authority of a petition for review of an arbitrator's award.

Issued, Washington, D.C., May 23, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

May 23, 1980

Mr. Gerald Hyland
Attorney At Law
Hyland and Hyland
616 South Washington Street
Alexandria, Virginia 22314

Re: Department of Defense, Dependents Schools and Overseas Education Association, Inc. (Kleeb, Arbitrator), Case No. 0-AR-51

Dear Mr. Hyland:

This refers to your exceptions to the arbitrator's award in the above-entitled case, filed with the Authority on October 25, 1979.

For the reasons indicated below, it has been determined that your exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the regulations of the Federal Labor Relations Authority (45 F.R. 3513 (1980), copy enclosed) provides:

> (b) The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in your submission, is dated September 7, 1979. Therefore, under section 2425.1(b) of the Authority's regulations, your exceptions were due in the office of the Authority no later than October 8, 1979. However, as stated above, your exceptions were not filed with the Authority until October 25, 1979. In this regard, the Authority is not empowered to extend or waive the time limit for filing exceptions to arbitrator's awards.

Accordingly, as your exceptions were untimely filed, and apart from other considerations, your appeal is hereby dismissed.

For the Authority.

Sincerely,

Samuel A. Chaitovitz
Executive Director

Enclosure

cc: Anthony Cardinale
DODDS

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE,
DEPENDENTS SCHOOLS

Activity

and

Case No. 0-AR-28

OVERSEAS EDUCATION
ASSOCIATION, INC.

Union

DECISION

This matter is before the Authority on a petition for review of the award of arbitrator Howard Kleeb filed by the union under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)).

According to the entire record before the Authority, the dispute in this case arose when the agency increased the number of actual work days in a school year for overseas teachers from 187 to 190 starting with the 1976-77 school year. Thereafter, the grievant filed a grievance seeking to "be financially compensated for these three extra work days." The grievance could not be resolved and was, therefore, submitted to arbitration.

Noting that the parties were unable to agree on the issue, the arbitrator found the "real issue" to be "[w]hether Management has paid the Grievant properly under Public Law 86-91."1/ [Footnote added.] On this issue, the arbitrator rendered an initial award on March 29, 1979. Therein, the arbitrator, in granting the grievance, held that the Department of Defense Office of Dependents Schools (DoDDS) had not been paying the grievant the proper daily rate and, applying the daily rate as he computed it to a 190 day school year, the arbitrator directed DoDDS to pay the grievant the difference between the newly computed salary and the salary the grievant was originally paid. However, in arriving at this award, the arbitrator stated:

> Because I have concluded that the grievance is a continuing grievance and because I am granting the grievance I recognize that the practical effect of my decision will undoubtedly open the door for the Association to file additional grievances or perhaps a class grievance which will involve all of the teachers covered by the agreement. Therefore, I will retain jurisdiction of the grievance in order to give either party a further opportunity to argue their positions after having reviewed my Discussion and Conclusions, because of the potential magnitude of the Award if it is sustained.

1/ Defense Department Overseas Teachers Pay and Personnel Practices Act, Pub. L. No. 86-91, 73 Stat. 213 (1959).

Therefore, the arbitrator retained jurisdiction until May 1, 1979, to resolve any disputes or to implement the award, and to hear any motions involving the award. Finally, the arbitrator denied the union's request for attorney fees, subject to further consideration.

Thereafter, in response to motions filed by the parties, the arbitrator issued a "Supplemental Opinion and Award" on May 29, 1979. In that award he held in part:

> 1. DoD's motion to reconvene the hearing is granted.
>
> . . . . . .
>
> 4. OEA's motion for the payment of Attorney's Fees is denied. As I read the authorities cited by OEA in its motion I do not find them applicable to an arbitration proceeding under the negotiated agreement of the parties. Article 13, Grievance Procedure, makes no reference to the payment of legal fees by either party. Section 10, Arbitration, Paragraph J limits the cost of arbitration to the arbitrator's fee, travel, per diem, and cost of the transcript of the hearing. The cost is to be borne equally by the parties. Therefore I find no authority for the assessment of legal fees against DoDDS.

Following that supplemental opinion and award and prior to the reconvened hearing ordered by the arbitrator, the union filed the petition for review involved herein, taking exception to the arbitrator's denial of the union's request for attorney fees. The agency filed an opposition.

As a result of the reconvened hearing, the arbitrator issued a "Second Supplemental Opinion and Award" on September 7, 1979. Therein the arbitrator stated that "[u]pon reconsideration [he was] of the opinion that Management did properly pay the Grievant for the years 1976-77 and 1977-78 within the framework of the negotiated Agreement that was signed on March 4, 1977 to remain in effect until March 4, 1980." Therefore, he denied the grievance.3/

The union's petition for review in this case, taking exception to the arbitrator's denial of the union's request for attorney fees, was filed pursuant to the rules of procedure set forth in 5 C.F.R. part 2411 (1978), which, to the extent consistent with the provisions of section 7122(a) of the Statute and as amended by section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority, 44 F.R. 44741, remain operative with respect to this case. The union seeks Authority acceptance of its petition on the basis of the exception discussed below.

3/ The union's exceptions to the arbitrator's ultimate denial of the grievance have been dismissed this date as untimely filed. Department of Defense, Dependents Schools and Overseas Education Association, Inc., Case No. 0-AR-51, 3 FLRA No. 39.

Pursuant to section 2411.32 of the amended rules and section 7122(a) of the Statute, the Authority will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award is deficient because it is contrary to law, rule, or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its exception the union contends that the arbitrator's denial of the union's request for attorney fees violates the Back Pay Act of 1966, 5 U.S.C. §5596, as amended by section 702 of the Civil Service Reform Act of 1978.4/ In

4/ The Civil Service Reform Act of 1978, Pub. L. No. 95-454, sec. 702, 92 Stat. 1216, provides, in relevant part:

BACKPAY IN CASE OF UNFAIR LABOR PRACTICES AND GRIEVANCES

Sec. 702. Section 5596(b) of title 5, United States Code is amended to read as follows:

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--

. . . . . .

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, shall be awarded in accordance with standards established under section 7701(g) of this title[.]

5 U.S.C. §7701, relating to appellate procedures before the Merit Systems Protection Board, provides in relevant part:

§ 7701. Appellate procedures

. . . . . .

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee, as the case may be,

(Continued)

support of its exception, the union states that as a result of the amendments made to the Back Pay Act "[the grievant] is entitled to an award of reasonable attorney fees . . . ."

The Authority will grant a petition for review of an arbitration award where it appears, based on the facts and circumstances described in the petition, that the award violates law. However, in this case the union has not presented sufficient facts and circumstances to support its exception.

The Back Pay Act of 1966, as amended, provides that an employee who is found to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of the employee's pay, is entitled, on correction of the action, to reasonable attorney fees related to the action and awarded in accordance with prescribed standards. In this case, however, it is noted that the arbitrator's final disposition of the matter before him was to deny the grievance, finding that the agency had properly paid the grievant. Thus, there has been no determination in this case that an unjustified or unwarranted personnel action has resulted in the withdrawal or reduction of the grievant's pay, a necessary threshold determination for entitlement to attorney fees under the Back Pay Act, as amended. Therefore, the union's exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules.

Accordingly, the union's petition for review of the arbitrator's award is denied because it fails to meet the requirements of section 2411.32 of the amended rules for acceptance by the Authority of a petition for review of an arbitrator's award.

Issued, Washington, D.C., May 23, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

(Continued)

determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. O-PS-14

DECISION ON REQUEST FOR GENERAL STATEMENT
OF POLICY OR GUIDANCE

The Authority received a request from the National Federation of Federal Employees (NFFE) that the Authority issue a major policy determination concerning, in effect, the propriety of an agency recouping an amount equal to union dues erroneously deducted from a supervisor's pay.

According to NFFE's submission, the request arises from the situation presently faced by some NFFE locals wherein an employee, formerly a bargaining unit member paying union dues through a written assignment authorizing the agency to deduct the dues from the employee's pay, has been promoted to a supervisory position and the agency does not immediately terminate such employee's dues assignment. NFFE claims the current practice is that after the agency discovers its oversight, it terminates the supervisor's union dues assignment, refunds all dues withheld to the supervisor since the effective date of his or her promotion, and then recoups an amount equal to the dues refunded from the NFFE local. In addition, NFFE claims that in many cases, the supervisor in question has not requested a refund of the union dues and has received services from the NFFE local in exchange for the dues. Further, NFFE claims that recouping union dues erroneously deducted from supervisors' pay by agencies has resulted in financial instability for many NFFE locals, which, in turn, has affected the ability of these locals to perform their responsibilities as the exclusive representative of employees.

In this context, NFFE asks the Authority to issue a major policy determination prohibiting the refunding of dues erroneously deducted from a supervisor's pay and prohibiting the recoupment of the dues from the local union. In addition, NFFE requests that agencies be required to refund to the local unions amounts recouped since the passage of the Federal Service Labor-Management Relations Statute.

The Authority has carefully considered this request and has determined that it does not satisfy the standards governing the issuance of general statements of policy and guidance set forth in section 2427.5 of the rules of the Federal Labor Relations Authority, which provides in pertinent part:

> § 2427.5 Standards governing issuance of general statements of policy and guidance.
>
> In deciding whether to issue a general statement of policy or guidance, the Authority shall consider:

(a) Whether the question presented can more appropriately be resolved by other means;

(b) Where other means are available, whether an Authority statement would prevent the proliferation of cases involving the same or similar question[.]

The matter raised in this request for a major policy determination can be more appropriately resolved by other means. For example, procedures set forth in the Statute and appropriate regulations for the resolution of unfair labor practices provide a mechanism for the adjudication of issues of fact with respect to the varied circumstances likely to be present in a specific termination of dues assignment situation.1/

Moreover, Authority action on this request is not warranted since it would not prevent the proliferation of cases involving the same or a similar matter. As previously indicated, the varied circumstances likely to be present in a specific termination of dues assignment situation make it difficult or impossible to render a meaningful policy statement. The Authority would be compelled to engage in conjecture regarding these varied circumstances and in so doing runs the risk of creating more cases than issuance of a policy statement would prevent.

Accordingly, the request for a major policy determination is denied.

Issued, Washington, D.C., May 21, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

1/ In this connection, it is noted that NFFE has filed several unfair labor practice charges with the Authority involving the matter herein.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. O-PS-12

DECISION ON REQUEST FOR GENERAL STATEMENT
OF POLICY OR GUIDANCE

The Authority received a request from the National Federation of Federal Employees for a clarification by the Authority of the Authority's Interpretation and Guidance, FLRA No. O-PS-1 (Apr. 19, 1979), Report No. 1, regarding the revocation of written dues assignments under section 7115(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. 7115(a)).

The Authority's above-referenced Interpretation and Guidance concerned the proper interpretation and application of section 7115(a) of the Statute as it relates to when written dues assignments in effect on January 11, 1979, may be terminated through revocations by the employees concerned and the status of such assignments under previously negotiated agreements with reference to the savings provisions of the Statute. The Authority's conclusion was as follows:

> It is the Authority's interpretation and guidance that:
>
> 1) The requirement of section 7115(a), namely that "any such [dues] assignment may not be revoked for a period of 1 year," does not apply in those situations where the parties to an existing collective bargaining agreement have mutually agreed in substance to renew or continue the six-month intervals for the revocation of dues assignments.
>
> 2) The 1-year period provided in section 7115(a) for dues revocations applies where a labor organization or an agency objects to such a renewal or continuation; and such 1-year period begins to run from either of the following dates, whichever is later:
>
> a) The ending date of the preceding six-month interval during which the employee could have revoked his or her dues authorization; or
>
> b) the date on which the employee authorized dues withholding.

In this context, the request asks the Authority to clarify its Interpretation and Guidance through a response to the following questions:

1. If the union during the life of the agreement asks to change to a once a year date, must the revocation date immediately preceding be used or may the parties decide upon another date of their own?

2. May the parties simply put into the agreement that revocation will only be allowed on the anniversary of an SF/1187 without using a specific date also?

3. If the parties are renegotiating and wish to specify a particular date, must they use the preceding date or may they change the revocation date?

4. If the parties have had one annual date for a number of years and wish to change to another month when they renegotiate the agreement, is this possible under the Authority's decision?

The Authority has carefully considered this request and has determined that it does not satisfy the standards governing the issuance of general statements of policy and guidance set forth in section 2427.5 of the rules of the Federal Labor Relations Authority, which provide in pertinent part:

> § 2427.5 Standards governing issuance of general statements of policy and guidance.
>
> In deciding whether to issue a general statement of policy or guidance, the Authority shall consider:
>
> (a) Whether the question presented can more appropriately be resolved by other means;
>
> (b) Where other means are available, whether an Authority statement would prevent the proliferation of cases involving the same or similar question[.]

The questions presented in the request can be more appropriately resolved by other means. For example, from the various circumstances described in the request, it appears that the procedures set forth in the Statute and appropriate regulations for the resolution of negotiability disputes provide a mechanism for the adjudication of the questions raised in the request. In the alternative, the unfair labor practice procedures could be utilized in appropriate situations.

Moreover, Authority action on the request is not warranted since it would not prevent the proliferation of cases involving the same or similar questions. The varying situations under which local parties have sought or are seeking to establish revocation dates for written dues assignments and the differing positions agencies have taken or may take with reference to such efforts are

not amenable to a general statement of policy or guidance by the Authority that would prevent the proliferation of cases.

Accordingly, the request is denied.

Issued, Washington, D.C., May 23, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 41 REPORT OF CASE DECISIONS July 11, 1980

REPRESENTATION CASE

3 FLRA No. 51 (May 30, 1980)

Department of the Navy, Naval Education and Training Center, Newport, Rhode Island, Case No. 1-CU-5. The union (IAFF Local F-100) filed a petition seeking to clarify an existing unit at the activity to include employees currently classified as Supervisor Firefighter, GS-6 (Fire Captains). The Authority found that the Fire Captains were not supervisors within the meaning of section 7103(a)(10) of the Statute. The Authority therefore ordered the unit clarified as requested. (Decision and Order Clarifying Unit attached.)

UNFAIR LABOR PRACTICE CASES

3 FLRA No. 43 (May 28, 1980)

U.S. Naval Ordnance Station, Louisville, Kentucky, Assistant Secretary Case No. 41-6355(CA). The union (IAM&AW Local Lodge 830) filed a complaint under E.O. 11491 alleging that the activity had violated section 19(a)(1) and (6) of the Order by unilaterally making changes in its Blood Donor Program without negotiating with the union. The activity's position was that it was not obligated to negotiate with the union pursuant to a provision in the parties' agreement by which the union waived certain bargaining rights and, further, that the provision survived the expiration of the agreement as a term and condition of employment. Upon transfer of the case by the Regional Director, the Authority found that the expired contract specifically provided for negotiations after expiration and it was unnecessary to reach the question as to whether the provision relied on by the activity constituted a waiver by the union of its bargaining rights or whether that provision survived the expired agreement. The Authority concluded that the activity violated section 19(a)(1) and (6) of the Order by refusing to negotiate with the union regarding the changes in the Blood Donor Program. Accordingly, the Authority issued an appropriate remedial order. (Decision and Order attached.)

GRIEVABILITY/ARBITRABILITY CASE

3 FLRA No. 42 (May 28, 1980)

Department of Agriculture, U.S. Forest Service, Siuslaw National Forest, Corvallis, Oregon, Assistant Secretary Case No. 71-5004(GA). Upon an Application for a Decision on Grievability or Arbitrability filed by the union (NFFE Local 454) under E.O. 11491, the ALJ found that the issue raised in Grievance No. 2 was previously raised in an unfair labor practice proceeding and, consequently, section 19(d) of the Order barred such grievance from consideration under the grievance/arbitration procedure of the parties' negotiated agreement. As to the other grievances presented, the ALJ found that they are arbitrable under the parties' negotiated agreement. The Authority adopted the ALJ's findings, conclusions and recommendation and, accordingly, ordered that all grievances presented, except No. 2, are subject to the arbitration procedure set forth in the parties' negotiated agreement. (Decision and Order attached.)

NEGOTIABILITY CASES

3 FLRA No. 44 (May 29, 1980)

National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO and U.S. Department of Labor, Washington, D.C., Case No. 0-NG-79. The dispute involved three proposals submitted by the union during negotiations to establish a special placement plan to provide placement opportunities for certain employees in the bargaining unit adversely affected by the consolidation of E.O. 11246 contract compliance functions in the agency. The first proposal would require that the agency use the competitive procedures of its Merit Promotion Plan in filling supervisory or management positions with bargaining unit employees. The second proposal involved a procedure for the selection of employees for reassignment solely on the basis of an employee's service computation date. The third proposal would require the agency to rescind certain permanent reassignments ordered prior to final agreement on the parties' negotiated plan, and to handle those reassignments in accordance with that plan. The Authority held that the proposals were outside the agency's obligation to bargain under section 7117 of the Statute and, further, that the second proposal violated section 7106(a)(2)(A) of the Statute. Accordingly, the Authority sustained the agency's allegations of nonnegotiability. (Decision attached.)

3 FLRA No. 46 (May 30, 1980)

American Federation of Government Employees, AFL-CIO, Local 3529 and Defense Contract Audit Agency, Case No. 0-NG-14. The dispute involved a union proposal which essentially would preclude the agency from applying its mandatory auditor rotation or reassignment policy to bargaining unit employees. The Authority held that the proposal violated section 7106(a)(2)(A) of the Statute. Accordingly, the Authority sustained the agency's allegation that the proposal was not within the duty to bargain. (Decision attached.)

3 FLRA No. 47 (May 30, 1980)

American Federation of Government Employees, AFL-CIO, Local 1692 and Headquarters, 323rd Flying Training Wing (ATC), Mather Air Force Base, California, Case No. 0-NG-183. The dispute involved a union proposal that equal official time to prepare for contract negotiations be alloted to the union and management negotiators. The Authority held that the proposal did not violate section 7131 of the Statute, as alleged by the agency. Accordingly, the Authority set aside the agency's allegation that the proposal was not within the duty to bargain. (Decision attached.)

3 FLRA No. 48 (May 30, 1980)

American Federation of Government Employees, AFL-CIO, Local 3669 and Veterans Administration Medical Center, Minneapolis, Minnesota, Case No. 0-NG-32. The dispute involved the negotiability of a union proposal concerning grievance procedures which the agency alleged was not within the duty to bargain under section 7121 of the Statute because it failed to expressly exclude from coverage of the procedures certain matters which the agency claimed were outside application of the procedure "as a matter of law." The Authority held that the proposal was within the duty to bargain under section 7121 of the Statute and set aside the agency's allegation to the contrary. (Decision attached.)

3 FLRA No. 49 (May 30, 1980)

Federal Uniformed Firefighters, Local F-169 and U.S. Army Armament Research & Development Command, Dover, New Jersey, Case No. 0-NG-73. The dispute involved a union proposal that the activity grant union representatives reasonable time to prepare for negotiations, impasse resolutions and counterproposals. The

Authority found that the issues raised in the case were identical to those before the Authority in Mather Air Force Base, Case No. 0-NG-183, 3 FLRA No. 47 (reported above). Therefore, for the reasons fully set forth in that case, the Authority held that the union's proposal was within the duty to bargain and set aside the activity's allegations to the contrary. (Decision attached.)

3 FLRA No. 50 (May 30, 1980)

American Federation of Government Employees, AFL-CIO, Local 3354 and U.S. Department of Agriculture, Farmers Home Administration, St. Louis, Missouri, Case No. 0-NG-37. The dispute arose during negotiations of a grievance procedure, as required by section 7121 of the Statute. The activity demanded that certain matters be specifically excluded from coverage of the procedure. The union responded by proposing, in substance, a grievance procedure free of express contractual limitations sought by the activity. The activity alleged that the proposal was outside the duty to bargain becuase it failed to expressly exclude from coverage matters involving the separation or termination of probationary and temporary employees. Based in part on its decision in the VA Medical Center, Minneapolis case, Case No. 0-NG-32, 3 FLRA No. 48 (reported above), the Authority held that the proposal was within the duty to bargain and, accordingly, set aside the activity's allegation to the contrary. (Decision attached.)

ARBITRATION CASE

3 FLRA No. 45 (May 29, 1980)

U.S. Army Armament Research and Development Command, Chemical Systems Laboratory Support, Product Assurance Directorate (Edgewood Arsenal) and National Federation of Federal Employees, Local 178 (Ables, Arbitrator), Case No. 0-AR-1. In a matter that arose and was decided under E.O. 11491, the arbitrator concluded that based upon findings made by the U.S. Civil Service Commision that the grievant was not qualified to be a professional engineer, the grievance could not be sustained. The union requested that the Authority accept its petition for review based upon exceptions alleging that the arbitrator failed to interpret decisions of the Federal Labor Relations Council correctly, that he failed to correctly interpret the grievance procedures in the parties' agreement, and that the award violated law. The Authority held that the union had not presented facts and circumstances sufficient to warrant Authority acceptance of the petition for review. Accordingly,

the Authority denied the union's petition because it failed to meet the requirements for review under the applicable rules of procedure. (Decision attached.)

Attachments (10)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE NAVY
NAVAL EDUCATION AND TRAINING CENTER,
NEWPORT, RHODE ISLAND

Activity

and

Case No. 1-CU-5

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL F-100

Labor Organization/Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under § 7111(b)(2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135, a hearing was held before Hearing Officer Robert E. Bailey. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the subject case, the Authority finds:

The Petitioner seeks to clarify an existing exclusively recognized unit of the civilian personnel of the Fire Protection Branch of the Naval Education and Training Center */ to include ten employees currently classified as Supervisory Firefighter, GS-6, (hereinafter referred to as Fire Captain), contending that these employees are not supervisors within the meaning of § 7103(a)(10) of the Statute. The Activity contends that the incumbents in the subject classification are supervisors within the meaning of § 7103(a)(10) of the Statute and, on this basis, opposes their inclusion in the certified unit. Section 7103(a)(10) defines supervisor as follows:

> 'supervisor' means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent

*/ The Petitioner was certified as the exclusive representative in the unit involved on July 8, 1974.

> exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority;

The Fire Protection Branch is composed of one Fire Chief, two Assistant Fire Chiefs, ten Fire Captains (GS-6), 40 Firefighters (GS-5), and 12 employees who perform various functions ranging from inspectors to alarm operators. The Fire Protection Branch occupies four stations and a headquarters building in the geographical area for which it is responsible. The Headquarters is staffed by the Fire Chief and the two Assistant Fire Chiefs. Fire Station No. One is manned by eight Firefighters and two Captains, No. Three, by six Firefighters, two Captains, No. Six being two separate shifts manned each by seven Firefighters and two Captains (a total of 14 Firefighters and four Captains), plus two Firefighters who stand duty on Gould Island, and Station No. Nine staffed by ten Firefighters and two Captains.

The Fire Chief is the primary supervisory official and is responsible for directing the administrative operation of the Fire Protection Branch. He works a standard 8:00 a.m. to 5:00 p.m. shift, Monday through Friday. The two Assistant Chiefs are supervisors, responsible for overseeing and directing the actual workforce. Their hours correspond with the 24 hour shifts which the Fire Captains and Firefighters work.

Although the Assistant Fire Chiefs are located at Headquarters, their job functions is integrally related to the activities occurring in and about the fire stations. The Assistant Chief is in charge of all firefighting operations once he arrives on the scene of the fire. In most cases, the Assistant Chief will appear from three to five minutes after the arrival of the fire crew led by the Fire Captain. In addition, the Assistant Fire Chief makes at least one daily visit to every fire station; the time spent on the visit ranges between 15 minutes and one hour. The visits may increase depending upon the nature of the problems being experienced by the particular station. The purpose of the visits is to discuss with the station's Fire Captain problems which may have arisen concerning personnel, equipment, building conditions, supplies, and/or departmental procedures. The Assistant Fire Chief is also responsible for training personnel and conducting drills in firefighting technique. The Assistant Fire Chief also officially reviews all the Performance Appraisals submitted by the Fire Captains.

The record reveals that the Fire Captains do have additional duties, responsibilities, and authority in the fire station as compared with the other Firefighters. Their authority is, however, limited. Fire Captains do not hire, promote, suspend, remove, transfer, furlough, layoff, or recall employees. However, Fire Captains assign tasks set out in the Daily Work Assignments, which is, in fact, a directive from Headquarters. The Daily Work Assignments designates the duties to be accomplished by the station crew as a whole on a day to day basis (washing trucks, cleaning equipment and the station). The Captain may order the Firefighter he wishes to do the job. Additionally, he does not have to abide by the daily schedule, so long as the daily work assignments are completed within the week. The record discloses that the assignment of personnel to perform the daily tasks is considered a routine procedure taken directly from a long-standing and established rotation system designed to make each Firefighter share equally in all of the work.

The record further reveals that Fire Captains direct the Firefighters to a limited extent. Captains are the supervisory officer at most fires prior to the arrival of the Assistant Fire Chief (about a three to five minute period). Assistant Fire Chiefs direct all operations once they arrive. All responses to fire are predetermined in a pre-fire plan program. More specifically, drills are conducted for specific alarms, and in case of an actual fire, the fire crew responds exactly as they had previously done in the drill. The instructions for these drills come from the Assistant Fire Chiefs.

Fire Captains do undertake annual performance evaluations of employees. Evidence indicates that not much time is devoted to this responsibility. These evaluations apparently have some impact in rating the employees in determining the order of RIF's. Captains are also responsible for approving within-grade increases to employees, but cannot award quality step increases.

The record discloses that Fire Captains do have limited authority to discipline employees. They can issue oral and written reprimands. They cannot, however, unilaterally suspend employees and the evidence indicates that their recommendations carry little, if any, weight. The Captains also have a limited authority to award employees. In evaluating employees, the ratings may be such as to gain additional seniority for the employee and/or a small monetary award. Apparently, the Captain may also submit a recommendation for an award outside of the performance evaluation. Recommendations for promotion by Captains also appear to have little influence on Activity promotional decisions.

Fire Captains do have the authority to adjust minor grievances if the settlements are satisfactory to the employee. They do not participate once a formal grievance is filed. Fire Captains do not have official contact with shop stewards. The Captains are responsible for maintaining order within the work place.

As previously indicated the Federal Labor-Management Relations Statute, § 7103(a)(10), provides that in determining the supervisory status of a firefighter, a more particular standard of assessment will be applied as compared to other employees. Section 7103(a)(10) states:

> with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such (supervisory) authority;

The record reveals, as detailed above, that although certain aspects of the Fire Captains' job function may involve the exercise of supervisory authority, their overall employment time is spent in either routinely administering Activity directives, performing routine and clerical duties, or waiting to respond to an alarm.

The Authority thus finds that the evidence contained in the record supports the Petitioner's contention that the Fire Captains, GS-6, are not supervisors under § 7103(a)(10) of the Statute, in that they do not devote a preponderance of their employment time to supervisory functions. Accordingly, the Authority finds Fire Captains serving at fire houses at the Naval Education and Training Center, Newport, Rhode Island, are not supervisors within the meaning of the Statute, and will be included within the bargaining unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified, in which exclusive recognition was granted to the International Association of Firefighters, Local F-100, on July 8, 1974, at the Naval Education and Training Center, Newport, Rhode Island, be and hereby is, clarified by including in said unit the position of Supervisory Firefighter, GS-6 (Fire Captain).

Issued, Washington, D.C., May 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. NAVAL ORDNANCE STATION,
LOUISVILLE, KENTUCKY

Respondent

and

Assistant Secretary
Case No. 41-6355(CA)

LOCAL LODGE 830,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO

Complainant

DECISION AND ORDER

This matter is before the Authority pursuant to Regional Director Seymour X. Alsher's Order Transferring Case to the Federal Labor Relations Authority in accordance with § 206.5(a) of the Regulations of the Assistant Secretary of Labor for Labor-Management Relations.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under § 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by § 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in § 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts, accompanying exhibits, and briefs submitted by the parties, the Authority finds:

The complaint herein alleges that the Respondent violated § 19(a)(1) and (6) of Executive Order 11491, as amended, by unilaterally making changes in its Blood Donor Program on July 20, 1978, without negotiating about its decision with the Complainant, the exclusive representative of its employees. The Respondent's position is that the parties' negotiated agreememt contained a waiver of the Complainant's bargaining rights pursuant to § 11(a) of the Order. While the parties' latest negotiated agreement had expired at the time of the alleged unilateral change, the Respondent contends that the waiver contained therein survived the expiration of the agreement as a term and condition of employment, citing the Federal Labor Relations Council's (the Council) decision in Internal Revenue Service, Ogden Service Center, and Internal Revenue Service, et al, FLRC No. 77A-40, Report No. 147 (March 23, 1978).

The undisputed facts, as stipulated by the parties, are as follows:

The Complainant has been the exclusive representative for a unit of the Respondent's employees since 1962. Consecutive negotiated agreements have been in effect since that time. The parties' latest agreement was entered into on September 20, 1974 and was amended, in part, on September 20, 1976. The agreement expired by its terms on September 19, 1977, and it was extended by mutual agreement until November 19, 1977. Article 4 of the parties' September 20, 1974 negotiated agreement deals with the extent of the parties' bargaining obligation. Section 1 of Article 4 defines consultation as a seeking of the views of the other party which results in an "objective exploration and consideration" of those views. Section 1.b(3) states that "Consultation, unlike negotiation, does not involve joint decision making, and the consultative process need not result in agreement." Article 4 then states that "matters appropriate for consultation cover aspects of policies, procedures and working conditions that would affect employees in the unit", including the changing of any work practice. Section 2 of Article 4 defines negotiation as "discussion between the Employer and Union Representatives, on matters within the discretion of the Employer, leading to a mutually agreed to written Employer-Union agreement," and it indicates that "negotiation may occur at the time an existing agreement expires and a new one is required." The negotiated agreement makes no reference to the Respondent's Blood Donor Program.

The policies and procedures concerning the donation of blood to the Blood Bank by the Respondent's employees were last set forth in a 1975 policy statement known as NOSLOUINST 12630.6a. It was stipulated that it had been the long-standing policy of the Respondent to grant its employees up to four hours of administrative leave for participtation in the Blood Donor Program. On April 24, 1978, the Respondent sent the Complainant copies of a proposed new policy statement concerning the Blood Donor Program, and a memorandum seeking comments regarding the new policy. The major changes in the program would have limited the granting of administrative leave for participation in the Blood Donor Program to day shift employees and limit the period of leave granted to two hours. The Complainant made a timely request for negotiations concerning the proposed new policy pursuant to its rights under § 11(a) of the Order. The Respondent took the position that the parties' negotiated agreement, at Article 4 contained a waiver of the Complainant's § 11(a) bargaining rights, and that, while the agreement had terminated, the waiver continued as a term and condition of employment, citing the Council's Ogden Service Center decision, above. Under these circumstances, the Respondent indicated its willingness to consult with the Complainant, thereby fulfilling its obligation pursuant to Article 4 of the agreement. As the parties were unable to resolve their differences over the extent of their bargaining obligation with respect to the changes in the Blood Donor Program, there was never any discussion of the specific matters raised by the Respondent's new policy statement, and the Respondent issued a final version of the new Instruction on July 20, 1978. There has been a marked decrease in the incidence of blood donations among the Respondent's employees since the issuance of that final Instruction.

The Council's Ogden Service Center decision, cited above, indicated in pertinent part, that:

> In our view, existing personnel policies and practices and matters affecting working conditions, whether or not they are included in a negotiated agreement, continue as established upon the expiration of a negotiated agreement, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of the agreement or unless otherwise modified in a manner consistent with the Order.

Thus, by the terms of the Council's Ogden decision, it is appropriate to have one portion of a negotiated agreement, § 2 of Article 4 in this case, supercede or negate another portion of the agreement upon the expiration of that agreement.

In the Authority's view, § 2, Article 4 of the parties' September 20, 1974 agreement, which, as noted above, indicated that "negotiations may occur at the time an existing agreement expires and a new one is required," became operative at the time the parties' agreement terminated on November 19, 1977, and it is therefore unnecessary for the Authority to reach the question of whether § 1, Article 4 of the parties' agreement constituted a waiver by the union of its 11(a) bargaining rights or whether such a waiver would have survived the agreement's termination pursuant to principles set forth in the Council's Ogden decision. The parties herein had begun negotiations for a new agreement prior to the date on which the September 20, 1974 agreement terminated and the parties were still engaged in negotiations for a new agreement during the period between the date of the Activity's submission to the union of its proposed new Instruction concerning blood donations and the date of the unilateral implementation of that policy by the Respondent. While the Blood Donor Program was not covered by the parties' September 20, 1974 agreement, the changes brought about by the new policy regarding blood donations fall within the definition of matters requiring negotiation by the terms of the parties' own agreement, as they are a "matter within the discretion of the Employer" related to personnel policies, practices, and matters affecting working conditions or other relationships. Therefore, the Authority finds that the Respondent violated § 19(a)(1) and (6) of the Order by refusing to negotiate with the union regarding changes in its Blood Donor Program as proposed on April 24, 1978, and implemented on July 20, 1978, based on its incorrect interpretation of the parties' negotiated agreement. Moreover, the Authority finds that the issues raised by the changes in the Blood Donor Program relate to existing personnel policies and practices and matters affecting working conditions within the meaning of § 11(a) of the Order. In so finding, the Authority rejects the Respondent's contention that the changes effectuated pursuant to the revised Instruction concerning the Blood Donor Program were reserved to management under its § 12(b)(3) right to relieve employees from duties because of lack of work or for other legitimate reasons or its § 12(b)(4) right to maintain the efficiency of Government operations entrusted to them. In this regard, the Respondent has provided no basis to support the contention that they had a management right to unilaterally make changes in the aspects of the Blood Donor Program which were at issue, as no evidence was presented as to the relationship between the issues raised by changes in the Blood Donor Program and the reserved management rights set forth in § 12(b)(3) and (4). Accordingly, the Respondent's unilaterial changes concerning these matters was in derogation of its bargaining responsibility under the Order.

ORDER

Pursuant to § 2400.2 of the rules and regulations of the Federal Labor Relations Authority and § 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the U.S. Naval Ordnance Station, Louisville, Kentucky, shall:

1. Cease and desist from:

(a) Refusing to negotiate with Local Lodge 830, International Association of Machinists and Aerospace Workers, AFL-CIO, with regard to changes in personnel policies, practices, and matters affecting working condition, including proposed directives relating to such matters.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the policies and provisions of the Order;

(a) Rescind NOSLOU Instruction 12630.6B, dealing with the Blood Donor Program, dated July 20, 1978.

(b) Upon request, meet and confer in good faith with Local Lodge 830, International Association of Machinists and Aerospace Workers, AFL-CIO, concerning personnel policies, practices, and matters affecting working conditions of employees represented by Local Lodge 830, including proposed directives relating to such matters.

(c) Post at its facility at the U.S. Naval Ordnance Station, Louisville, Kentucky, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by Commanding Officer, U.S. Naval Ordnance Station, Louisville, Kentucky and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 28, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We Hereby Notify Our Employees That:

WE WILL NOT refuse to negotiate with Local Lodge 830, International Association of Machinists and Aerospace Workers, AFL-CIO, with regard to changes in personnel policies, practices, and matters affecting working conditions, including proposed directives relating to such matters.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind NOSLOU Instruction 12630.6B, dealing with the Blood Donor Program, dated July 20, 1978.

WE WILL, upon request, meet and confer in good faith with Local Lodge 830, International Association of Machinists and Aerospace Workers, AFL-CIO, concerning personnel policies, practices, and matters affecting working conditions of employees represented by Local Lodge 830, including proposed directives relating to such matters.

_____
(Agency or Activity)

Dated:_____ By:_____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, whose address is: 1776 Peachtree Street, NW., Suite 501, North Wing, Atlanta, Georgia, 30309, and whose telephone number is: (404) 881-2324.

3 FLRA No. 42

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF AGRICULTURE
U.S. FOREST SERVICE
SIUSLAW NATIONAL FOREST
CORVALLIS, OREGON

Activity

and

Assistant Secretary
Case No. 71-5004(GA)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 454

Applicant

DECISION AND ORDER

On September 10, 1979, the Administrative Law Judge issued his recommended decision and order in the above-entitled proceeding, finding that the issue raised in Grievance No. 2 was previously raised in an unfair labor practice complaint and thus Section 19(d) of the Order barred such grievance from consideration under the grievance/arbitration procedure of the parties negotiated agreement. He concluded as well that all the other grievances were arbitrable under the parties' negotiated agreement, and that the arbitrator should decide, as a threshold question, whether these grievances were timely filed within the meaning of the agreement. Thus, he concluded that all grievances except No. 2 be found to be subject to the arbitration procedure set forth in the parties' negotiated agreement. No exceptions were filed to the Administrative Law Judge's recommended decision and order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under Section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by Section 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980.) The Authority continues to be responsible for the performance of these functions as provided in Section 7135(b) of the Federal Service Labor-Management Statute (92 Stat. 1215).

Therefore, pursuant to Section 2400.2 of the Authority's rules and regulations and Section 7135(b) of the statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's recommended decision and order and the entire record in the subject case, the Authority hereby adopts the Administrative Law Judge's findings, conclusion and recommendation. */

ORDER

IT IS HEREBY ORDERED that all grievances except No. 2 are subject to the arbitration procedure set forth in the parties negotiated agreement.

Issued, Washington, D.C., May 28, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

*/ In conformity with Section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The Decision and Order does not prejudge in any manner either the meaning or application of related provisions in the new statute or the results which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of

DEPARTMENT OF AGRICULTURE
UNITED STATES FOREST SERVICE
SIUSLAW NATIONAL FOREST
CORVALLIS, OREGON
Activity

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 454
Applicant

Case No. 71-5004(GA)

WILLIAM J. DUGGAN
Employee Relations Specialist
U.S. Forest Service
P.O. Box 3623
Portland, Oregon 97208
For the Activity

P.J. HEATH
President, Local 454
National Federation of Federal Employees
P.O. Box 726
Corvallis, Oregon 97330
For the Applicant

CATHERINE WAELDER, ESQUIRE
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036
(On the Brief)

Before: GARVIN LEE OLIVER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding on an Application for Decision on Grievability or Arbitrability filed pursuant to Section 13(d) of Executive Order 11491, as amended, and 29 C.F.R. Part 205 (1975) by the National Federation of Federal Employees, Local 454 (Applicant) challenging a determination by the Department of Agriculture, U.S. Forest Service, Siuslaw National Forest, Corvallis, Oregon (Activity) that seven grievances filed by the Applicant were not arbitrable under the parties' negotiated agreement.

Pursuant to a Notice of Hearing issued by the Regional Director, Federal Labor Relations Authority, Region 9, San Francisco, California, a hearing on the application was conducted at Corvallis, Oregon. The parties were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and present oral argument, and briefs.

Based on the entire record, including the exhibits and other relevant evidence adduced at the hearing, I make the following findings of fact, conclusions, and recommendations.

Findings of Fact and Conclusions

1. The Applicant and the Activity were parties to a negotiated agreement, effective July 7, 1976 for a term of two years, which was in effect at all material times herein.

2. Article 8.1 of the agreement provided that, "A grievance may be undertaken by the Local, an employee, or a group of employees over the interpretation, application, or violation of any matter which is contained within this Agreement or within published agency personnel policy; working conditions and working environment; or relationships with agency supervisors and officials.

3. Article 8.1(a) provided that the "grievance procedure does not apply to cases involving discrimination complaints, classification appeals, adverse actions, reductions-in-force, or other situations for which alternative appeals procedures are established by law or regulation."

4. Article 8.1(b) provided that "the employee shall attempt to resolve the grievance directly with his or her immediate supervisor within fifteen (15) working days of the alleged incident or problem on which the grievance is based."

5. Article 8.2 provided that, "Failure of the employee to meet the time limits specified at each step without reasonable justification entitles the employer to refuse to consider the grievance. All time limits may be extended by mutual agreement between the grievant and the employer."

6. Article 8.1(c) provided that, "If not satisfied with the Chief's decision, the employee may elect to submit the grievance to arbitration following the procedures in Article IX."

7. Article 9.1 provided that, "Arbitration consistent with applicable regulations is an acceptable channel for settling disputes relative to interpretation or application of this Agreement."

8. This matter arose as a result of the termination of unit employee William Friday effective February 21, 1978, as ordered by letter of the Employment Officer dated February 15, 1978. (Complainant's Ex. C-4).

9. An equal employment opportunity complaint relating to Mr. Friday's discharge was initiated in April 1978. (Respondent's Ex. 14). A hearing has been requested on the complaint. (Respondent's Ex. 19).

10. On May 10, 1978 an appeal pursuant to Part 752, Subpart B of the Civil Service Regulations was submitted to the Federal Employee Appeals Authority (FEAA) on behalf of Mr. Friday relating to the removal action. On June 29, 1978 the Seattle Field Office of the FEAA determined that Mr. Friday, as an excepted service appointee with less than one year of current continuous employment, did not have a right of appeal. (Respondent's Ex. 13).

11. On May 22, 1978 the Applicant filed an unfair labor practice charge upon the Activity which subsequently became Assistant Secetary Case No. 71-4744(CA). The charge alleged that the Activity "unilaterally made a list of rules regarding operations at the YACC Camp at Gardiner, Oregon without consulting the Local, which has exclusive recognition." (Complainant's Exhibit C-14).

12. The Applicant filed six grievances on May 23, 1978 on behalf of Mr. Friday. (Respondent's Exhibit 3). The grievances allege:

> 1. Management failed to follow proper procedures in the dismissal of the employee.
>
> 2. Rules were cited in the termination letter of February 15, but said rules were invalid in that they had not been negotiated with the Local. This grievance is concerned with the citing of invalid rules.
>
> 3. The above letter cited that he had problems with his supervisor, which is not verified by his supervisor. In fact, his supervisor was not even aware of Mr. Friday's termination until after the fact.

> 4. The letter cited said that Mr. Friday used improper methods of problem resolution.
>
> 5. Mr. Stump failed to use proper methods of problem resolution, in that he failed to consult with Mr. Friday's supervisor.
>
> 6. You failed to notify the Local of the name, position, and duty station of new employees. Article XIII of the Agreement.

13. On May 26, 1978 the Forest Supervisor refused to consider the grievances on the grounds that the time limits had not been met. (Respondent's Exhibit 4).

14. On May 26, 1978 the Applicant, by Mr. Gump, urged the Forest Supervisor to consider the grievances, alleging, in part, that the last letter containing information needed to pursue these grievances was not received until after May 13. (Complainant's Exhibit 7).

15. On May 31, 1978 the Applicant filed a seventh grievance which alleged:

> You have failed to insure that the employees are apprised of their rights in the Agreement, as agreed to in Article III, paragraph 3.3, Rights of Employees. (Complainant's Ex. 8).

This grievance was clarified on June 8, 1978 as "based upon your failure to inform Mr. Friday of his rights under the agreement, Article III, 3.3." (Respondent's Ex. 6). The Applicant alleged that it first learned of the alleged failure as a result of the Activity's letter on May 26, 1978. (Complainant's Exhibit 8).

16. The Forest Supervisor also refused to consider the seventh grievance on the grounds that it was not initiated within 15 days of the incident. (Respondent's Exhibit 8).

17. In advancing the grievances to the Regional Forester (Step 1), the Applicant offered reasons for the delay in initiating the grievances and why they should be considered under the agreement. (Complainant's Exhibit 10). All levels of grievance review were exhausted.

18. On October 2, 1978 the Applicant invoked arbitration. The Activity rejected arbitration on the grounds that the grievances were not filed in a timely manner as required by the negotiated grievance procedure; the

grievances were non-specific; and duplicated in part by a discrimination complaint and an unfair labor practice complaint. (Respondent's Exhibit 12; Complainant's Exhibit 12).

There is considerable additional evidence in the record. However, in view of my analysis of the facts and the law governing the basic issue in this case, I deem such evidence irrelevant to the proper determination of the application.

Discussion, Conclusions, and Recommendations

The Federal Labor Relations Council has outlined the scope of responsibility for determining arbitrability disputes under Sections 6(a)(5) and 13(d) of Executive Order 11491, as amended, in Department of the Navy, Naval Ammunition Depot, Crane, Indiana, FLRC No. 74A-19 (1975) and Community Services Administration, 5 FLRC 727, FLRC No. 76A-149(1977). In Crane the Council stated:

> In any dispute referred to the Assistant Secretary concerning whether a grievance is on a matter subject to the negotiated grievance procedure, the Assistant Secretary must decide whether the dispute is or is not subject to the negotiated grievance procedure, just as an arbitrator would if the question were referred to him. In making such a determination, the Assistant Secretary must consider relevant provisions of the Order, including section 13, and relevant provisions of the negotiated agreement, including those provisions which describe the scope and coverage of the negotiated grievance procedure, as well as any substantive provisions of the agreement which are being grieved. [Council decision at 4.]

In Community Services Administration the Council noted that Section 13(d) of the Order does not require the Assistant Secretary to interpret and apply provisions of the negotiated agreement. Indeed, such action is inconsistent with the purposes and policies of the Order. In clarifying its apparently contrary holding in Crane, the Council stated:

> In deciding whether a dispute is or is not subject to a particular negotiated grievance procedure, it is the responsibility of the Assistant Secretary to consider those "provisions which describe the scope and coverage of the negotiated grievance procedure," i.e., the general scope of such

> procedure as well as any specific exclusions therein. That is, he must decide, just as an arbitrator would decide at the outset in the Federal sector ... whether the grievance involves a dispute which the parties intended to be resolved through their negotiated grievance procedure. The Assistant Secretary's consideration of "substantive provisions of the agreement being grieved" would be for the limited purpose of determining whether the grievance involves a claim which on its face is covered by the contract, i.e., involves a matter which arguably concerns the meaning of application of the substantive provision(s) being grieved and which the parties intended to be resolved under the negotiated grievance procedure. The Council's statement in Crane that the Assistant Secretary must decide whether or not a dispute is subject to the negotiated grievance procedure "just as an arbitrator would if the question were referred to him," while perhaps ambiguous, was not intended and should not be construed to mean that the Assistant Secretary may interpret the substantive provisions of an agreement in resolving a grievability or arbitrability question as an arbitrator would in deciding the merits of a grievance. Instead, the Council's statement was intended to indicate that the Assistant Secretary must decide a question of grievability or arbitrability under a negotiated grievance procedure where such question is referred to him, just as an arbitrator would be required to decide the question of grievability or arbitrability where the parties bilaterally agree to refer such threshold issue to the arbitrator pursuant to section 13(d) of the Order. [Council decision at 5-6 (footnotes omitted; emphasis in original).]

Examining the application under these standards, it is concluded that the grievances are not barred from the grievance/arbitration procedure under Section 19(d) of the Executive Order by virtue of Mr. Friday's appeal to the Federal Employee Appeals Authority. As an excepted service appointee with less than one year of current continuous employment, Mr. Friday did not have a right of appeal to the Civil Service Commission. (Respondent's Exhibit 13; Tr. 61-62).

The grievances are also not barred from the grievance/arbitration procedure under Section 19(d) of the Executive Order by virtue of Mr. Friday's equal employment opportunity complaint. The issue in that proceeding will necessarily be limited to the sex discrimination issue raised by Mr. Friday. (Respondent's Exhibit 17-19). Cf. Veterans Administration, Veterans Benefits Office, 3 A/SLMR 444, A/SLMR No. 296 (1973).

Grievance number 2, however, is barred by Section 19(d) of the Executive Order inasmuch as that grievance, alleging that certain rules were invalid because they were not negotiated with the Union, was previously raised in an unfair labor practice complaint. (Complainant's Exhibit C-14; Assistant Secretary Case No. 71-4744(CA).)

The remaining grievances, numbers 1 and 3 through 7, are subject to arbitration under the parties' negotiated agreement. Article 8.1(c) provides that a grievance may be submitted to arbitration if the employee is not satisfied with the Chief's decision. It is uncontested that all previous levels of grievance review have been exhausted. The grievances also present the threshold issue of whether the Applicant's failure to meet the time limits specified for the filing of grievances were "without reasonable justification" under Article 8.2 of the agreement. The Applicant filed with the grievances reasons why it felt the grievances should be considered to be timely under the circumstances. The Activity, in effect, found that these reasons did not provide reasonable justification for failure to comply with the time limits. Article 9.1 of the parties' negotiated agreement provides that "arbitration ... is an acceptable channel for settling disputes relative to the interpretation or application of the Agreement." Since the grievances involve a dispute as to the interpretation and application of the "reasonable justification" standard contained in the negotiated agreement for determining the timeliness of grievances and are otherwise matters which the parties determined should be resolved by resort to arbitration under Article 8.1(c), I conclude that all the grievances except number 2 are arbitrable under Article 8.1(c) and 9.1 of the local agreement, and the arbitrator must decide, as a threshold question, whether these grievances were timely filed within the meaning of Article 8.2 of the agreement.

The parties presented evidence and asserted that the threshold issue of timeliness may be determined in this proceeding. However, I conclude that this issue involves an interpretation and application of the agreement, and therefore

must be resolved by the arbitrator. Cf. Department of the Air Force, Newark Air Force Station, A/SLMR No. 1044 (1978).

Recommendation

It is recommended that all grievances except number 2 in Case No. 71-5004(GA) be found to be subject to the arbitration procedure set forth in the parties' negotiated agreement.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: 10 SEP 1979
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL COUNCIL OF FIELD LABOR LOCALS,
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Union

and

Case No. 0-NC-79

U.S DEPARTMENT OF LABOR,
WASHINGTON, D.C.

Agency

DECISION ON NEGOTIABILITY ISSUES

This case comes before the Federal Labor Relations Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. secs. 7101-7135.

The three union proposals in issue arose from negotiations to establish a Special Placement Plan to provide placement opportunities for Office of Federal Contract Compliance Programs employees in the union's bargaining unit who were adversely affected by the consolidation of the E. O. 11246 contract compliance function in the Department of Labor.

Union Proposal I

E. Basic Requirements

. . . . . .

2. Area of Fligibility

a. In recognition of the merit principles established by the Civil Service Reform Act of 1978, and the inherent differences between a supervisory and a

nonsupervisory position, the parties agree that the competitive procedures of the Department's Merit Promotion Plan will be utilized when filling supervisory or management positions with bargaining unit employees.

Question Here Before The Authority

The question is whether Union Proposal I is outside the ambit of the duty to bargain under section 7117 of the Statute 1/ as alleged by the agency.

1/ Section 7117(a)(1) of the Statute provides:

Sec. 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

The term "matters" as used in section 7117(a)(1) is explained by reference to the definition of "collective bargaining" in section 7103(a)(12) and "conditions of employment" in section 7103(a)(14) of the Statute:

Sec. 7103. Definitions; application

(a) for the purpose of this Chapter --

. . . . . .

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees. . . .

. . . . . .

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions. . . .

Opinion

Conclusion: Union Proposal I is outside the scope of the duty to bargain under Section 7117 of the Statute. Accordingly, pursuant to Section 2424.10 of the Authority's rules and regulations, 45 F. R. 35123, the agency's allegation that the disputed proposal is not within its duty to bargain is sustained. 2/

Reasons: The agency asserts that Union Proposal I is outside management's obligation to bargain under Section 7117 of the Statute because it relates to the method that management will use in filling supervisory and management positions, which are non-bargaining unit positions. The Authority agrees with the agency's contention. The proposal puts conditions on filling supervisory and management positions which are outside the unit and may not be included in appropriate units by operation of section 7112(b)(1) of the Statute. An exclusive representative's obligation and correlative rights, however, extend only to employees in the unit, under section 7114(a)(1). 3/ Furthermore, the definition of "collective bargaining" found in section 7103(a)(12) and set out at footnote 1, supra, restricts the scope of the obligation to bargain in good faith to matters affecting the conditions of employment of employees in an appropriate unit. Consequently, the agency has no obligation to bargain over matters relating to the non-bargaining unit positions referred to in the proposal. Thus, as the proposal goes beyond the representation rights of the exclusive representative and does not directly relate to conditions of employment of unit employees, it is outside the duty to bargain under the Statute.

Union Proposal II

E. Basic Requirements
2. Area of Eligibility
. . . . . .
b. Bargaining Unit Employees to Bargaining Unit Positions
(1) . . . . . .
The procedures for reassignment are as follows:
. . . . . .

2/ In view of the decision herein that the union's proposal is not within the duty to bargain, it is unnecessary to consider the remaining contention of the agency that the proposal conflicts with Section 7106(a)(2)(C) of the Statute.

3/ Section 7114(a)(1) of the Statute provides, in pertinent part:

Section 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit.

> The most senior qualified volunteer in terms of SCD [service computation date] will be offered the reassignment. If no eligible qualified employee volunteers for the particular vacant position, the position, if to be filled, will then be filled through the normal staffing procedures outlined in Article 20 of the Master Collective Bargaining Agreement.

c. The procedures outlined above will be used on a continuing basis until all eligible employees have been placed in a permanent position or until the extended detail authority expires, whichever is earlier.

Question Here Before the Authority

The question is whether, as alleged by the agency, Union Proposal II violates the right of the agency to assign employees under section 7106(a)(2)(A) of the Statute. 4/

Opinion

Conclusion: Union Proposal II violates the right of the agency to assign employees under section 7106(a)(2)(A) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 45 F.R. 3513, the agency's allegation that the disputed proposal is not within its duty to bargain is sustained.

Reasons: The agency contends that Union Proposal II violates its right to assign employees under section 7106(a)(2)(A) of the Statute because under the proposal, the selection of employees for reassignment would be based totally on an employee's service computation date, which would clearly interfere with the agency's authority to decide upon the selection of an individual once a decision had been made to fill a position. The Authority agrees with the agency's contention. In this regard, the Authority stated when ruling on a similar proposal that the discretion to determine which employee will be

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4/ Section 7106(a)(2)(A) of the Statute provides, in relevant part:

Section 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

. . . . . .

(2) in accordance with applicable laws--

(A) to . . . assign . . . employees in the agency . . . .

assigned is implicit in the right to assign. 5/ It follows that a procedure for selecting employees for reassignment solely on the basis of the most senior qualified volunteer in terms of service computation date removes from management the discretion to determine which employee will be reassigned, an essential part of the decision to reassign. Thus, because Union Proposal II interferes with the agency's right to reassign employees, it is in violation of section 7106(a)(2)(A).

Union Proposal III

H. The cited permanent reassignments which the Department has ordered prior to final agreement of this plan shall be rescinded and handled in accordance with the provisions of this plan.

Question Here Before The Authority

The question is whether, as the agency alleges, Union Proposal III is outside the ambit of the duty to bargain under section 7117 of the Statute. 6/

Opinion

Conclusion: Union proposal III is outside the scope of the duty to bargain under section 7117 of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 45 F.R. 3513, the agency's allegation that the disputed proposal is not within its duty to bargain is sustained.

Reasons: The agency asserts that Union Proposal III is outside management's obligation to bargain under section 7117 of the Statute because the clear intent of the proposal is to negotiate the criteria/method that will be used in filling non-bargaining unit positions. For the reasons discussed in connection with Union Proposal I, herein, the Authority agrees with the agency's contention to the extent that the language of the proposal would require the rescission of assignments involving non-bargaining unit employees. Thus, to the extent that the scope of Union Proposal III affects non-bargaining unit employees, it is outside the duty to bargain under the Statute.

Issued, Washington, D.C., May 29, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

5/ See American Federation of Government Employees, AFL-CIO, and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, Case No. 0-NG-40, 2 FLRA No. 77 (January 31, 1980).

6/ Note 1, supra.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFL-CIO, LOCAL 3529

(Labor Organization)

and

Case No. O-NG-14

DEFENSE CONTRACT AUDIT AGENCY

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Statute (5 U.S.C. § 7101 et seq.).

Union Proposal

The description of the proposal at issue contained in a letter from Ronald D. King, Director, Contract and Appeals Division, AFGE to Frederick Neuman, Director of the DCAA, dated December 12, 1978, is:

> . . . to have the DCAA auditor rotation policy not apply to the bargaining unit . . . .

Question Here Before the Authority

The question is whether the union's proposal is outside the agency's duty to bargain under the Federal Service Labor-Management Relations (FSLMR) Statute, as alleged by the agency.

The union raised a threshold issue objecting to the Authority's requesting the agency to supplement its initial submission. Additional information was requested from both parties to complete the case file since neither party in its initial submission gave an accurate or complete description of the present status of the parties' dispute. Therefore, the union's objection cannot be sustained.

Opinion

Conclusion: The subject proposal violates section 7106(a)(2)(A) of the FSLMR Statute.*/ Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, 45 F. R. 3513, the agency's allegation that the disputed proposal is not within the duty to bargain is sustained.

Reasons: The record before the Authority indicates that the agency's auditor rotation policy establishes a maximum period for the continuous assignment of an auditor at one location, after which an auditor would be subject to a change in assignment. The agency memorandum establishing this policy, in essence describes such "changes in assignment" as changes within the organizational structure of the agency, specifically:

> (1) Moves (lateral or by promotion) to other duty stations such as reassignment between FAOs, suboffices, PLA activities and/or regional headquarters.
>
> (2) Major work assignment changes with or without change of duty station which completely change the contractor contacts and work relationships of the employee. Some examples are, moves within an FAO between mobile audit work and permanent offices or suboffices, between mobile audit teams involving a completely new group of contractors, and change of FAO cognizance for personnel at regional headquarters level.

The union's proposal essentially would preclude the agency from applying this mandatory reassignment policy to bargaining unit employees. The agency contends, insofar as is relevant herein, that the proposal violates section 7106(a)(2)(A) of the Statute. In view of the decision that the proposal violates section 7106 of the Statute, the Authority finds it unnecessary to consider the agency's additional contentions.

Section 7106(a)(2)(A) reserves to management the right to "assign . . . employees in the agency." The Authority recently considered the meaning of the term "assign . . . employees" in American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, No. 0-NG-40, 2 FLRA No. 77 (Jan. 31, 1980), stating at 10:

---

*/ Section 7106(a)(2)(A) of the Statute provides:

> § 7106. Management rights
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--
>
> . . . . . .
>
> (2) in accordance with applicable laws--
>
> (A) to hire, assign, direct, layoff, and retain employees in the agency[.]

> The right to assign employees in the agency under section 7106(a)(2)(A) of the Statute is more than merely the right to decide to assign an employee to a position. An agency chooses to assign an employee to a position so that the work of that position will be done. Under section 7106(a)(2)(A) of the Statute, the agency retains discretion as to the personnel requirements of the work of the position, i.e., the qualifications and skills needed to do the work, as well as such job-related individual characteristics as judgment and reliability. Therefore, the right to assign an employee to a position includes the discretion to determine which employee will be assigned.

Thus, the Authority has determined that a proposal which divests management of its discretion to assign employees would be in violation of section 7106(a)(2)(A) of the Statute.

In this instance, management's right to assign is manifested in its mandatory reassignment policy. The present proposal would prohibit management from applying the policy to bargaining unit employees and, therefore, would prohibit management from changing the assignment of auditors who have completed designated periods of continuous assignment at single locations. Since the proposal therefore constitutes a bar to management's making rotational assignments within the bargaining unit, it clearly divests management of any discretion to assign employees in that regard, and thus violates section 7106 (a)(2)(A).

In so deciding, the Authority notes that procedures which management will observe in exercising its authority to reassign, as well as appropriate arrangements for employees adversely affected by such reassignment, would be proper matters for negotiation under section 7106(b)(2) and (3) of the Statute.

Accordingly, the proposal at issue violates section 7106(a)(2)(A) of the Statute, and, therefore, is not within the duty to bargain.

Issued, Washington, D.C., May 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1692

(Union)

and

Case No. 0-NG-183

HEADQUARTERS, 323rd FLYING TRAINING WING (ATC), MATHER AIR FORCE BASE, CALIFORNIA

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

Union Proposal

Management will allow equal official time to the Union Negotiation Team, as allotted to the Management Negotiation Team, for preparation of Contract Negotiations.

Question Here Before the Authority

The question is whether the union's proposal providing that equal official time to prepare for contract negotiations be allotted to the union and management negotiators is within the duty to bargain or, as alleged by the agency, violates section 7131(b) of the Federal Service Labor-Management Relations Statute (the Statute). 1/

1/ Section 7131 of the Statute (92 Stat. 1214) provides in part, as follows:

§ 7131. Official time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this [Statute] shall be authorized official time for such purposes, including attendance at impasse proceeding[s], during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(Continued)

Opinion

Conclusion: The subject proposal does not violate section 7131 of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that the disputed proposal is not within the duty to bargain is set aside. The request to submit written presentations in the instant case, filed by the American Federation of Government Employees, AFL-CIO, pursuant to § 2429.9 of the Authority's rules, is denied. To hold otherwise would cause an unwarranted delay in the processing of the case. See also § 2424.8 of the Authority's rules (45 Fed. Reg. 3512 (1980)).

Reasons: As previously stated, the agency alleges that the union's proposal violates section 7131(b) of the Statute. More specifically, the agency contends that the Statute grants official time to an employee in the negotiation of a collective bargaining agreement but does not provide official time in connection with preparation for such negotiations. According to the agency, preparation for negotiations must be construed as "internal union business" within the meaning of section 7131(b) of the Statute in that, unlike time spent in negotiations, preparation is not of mutual concern to both the union and management.

(Continued)

> (b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.
>
> . . . . .
>
> (d) Except as provided in the preceding subsections of this section--
>
> (1) any employee representing an exclusive representative, or
>
> (2) in connection with any other matter covered by this [Statute], any employee in an appropriate unit represented by an exclusive representative,
>
> shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

In American Federation of Government Employees, AFL-CIO, Local 2823 and Veterans Administration Regional Office, Cleveland, Ohio, Case No. 0-NG-8, 2 FLRA No. 1 (Oct. 9, 1979), the Authority recently stated, with regard to the interpretation and application of section 7131(b) of the Statute, as follows:

> Section 7131(b) of the Statute requires that activities relating to the internal business of a labor organization be performed by an employee while that employee is in a non-duty status, i.e., not on duty time.
>
> . . . .
>
> The Statute does not expressly define the phrase "internal business of a labor organization." Section 7131(b) merely lists examples of some activities which are related to the "internal business of a labor organization," i.e., solicitation of membership, election of labor organization officials, and collection of dues. None of these specific examples have any relationship to...the subject of the disputed proposal.
>
> The provision regarding official time in the version of the bill reported out of the Senate-House Conference Committee, which was enacted and signed into law (§ 7131), was identical to that in the bill (H.R. 11280) reported out of the House Committee (§ 7132) and in the final version of the bill passed by the House (the "Udall substitute"). The Report which accompanied the House Committee bill indicated that subsection (b) of the provision on official time was intended to require that matters solely relating to the internal business of a labor organization be performed when an employee is in a non-duty status [H.R. REP. No. 95-1403, 95th Cong., 2d Sess. 58-59 (1978)]. [Footnotes omitted.]

The Authority further noted that proponents of the Udall substitute indicated during floor debate that subsection (b) was meant to be strictly construed to apply only to those activities concerning the "structure and institution" of the labor organization. In this regard, the Authority referred to the following statement of Representative Clay (124 CONG. REC. H 9638 (daily ed. Sept. 13, 1978)):

> Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal business of a labor organization. The section also lists three such activities reflecting our intention that "internal business" be strictly construed to apply only to those activities regarding the structure and institution of the labor organization. Activities that involve labor-management contacts are not included in this section. Nor is preparation for such activities, such as grievances, bargaining, unfair labor practice proceedings, included within this section. Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities. [Emphasis added.]

The Authority also referred to the following statement of Representative Ford to the same effect (124 CONG. REC. H 9650 (daily ed. Sept. 13, 1978)):

> Section 7132(b) of the compromise precludes the use of official time by employees for conducting the internal business of a labor organization. This subsection specifically provides that employees shall not solicit membership, engage in electioneering, or collect dues on official time. The inclusion of these three categories reflects the general intention that "the internal business of a labor organization" encompasses those activities directed to the institutional structure of such organizations. This section does not, therefore, apply to activities of labor organizations that involve an "interface" with agency management, such as negotiations, grievances, negotiability disputes, and unfair labor practices. Nor does this section apply to preparation for such "interface" activities. Management, of course, engages in all these activities, including preparation, on official time, and subsection 7132(d)(2) makes the use of official time by employees for these activities a subject of negotiated agreement between the agency and exclusive representative. [Emphasis added.]

The Senate-House Conference Report did not address the intended application of section 7131(b) as reflected in the House Committee Report and statements on the House floor set forth above.

The disputed proposal in the instant case clearly does not relate solely to the structure and institution of the labor organization. Rather, the proposal specifically involves the allotment of official time to union negotiators for the purpose of preparing for contract negotiations with management. As previously noted, Congress intended that activities such as collective bargaining negotiations which involve labor-management contacts, as well as preparation for such activities, are not "internal business of a labor organization" within the meaning of section 7131(b) of the Statute. Accordingly, section 7131(b) would not bar negotiations under section 7131(d) (see note 1, supra) on the proposal at issue and the agency allegation that the proposal is not within the duty to bargain must be set aside. 2/ Moreover, such proposal would be consistent with the contemplation of Congress, as set forth above (supra pp. 3-4).

In summary, as indicated above, the amount of official time to be used by union negotiators to prepare for collective bargaining negotiations is a matter which falls within the duty to bargain as provided in section 7131(d) of the Statute, as distinguished from the use of official time by employees representing an exclusive representative in the actual "negotiation of a collective bargaining agreement" which is expressly authorized by section 7131(a) of the Statute itself (supra note 1). Moreover, as previously stated, the use of official time to prepare for negotiations is a matter which is not excepted from the duty to bargain as "internal business of a labor organization" under section 7131(b) of the Statute.

2/ In so deciding that the subject proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

In so concluding, however, the Authority notes that the instant case does not present and the Authority therefore does not rule on the question of what activities would properly constitute "preparations" under the official time provisions of the Statute. Such questions are more appropriately resolved by the parties during negotiations or by arbitrators in the specific factual contexts of individual cases, subject to review by the Authority pursuant to section 7122 of the Statute and Part 2425 of the Authority's Rules and Regulations. Nevertheless, it should be emphasized that the Authority does not intend and should not be construed as having concluded herein that official time allotted for "preparations" may properly be used by union representatives for matters which involve the "internal business of a labor organization" within the meaning of section 7131(b) of the Statute.

Issued, Washington, D.C., May 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3669

Labor Organization

and

Case No. O-NG-32

VETERANS ADMINISTRATION
MEDICAL CENTER,
MINNEAPOLIS, MINNESOTA

Activity

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 et seq.).

Union Proposal

Article XXII, Grievance Procedure, Section 2

A grievance is defined to be any dispute or complaint between the Employer and the Union, or an employee covered by this Agreement, which may pertain to any of the following:

1. Any matter involving the interpretation, application or violation of this Agreement, and

2. Any matter involving working conditions or the interpretation and application of agency policies, regulations and practices not specifically covered by this Agreement. The sole exclusion of this grievance procedure shall be those matters subject to statutory appeals procedures.

Question Here Before the Authority

The question is whether, as alleged by the agency, the union proposal is not within the duty to bargain under section 7121 of the Statute, 1/ because it fails to expressly exclude from coverage of the grievance procedure certain matters claimed by the agency to be outside the application of the negotiated grievance procedure "as a matter of law."

Opinion

Conclusion: The union's proposal is within the duty to bargain under section 7121 of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 45 F.R. 3513, the agency's allegation that the disputed proposal is not within the duty to bargain is set aside. 2/

Reasons: During negotiations between the parties on a grievance procedure as required by section 7121(a) of the Statute (note 1, supra), the union proposed the language here in dispute, which provides that the sole contractual exclusion from the grievance procedure's application shall be those matters which are subject to statutory appeals procedures. The agency claims, in essence, that, as proposed, the procedure would apply to matters which are "nongrievable as a matter of law." More specifically, the agency claims that as proposed the procedure would apply to certain matters concerned with the appointment and discipline of agency employees who are appointed under authority contained in Title 38, United States Code, and, thus, the proposed grievance procedure would

1/ 5 U.S.C. § 7121 of the Statute provides, in pertinent part, that:

§ 7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this section, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsection (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

. . . . . .

2/ In so deciding that the subject proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

violate law and agency regulations unless it is modified to expressly exclude those matters.3/ For the reasons stated below, the agency's contention that the union's proposal is not within the duty to bargain is without merit. In so holding, the Authority finds it unnecessary to rule on the agency's claim that the matters which the agency asserts must expressly be excluded from the grievance procedure are, by law and implementing regulations, nongrievable and nonarbitrable.

The language and legislative history of section 7121(a) of the Statute, viewed as an entirety, do not indicate that Congress intended to require the parties to a collective bargaining agreement specifically and expressly to set forth all or any of those matters which, under provisions of law, could not properly be covered by their negotiated grievance procedure. Rather, in this regard, section 7121(a) of the Statute (note 1, supra) provides that a collective bargaining agreement must contain a grievance procedure which shall be the exclusive method of resolving grievances falling within its coverage, with the proviso that the parties "may exclude any matter from the application of the grievance procedure . . . ." [Emphasis added.] "Grievance" is defined in section 7103(a)(9) of the Statute as follows:

> grievance means any complaint--
> (A) by any employee concerning any matter relating to the employment of the employee;
> (B) by any labor organization concerning any matter relating to the employment of an employee; or
> (C) by an employee, labor organization, or agency concerning--
> (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
> (ii) any claimed violation, misinterpretation or misapplication of any law, rule, or regulation affecting conditions of employment[.]

Section 7121(c) of the Statute specifically excludes from the coverage of negotiated grievance procedures the following:

> The preceding subsections of this section shall not apply with respect to any grievance concerning--
> (1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);
> (2) retirement, life insurance, or health insurance;
> (3) a suspension or removal under section 7532 of this title;
> (4) any examination, certification, or appointment; or
> (5) the classification of any position which does not result in the reduction in grade or pay of an employee.

3/ The express exclusions demanded by the agency were:

1. The separation of employees in their probationary period;

2. Any actions and recommendations resulting from competency reviews by the supervisor or by a nurse professional standards board;

3. Any action taken by the Chief Medical Director on the basis of disciplinary board recommendations.

Further, in this regard, the Joint Explanatory Statement of the Committee on Conference which accompanied the bill as enacted and signed into law, stated as follows:4/

> The Senate provides that the coverage and scope of the grievance procedures shall be negotiated by the parties (section 7121(a)). House section 7121(a) does not authorize the parties to negotiate over the coverage and scope of the grievances that fall within the bill's provisions but prescribes those matters which would have to be submitted, as a matter of law, to the grievance procedures. The conference report follows the House approach with an amendment. All matters that under the provisions of law could be submitted to the grievance procedures shall in fact be within the scope of any grievance procedure negotiated by the parties unless the parties agree as part of the collective bargaining process that certain matters shall not be covered by the grievance procedures. [Emphasis added.]

In sum, Congress clearly intended that the scope and coverage of a negotiated grievance procedure shall extend to all matters which "under the provisions of law" could be covered unless the parties agreed through the collective bargaining process to a procedure having a narrower coverage. Congress clearly did not, however, mandate that, to fall within the duty to bargain, each proposed grievance procedure must enumerate all or some of the matters which "under the provisions of law" could not be so covered. Such a requirement would be redundant and without legal significance since, as indicated, section 7121, as explained by the Committee on Conference, already provides that negotiated grievance procedures cover, at a maximum, matters which under the provisions of law could be submitted to the procedures.

Consequently, there is no merit in the agency's contention that the proposed procedure is not within the duty to bargain because it does not specifically exclude certain matters which are alleged to be outside the scope and coverage of the parties' negotiated agreement by operation of law and regulations, i.e., matters concerned with the personnel system for Title 38 employees. If the agency believes that, as a matter of law, certain matters are nongrievable and nonarbitrable, grievances which might be filed with respect to them may be challenged by the agency as nongrievable or nonarbitable, in the context of specific factual circumstances. In this regard, section 7121(a) of the Statute requires the parties to "provide procedures for the settlement of grievances, including questions of arbitrability . . . ." [Emphasis added.] Furthermore, if an arbitrator were to render an award involving the matters which "under the provisions of law" may not be covered by negotiated grievance procedures, the agency would have an opportunity to challenge the award by filing exceptions thereto with the Authority pursuant to section 7122 of the Statute (92 Stat. 1212) on the basis that the award is "contrary to any law, rule or regulation."

4/ S. Rep. No. 95-1272, 95th Cong., 2d Sess. 157 (1978).

In summary, we hold that the union's proposal is a matter within the agency's duty to bargain under the Statute. Accordingly, the agency's allegation that the proposal is not within the duty to bargain is set aside.

Issued, Washington, D.C., May 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL UNIFORMED FIREFIGHTERS,
LOCAL F-169

(Labor Organization)

and

Case No. O-NG-73

U.S. ARMY ARMAMENT RESEARCH
& DEVELOPMENT COMMAND,
DOVER, NEW JERSEY

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 et seq.).

Union Proposal

Reasonable official time will be granted to Union Representatives for preparations for negotiations, and impasse resolutions and counterproposals.

Question Here Before the Authority

The question is whether the union's proposal is inconsistent with Federal law (section 7131(b) and (d) of the Statute), as alleged by the agency and, therefore, not within the duty to bargain.1/

1/ Section 7131 of the Statute provides:

§ 7131. Official time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized

(Continued)

Conclusion: The proposal does not conflict with section 7131 of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3513 (1980)), the agency's allegation that the disputed proposal is not within the duty to bargain is set aside.2/.

Reasons: In American Federation of Government Employees, AFL-CIO, Local 1692 and Headquarters, 323rd Flying Wing (ATC), Mather Air Force Base, California, Case No. O-NG-183, 3 FLRA No. 47, (1980) [hereinafter Mather], the Authority held that the following proposal, which the agency alleged to be outside of the duty to bargain under section 7131 of the Statute, was within the duty to bargain:

> Management will allow equal official time to the Union Negotiation Team, as allotted to the Management Negotiation Team, for preparation of Contract Negotiations.

In that case, after analyzing the relevant legislative history, the Authority stated as follows:

> The disputed proposal in the instant case clearly does not relate solely to the structure and institution of the labor organization. Rather, the proposal specifically involves the allotment of official time to union negotiators for the purpose of preparing for contract negotiations with management. As previously noted, Congress intended that activities such as collective bargaining negotiations which involve labor-management contacts, as well as preparation for such activities, are not "internal business of a labor organization" within the meaning of section 7131(b) of

(Continued)

> under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.
>
> (b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.
>
> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.
>
> (d) Except as provided in the preceding subsections of this section—
>
> (1) any employee representing an exclusive representative, or
>
> (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,
>
> shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

2/ In so deciding that the proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

the Statute. Accordingly, section 7131(b) would not bar negotiations under section 7131(d) (see note 1, supra) on the proposal at issue and the agency allegation that the proposal is not within the duty to bargain must be set aside. Moreover, such proposal would be consistent with the contemplation of Congress, as set forth above (supra pp. 3-4).

In summary, as indicated above, the amount of official time to be used by union negotiators to prepare for collective bargaining negotiations is a matter which falls within the duty to bargain as provided in section 7131(d) of the Statute, as distinguished from the use of official time by employees representing an exclusive representative in the actual "negotiation of a collective bargaining agreement" which is expressly authorized by section 7131(a) of the Statute itself (supra note 1). Moreover, as previously stated, the use of official time to prepare for negotiations is a matter which is not excepted from the duty to bargain as "internal business of a labor organization" under section 7131(b) of the Statute.

In so concluding, however, the Authority notes that the instant case does not present, and the Authority therefore does not rule on the question of what activities would properly constitute "preparations" under the official time provisions of the Statute. Such questions are more appropriately resolved by the parties during negotiations or by arbitrators in the specific factual contexts of individual cases, subject to review by the Authority pursuant to section 7122 of the Statute and Part 2425 of the Authority's Rules and Regulations. Nevertheless, it should be emphasized that the Authority does not intend and should not be construed as having concluded herein that official time allotted for "preparations" may properly be used by union representatives for matters which involve the "internal business of a labor organization" within the meaning of section 7131(b) of the Statute. [Footnote omitted.]

The issues raised in the instant appeal are identical to the issues that were raised and discussed in Mather. Therefore, for the reasons fully set forth in Mather, the proposal in the instant case is within the duty to bargain.

Issued, Washington, D.C., May 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3354

(Union)

and

Case No. 0-NG-37

U.S. DEPARTMENT OF AGRICULTURE
FARMERS HOME ADMINISTRATION
ST. LOUIS, MISSOURI

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute)(5 U.S.C. § 7101 et seq.).

Union Proposal

During negotiations between the parties on a grievance procedure as required by section 7121(a) of the Statute, 1/ the activity demanded that certain matters be specifically excluded from coverage under the grievance procedure. 2/ In response, the union "proposed to delete this [exclusionary] sentence," thus proposing, in substance, a grievance procedure free of express contractual limitations.

1/ Section 7121(a) of the Statute (92 Stat. 1211) provides:

§ 7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

2/ The express exclusions demanded by the activity were set forth in the following sentence:

Matters subject to statutory appeal and any matters involving the separation or termination of probationary or temporary employees, including the merits of such action taken, are specifically excluded from coverage by this grievance procedure.

Question Here Before the Authority

The question is whether, as alleged by the agency, the union proposal is not within the duty to bargain under section 7121 of the Statute (note 1, supra) because it fails to expressly exclude from coverage of the grievance procedure matters involving the separation or termination of probationary and temporary employees, which matters are claimed by the agency to be outside the application of the negotiated grievance procedure by operation of law and regulations.

Opinion

Conclusion: The union's proposal is within the duty to bargain under section 7121 of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 45 F.R. 3513, the agency's allegation that the disputed proposal is not within the duty to bargain is set aside. 3/

Reasons: The agency claims in substance that the union's proposal would result in the inclusion under the negotiated grievance procedure of "matters involving the separation or termination of probationary or temporary employees." In the agency's view, these matters may not be included within the scope of negotiated grievance procedures under law and regulation. More specifically, the agency contends that "grievances which involve the separation or termination of probationary and temporary employees are nonnegotiable" under the Statute and the Federal Personnel Manual. For the reasons stated below, the agency's contention that the union's proposal is not within the duty to bargain cannot be sustained. In so holding, the Authority finds it unnecessary to reach and therefore makes no ruling on the agency's claim that the matters which the agency asserts must expressly be excluded from the grievance procedure are, by law and implementing regulations, nongrievable and nonarbitrable.

In American Federation of Government Employees Local 3669, AFL-CIO and Veterans Administration Medical Center, Minneapolis, Minnesota, Case No. 0-NG-32, 3 FLRA No. 48 (May 30, 1980), the Authority rejected an agency contention that the proposed grievance procedure was not within the duty to bargain because it did not specifically exclude certain matters such as the "separation of employees in their probationary period" which were alleged to be outside the scope and coverage of the parties' negotiated agreement by operation of law and regulations. In so concluding, the Authority, relying upon the definition of "grievance" in section 7103(a)(9) of the Statute as well as the language and legislative history of section 7121 in its entirety, 4/ stated as follows:

3/ In so deciding in the subject case, the Authority makes no judgment as to the merits of the proposal.

4/ S. REP. No. 95-1272, 95th Cong., 2d Sess. 157 (1978).

> In sum, Congress clearly intended that the scope and coverage of a negotiated grievance procedure shall extend to all matters which "under the provisions of law" could be covered unless the parties agreed through the collective bargaining process to a procedure having a narrower coverage. Congress clearly did not, however, mandate that, to fall within the duty to bargain, each proposed grievance procedure must enumerate all or some of the matters which "under the provisions of law" could not be so covered. Such a requirement would be redundant and without legal significance since, as indicated, section 7121, as explained by the Committee on Conference, already provides that negotiated grievance procedures cover, at a maximum, matters which under the provisions of law could be submitted to the procedures.

The Authority further indicated that:

> If the agency believes that, as a matter of law, certain matters are nongrievable and nonarbitrable, grievances which might be filed with respect to them may be challenged by the agency as nongrievable or nonarbitrable, in the context of specific factual circumstances. In this regard, section 7121(a) of the Statute requires the parties to "provide procedures for the settlement of grievances, including questions of arbitrability . . . ." [Emphasis added.] Furthermore, if an arbitrator were to render an award involving the matters which "under the provisions of law" may not be covered by negotiated grievance procedures, the agency would have an opportunity to challenge the award by filing exceptions thereto with the Authority pursuant to section 7122 of the Statute (92 Stat. 1212) on the basis that the award is "contrary to any law, rule or regulation."

Accordingly, we hold that the union's proposal in the instant case is a matter within the agency's duty to bargain under the Statute, and the agency's allegation that the proposal is not within the duty to bargain is set aside.

Issued, Washington, D.C., May 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. ARMY ARMAMENT RESEARCH AND DEVELOPMENT
COMMAND, CHEMICAL SYSTEMS
LABORATORY SUPPORT, PRODUCT
ASSURANCE DIRECTORATE (EDGEWOOD
ARSENAL)

Activity

and

Case No. 0-AR-1

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 178

Union

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator Robert J. Ables filed by the union.

According to the arbitrator, the grievant, a GS-12 engineering technician, sought to have his qualifications rating upgraded from engineering technician to that of a professional engineer (General Engineer) based upon his certification by the State of California, in October 1975, as a professional engineer. In May 1976 the grievant filed the necessary papers with the activity requesting that his qualifications be upgraded. However, because the grievant's submission was lost and he had to resubmit it, the grievant's request for the professional rating was not approved by the activity until June 1977. Subsequently, when the activity submitted the request to a higher agency level for final approval, it was discovered that in December 1976 the Civil Service Commission had changed its qualifications requirements for the General Engineer position to the effect that the grievant's California certification as a professional engineer no longer qualified him for the General Engineer rating. Thus, as a result, the grievant did not receive the General Engineer rating.

The activity, taking the position that the grievant deserved the professional rating since he would have received it prior to the changes in the qualifications standards by the Civil Service Commission had the activity not lost his first request, initiated action to convince the Civil Service Commission to grant the grievant's application for a qualifications upgrade or to waive the requirements so that the grievant could be rated as a professional engineer. The Civil Service Commission, however, denied the efforts taken by the activity on behalf of the grievant, noting that qualification requirements had to be applied uniformly. The matter was ultimately submitted to arbitration.

The arbitrator, in the opinion accompanying his award, noted that the Civil Service Commission had advised the activity:

> If a grievance concerning a qualification determination is filed under a grievance procedure which provides for unresolved grievances to go to arbitration, there is no bar to the arbitrator rendering a decision on qualifications. His decision, however, must be consistent with the Commission's [qualification standards and the Commission's] interpretation of those standards in order to be legally implementable.

Thus, the arbitrator concluded that based on the "findings already made by the Civil Service Commission that [the grievant] is not qualified to be a professional engineer," the grievance could not be sustained. As his award, the arbitrator denied the grievance.

The union requests that the Authority accept its petition for review of the arbitrator's award based upon the exceptions discussed below. The agency filed an opposition.

In accordance with section 2400.5 of the transition rules and regulations of the Authority, 44 F.R. 44741, and section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215), the rules of procedure of the Federal Labor Relations Council, 5 C.F.R. part 2411 (1978), remain operative with respect to the present case except that the word "Authority" is substituted, as appropriate, wherever the word "Council" appears in such rules.

Under section 2411.32 of the rules as so amended, review of an arbitrator's award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

The union's exceptions to the arbitrator's award as set forth in its petition for review are that the arbitrator failed "to interpret decisions of the Federal Labor Relations Council correctly," that he misinterpreted regulations of the Civil Service Commission, that he failed "to interpret the grievance procedures of the contract" by "erroneously interpret[ing] the meaning of the grievance and the remedy sought [concerning] a satisfaction of the grievance," and that the award violates "the law concerning the retroactive application of regulations."

With respect to these exceptions, the union has not presented facts and circumstances sufficient to warrant Authority acceptance of the union's petition for review on any of the grounds advanced by the union. In effect, the union's petition is bottomed on the arbitrator's reasoned determination in this case to apply the "authoritative precedent" of the Civil Service Commission. As the arbitrator stated in his opinion: "[T]his grievance turns on qualifications for placement in a job and it already has been determined by the Civil Service Commission in this dispute that [the grievant] does not have qualifications for a professional engineer under existing requirements . . . ."

In two cases arising under Executive Order 11491,[1] the Civil Service Commission advised the Federal Labor Relations Council that

> provided a qualifications issue were otherwise properly before the arbitrator, we would know of no bar to his rendering a decision on it. His decision would, of course, have to be consistent with the controlling qualifications standards of the Commission in order to be legally implementable. [Emphasis added.]

As previously indicated, the arbitrator applied the Commission's determination regarding the grievant's qualifications to the matter before him and denied the grievance. In doing so he noted throughout his opinion the inequities involved in this case, in which it was conceded by the activity/agency that the grievant would have had his qualifications upgraded by the activity prior to the Commission's change in the qualification requirements had the grievant's initial request not been lost. However, the arbitrator also correctly noted that because of the Civil Service Commission's determination with respect to the grievant's qualifications in this case, there was no basis upon which he could sustain the grievance. In its petition for review, the union is seeking, as it did before the arbitrator, to obtain a result different from the one rendered by the Civil Service Commission. However, while the Authority shares the views stated by the activity/agency in its submission to the Civil Service Commission and the concerns stated by the arbitrator with respect to the apparent inequities in this case, in light of the decision made by the Civil Service Commission with respect to the grievant's qualifications and the cited Council cases that qualifications decisions must be consistent with Commission qualifications determinations, the union's exceptions do not provide a basis for acceptance of its petition for review under section 2411.32 of the amended rules.[2]

1/ International Association of Machinists and Aerospace Workers and Naval Air Rework Facility, Norfolk, Virginia (Ables, Arbitrator), 5 FLRC 951, 955 [FLRC No. 77A-11 (Dec. 20, 1977), Report No. 140] quoting Defense General Supply Center, Richmond, Virginia and American Federation of Government Employees, Local 2047, AFL-CIO (DiStefano, Arbitrator), 4 FLRC 280, 286 [FLRC No. 74A-99 (Apr. 27, 1975), Report No. 104].

2/ This case was filed with the Authority prior to the effective date of the Federal Service Labor-Management Relations Statute (92 Stat. 1191). Therefore, in conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), this case was decided solely on the basis of E.O. 11491, as amended, and as if the Statute had not been enacted. The decision does not prejudge in any manner either the meaning or application of related provisions of the Statute or the result which would be reached by the Authority if the case had arisen under the Statute.

Accordingly, the union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the amended rules of procedure.

Issued, Washington, D.C., May 29, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

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FLRA Report of Case Decisions and FSIP Releases

Contents of Package

This package should include the following items:

FLRA Report of Case Decision Number 42

FLRA Report of Case Decision Number 43

FLRA Report of Case Decision Number 44

FLRA Report of Case Decision Number 45

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Federal Labor Relations Authority

1900 E Street, NW.
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Number 42 REPORT OF CASE DECISIONS July 16, 1980

REPRESENTATION CASES

3 FLRA No. 58 (June 10, 1980)

Department of the Air Force, National Guard Bureau, The Adjutant General, The State of Arizona, Case No. 8-CU-1. The activity filed a petition for clarification of unit under section 7111(b)(2) of the Statute seeking to clarify a unit represented by the union (AFGE Local 3046). More specifically, the activity sought to exclude from the unit a number of employees known and referred to as "small shop chiefs." The Authority found that the small shop chiefs, because of their authority to direct and assign civilian technicians in the performance of their work and because they either had or would soon have authority to recommend the promotion and/or discipline of civilian technicians within their shops, were "supervisors" within the meaning of section 7103(a)(10) of the Statute. Accordingly, the Authority ordered that the unit be clarified to exclude the employees in the disputed job classifications. (Decision and Order attached.)

3 FLRA No. 59 (June 10, 1980)

U.S. Department of the Treasury, Internal Revenue Service, North-Atlantic Service Center, Andover, Massachusetts, Case No. 1-RO-12. The Authority, upon a representation petition filed by NTEU, found that section 7111(f)(3)(B) of the Statute requires the use of the effective date of an agreement rather than its execution date in determining the "open period" prior to the expiration date of such agreement during which a petition for exclusive recognition may be timely filed. The Authority thereupon concluded that NTEU's petition was timely filed during the open period prior to the expiration of the agreement here involved between the activity and AFGE Local 2078, and directed an election in the unit found appropriate. (Decision and Direction of Election attached.)

UNFAIR LABOR PRACTICE CASES

3 FLRA No. 55 (June 3, 1980)

The Adjutant General's Office, Puerto Rico Air National Guard, Assistant Secretary Case No. 37-01985(CA). The ALJ, upon a complaint filed by the union (NFFE Local 1665) under E.O. 11491, concluded that the activity violated section 19(a)(1) and (6) of the Order by its actions in utilizing new procedures to effectuate a reduction in force (RIF) without first notifying the union and affording the union an opportunity to bargain over the implementation and impact of the RIF on affected unit employees. In agreement with the ALJ, the Authority concluded that the activity had violated the Order, but reached that conclusion for different reasons. Further, the Authority found that a remedial order requiring the activity to rescind a RIF action was not warranted. The Authority therefore issued a remedial order different than that recommended by the ALJ and ordered the activity to cease and desist from engaging in the future in the conduct found violative of the Order, and, upon request, to afford the union an opportunity to bargain concerning the impact and implementation of the RIF action on affected unit employees. (Decision and Order attached.)

3 FLRA No. 57 (June 10, 1980)

Department of the Army, Fort Bragg Schools, Case Nos. 4-CA-148, 4-CA-149, 4-CA-150, 4-CA-151 and 4-CA-152. The complaints alleged that the activity violated section 7116(a)(1) of the Statute when the Superintendent of Schools spoke against collective bargaining at an organizational meeting conducted by the union (North Carolina Federation of Teachers, AFT, AFL-CIO), and when on four other occasions union informational meetings at four separate schools were attended by the respective principals of those schools. The ALJ found first, as to a jurisdiction issue, that the school personnel were employees and all such employees, including the Superintendent, were subject to the supervision and control of the agency; and that the teachers involved were employees protected by the Statute. The ALJ also found that the activity had engaged in the unfair labor practices alleged in the complaint. The Authority adopted the findings, conclusions, and recommendations of the ALJ and, accordingly, issued an appropriate remedial order. (Decision and Order attached.)

NEGOTIABILITY CASES

3 FLRA No. 52 (May 30, 1980)

National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, Washington, D.C., Case No. 0-NG-92. The activity announced plans to implement guidelines concerning inspectional overtime. In response, the union sought to negotiate on the substance, impact, and implementation of the guidelines and subsequently submitted 54 proposals concerning the impact of the guidelines. After numerous bargaining sessions, the activity refused to bargain over 6 of the union's proposals, claiming they bore no relation to the subject matter under consideration. The union filed an appeal from the activity's action. The Authority found that the appeal concerned a refusal to bargain rather than an allegation of nonnegotiability. Accordingly, the Authority held that the union's appeal did not present issues that the Authority could appropriately resolve under section 7117 of the Statute and Part 2424 of its rules and regulations and dismissed the union's appeal without prejudice to its right to resubmit to the Authority any negotiability dispute which remains concerning the union's proposals, after resorting to an unfair labor practice proceeding. (Decision attached.)

3 FLRA No. 54 (May 30, 1980)

National Treasury Employees Union and NTEU Buffalo District Joint Council and Internal Revenue Service, Buffalo District, Case No. 0-NG-133; National Treasury Employees Union and NTEU Chapter 49 and Internal Revenue Service, Manhattan District, Case No. 0-NG-134; National Treasury Employees Union and NTEU Chapter 54 and Internal Revenue Service, Providence District, Case No. 0-NG-135; and National Treasury Employees Union and NTEU Chapter 61 and Internal Revenue Service, Albany District, Case No. 0-NG-136. The cases, which were consolidated by the Authority for consideration and decision, first arose under E.O. 11491 when the IRS issued changes to its Handbook of Employee Responsibilities and Conduct and determined that two proposals (concerning administrative time and training sessions for employees for familiarization with and clarification of the handbook changes), submitted by the union in each case to the IRS district involved, were nonnegotiable. The Federal Labor Relations Council dismissed the union's separate petitions in the closing days of the Federal service labor-management relations program under the Order as in effect moot, without passing upon the merits of the appeals and without prejudice to the union's submission of the disputes to the Authority in conformity with the provisions of the Statute and the Authority's regulations. After the Statute became effective,

the union requested the agency head to reconsider his original nonnegotiability determination in light of the Statute, and filed the instant petitions for review with the Authority when it received no response from the agency. The Authority found that the substance of the dispute between the parties as to the first proposal concerned unfair labor practice issues appropriate for resolution under procedures set forth in section 7118 of the Statute; and that the dispute as to the second proposal essentially concerned a threshold question as to the coverage of the parties' negotiated agreement of the matter sought to be negotiated and that the proper forum in which to resolve such questions would be the procedures adopted by the parties for that purpose in their agreement. The Authority therefore held that the union's appeals did not present issues that could be appropriately resolved under section 7117 of the Statute at that time. Accordingly, the Authority dismissed the union's appeals without prejudice to resubmit any negotiability dispute concerning the subject proposals that remained after resorting to the procedures described. (Consolidated Decision attached.)

3 FLRA No. 60 (June 11, 1980)

National Federation of Federal Employees, Local 1451 and Navy Exchange, Naval Administrative Command, Orlando, Florida, Case No. 0-NG-160. The dispute involved a union proposal that consideration of outside applicants may be undertaken when there are less than three minimally qualified internal applicants being considered for a promotional vacancy and when the Qualification Screening Committee determines that no qualified candidates are among the applicants, external recruitment will be effected. The Authority held that the proposal violated section 7106(a)(2)(C) of the Statute and, accordingly, sustained the agency's allegation that the proposal was not within the duty to bargain.

Appeal withdrawn:	Case No.	Date
	0-NG-260	May 28, 1980

GENERAL STATEMENTS OF POLICY OR GUIDANCE

3 FLRA No. 53 (May 30, 1980)

American Federation of Government Employees, Case No. 0-PS-11. AFGE requested that the Authority issue a general statement of policy or guidance as to the obligation to negotiate during the

term of a collective bargaining agreement. The Authority determined that the request did not satisfy the standards governing the issuance of such statements set forth in section 2427.5 of the Authority's rules and regulations. Accordingly, the Authority denied AFGE's request. (Decision attached.)

3 FLRA No. 56 (June 10, 1980)

National Treasury Employees Union, Case No. 0-PS-17. NTEU filed a request that the Authority issue a major policy determination concerning the question of whether an agency is required to maintain the status quo when the exclusive bargaining representative appeals the agency's determination that a proposal is nonnegotiable pursuant to section 7117 of the Statute. The Authority found that the request did not satisfy the standards governing the issuance of general statements set forth in section 2427.5 of the Authority's rules and regulations and therefore denied NTEU's request. (Decision attached.)

Attachments (9)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
NATIONAL GUARD BUREAU
THE ADJUTANT GENERAL
THE STATE OF ARIZONA 1/

Activity/Petitioner

and

Case No. 8-CU-1

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3046

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed with the Federal Labor Relations Authority under § 7111(b)(2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135, a hearing was held before Hearing Officer Thomas R. Wilson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby affirmed.

Upon the entire record in the subject case, the Authority finds: The Activity filed a petition for clarification of unit (CU) seeking to clarify a unit represented by the American Federation of Government Employees, Local 3046, AFL-CIO (AFGE). 2/ Specifically, the Activity seeks to exclude from the unit employees in the following job descriptions: Aircraft Mechanic, WG-8852-12; Pneudraulic Systems Mechanic, WG-8255-12; Aircraft Electrician, WG-2892-11; Aircraft Pneudraulic Systems Mechanic, WG-8268-11; Pneudraulic Systems Mechanic, WG-8255-11; Fabric Worker, WG-3105-11; Electronics Mechanic (Radar), WG-2614-14; Powered Support Systems Mechanic, WG-5378-12; Automotive Mechanic, WG-5823-12. The Activity contends that the employees in these positions, known and hereinafter referred to as small shop chiefs, are supervisory, and, in accordance with § 7103(a)(10) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135, should be excluded from the bargaining unit. The AFGE contends that although the small shop chiefs in question have additional responsibilities and duties as compared with those employees with whom they closely work, they are not enough to classify them as supervisors.

1/ The name of the Activity appears as amended at the hearing.

2/ The AFGE was recognized as the exclusive representative on September 29, 1969, in a unit defined as follows:

> All technicians of the Phoenix Air National Guard, clarified as necessary by the Assistant Secretary excluding professional, managerial, supervisory employees and employees engaged in Federal personnel work of a non-clerical nature.

The positions in question are all located in either the 107th Tactical Control Squadron or the 161st Air Refueling Group of the Arizona Air National Guard. The 107th is a mobile radar control unit designed to operate from field locations on a self sufficient basis. The 161st is a reserve unit responsible for recruiting and training personnel, maintaining support equipment, and maintaining base facilities for a reserve force capable of augmenting the strategic air command in support of air refueling. The Activity has identified 19 small shop chiefs in the two units, but seeks to have only nine classified as supervisors. All nine positions are situated within the Chief of Maintenance Complex. Six of these positions are located in the 161st, five of which are situated in the Aerospace Systems Division and the remaining position is in Fabrication. The three small shop chief positions in the 107th are specifically located in the Ground Radar section, the Aerospace Ground Equipment section, and Vehicle Maintenance operations. Each Division is headed by a superintendent and is organized into specific sections, each headed by a foreman. Each section is further organized into shops, which are headed by the small shop chiefs. The shops are manned, in addition to the shop chief, by one or two journeymen technicians who serve in a civilian capacity. The small shop chiefs are at least one grade higher than those technicians assigned to the respective shops.

Small shop chiefs are ultimately responsible for the completion of work assigned to their specific shop by the Chief of Maintenance. The record reveals that in carrying out these designated tasks, small shop chiefs, acting in their civilian capacity, consistently assign and direct those civilian technicians with whom they work, and consistently exercise independent judgment in supervising the technicians' performances. The record reveals the small shop chiefs give technical advice to lower graded employees within their shop. There is evidence to show the chiefs regularly participate in the training of technicians, and they are responsible for either sufficiently training the individual or assigning him to a proper training program.

The small shop chief is responsible for all the assignment of work within his shop. He determines who will perform the work, based upon his evaluation of the nature of the job and the expertise of the technicians(s) in his shop. He also makes all work shift assignments. The small shop chief also decides when various maintenance tasks will be performed within his shop if the Chief of Maintenance has not established priorities. In all cases, it is the small shop chief who determines which technician will undertake the assignment.

The record also discloses that in regards to discipline, small shop chiefs have exercised authority over civilian technicians. They have recommended disciplinary actions which have resulted in letters of reprimand being placed into the employees' personnel files. They have also initiated actions which are pending resolution.

The position descriptions entered into evidence describe the supervisory authority of the small shop chiefs. The authority includes: control over work operations performed by civilian technicians assigned to their shop; planning, organizing, and scheduling work assignments; explaining work requirements, work methods, and standards of quality and quantity to be met to the civilian technicians; monitoring work and giving instructions to the technicians on difficult

operations; making adjustments in work assignments; and scheduling leave, appraising performance, recommending promotion, and initiating disciplinary action. The record discloses the three small shop chiefs testified, all concurring that their position descriptions described their authority and functions within their shops.

The Authority finds the evidence contained in the record clearly establishes the nine small shop chiefs are supervisors as defined by § 7103(a)(10) of the Statute. That definition provides, in pertinent part: " 'supervisor' means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, ... " The small shop chiefs direct and assign civilian technicians in the performance of their work, and either have or will soon be authorized to recommend the promotion, and/or discipline of the civilian technicians in their shops. Accordingly, the Authority shall order that employees in the disputed job classifications be excluded from the exclusively represented unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified, in which exclusive recognition was granted to the American Federation of Government Employees, Local 3046, on September 29, 1969, at the Department of the Air Force, National Guard Bureau, State of Arizona, Phoenix, Arizona, be, and it hereby is, clarified by excluding from said unit the following positions: Aircraft Mechanic, WG-8852-12; Pneudraulic Systems Mechanic, WG-8255-12; Aircraft Electrician, WG-2892-11; Aircraft Pneudraulic Systems Mechanic, WG-8268-11; Pneudraulic Systems Mechanic, WG-8255-11; Fabric Worker, WG-3105-11; Electronic Mechanics (Radar), WG-2614-14; Powered Support Systems Mechanic, WG-5378-12; Automotive Mechanic, WG-5823-12.

Issued, Washington, D.C., June 10, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
NORTH-ATLANTIC SERVICE CENTER,
ANDOVER, MASSACHUSETTS

Activity

and

Case No. 1-RO-12

NATIONAL TREASURY EMPLOYEES UNION

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2078, AFL-CIO

Intervenor

DECISION AND DIRECTION OF ELECTION

This matter is before the Authority pursuant to the Regional Director's Order Transferring Case to the Federal Labor Relations Authority in accordance with section 2429.1 of the Rules and Regulations of the Authority.

Upon the entire record in this case, including the parties' stipulation and briefs submitted by the Petitioner and the Activity, the Authority finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The Petitioner (NTEU), seeks an election in a unit of all General Schedule and Wage Grade professional and nonprofessional employees, including seasonal (WAE) and part-time employees, employed at the Internal Revenue Service, North Atlantic Service Center, Andover, Massachusetts (the Activity), excluding all management officials, supervisors, confidential employees, all employees engaged in personnel work in other than a purely clerical capacity, and guards. The Intervenor (AFGE), was recognized in 1968 as the exclusive representative of certain of the Activity's employees. The record reveals that a negotiated agreement was signed and dated by the Activity and AFGE on August 26, 1976, and became effective on October 4, 1976, for a three-year period.

The sole question in issue before the Authority is whether NTEU's petition was timely filed or whether the agreement between the Activity and AFGE constituted a bar to the filing of said petition. The Activity and AFGE contend that NTEU's petition should be dismissed as untimely since it was not filed within the "open period" as measured from the execution date of the agreement between the Activity and AFGE. On the other hand, NTEU asserts that its petition was timely filed under section 7111(f)(3)(B) of the Statute, i.e., within the "open period" between the 105th and the 60th day prior to the expiration date of the agreement as measured from its effective date.

Inasmuch as the instant petition was filed on July 23, 1979, after the Federal Service Labor-Management Relations Statute became effective, the Statute governs the resolution of the foregoing question. Section 7111(f)(3) of the Statute provides:

> (f) Exclusive recognition shall not be accorded to a labor organization--
>
> . . . . . .
>
> (3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless--
>
> (A) the collective bargaining agreement has been in effect for more than 3 years, or
>
> (B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement. . . .

Noting particularly Congressional reliance on the effective date of the agreement under section 7111(f)(3)(A) the Authority finds, in agreement with NTEU, that section 7111(f)(3)(B) of the Statute also requires the use of the effective date of an agreement rather than its date of execution in determining the "open period" prior to the expiration date of such agreement during which a petition for exclusive recognition may be timely filed. Consistent with the foregoing interpretation of the Statute, §2422.3(d) of the Authority's Rules and Regulations provides (45 F. R. 3501, January 17, 1980):

> (d) A petition for exclusive recognition or other election petition will be considered timely when filed as follows:
>
> (1) Not more than one hundred and five (105) days and not less than sixty (60) days prior to the expiration date of an agreement having a term of three (3) years or less from the date it became effective. [Emphasis added.]

Thus, the petition filed on July 23, 1979, was timely filed within the open period which was from July 19, 1979 to September 4, 1979.

Accordingly, the Authority finds that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of section 7112 of the Statute:

> All professional and nonprofessional General Schedule and Wage Grade employees including seasonal (WAE) and part-time employees, employed at the Internal Revenue Service, North Atlantic Service Center, Andover, Massachusetts, excluding all management officials, supervisors, guards, and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).

It is noted that the unit found appropriate includes professional employees and that the Authority is prohibited by section 7112(b)(5) of the Statute from including professional employees in the unit with employees who are not professionals unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in the unit with nonprofessional employees must be ascertained. The Authority, therefore, directs separate elections in the following groups:

> Voting Group (a): All professional General Schedule and Wage Grade employees including seasonal (WAE) and part-time employees, employed at the Internal Revenue Service, North Atlantic Service Center, Andover, Massachusetts, excluding all nonprofessional General Schedule and Wage Grade employees, management officials, supervisors, guards and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).
>
> Voting Group (b): All nonprofessional General Schedule and Wage Grade employees including seasonal (WAE) and part-time employees, employed at the Internal Revenue Service, North Atlantic Service Center, Andover, Massachusetts, excluding all professional General Schedule and Wage Grade employees, management officials, supervisors, guards, and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).

The employees in the nonprofessional voting group (b) will be polled as to whether or not they desire to be represented by the AFGE, by the NTEU or by neither.

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether or not they wish to be represented for the purpose of exclusive

recognition by the AFGE, by the NTEU or by neither. In the event that a majority of the valid votes of voting group (a) is cast in favor of inclusion in the same unit as the nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the votes of voting group (a) is cast for inclusion in the same unit as the nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued indicating whether the AFGE, the NTEU or neither was selected by the professional employees unit.

The unit determination in the subject case thus is based in part upon the results of the election among the professional employees. However, the Authority makes the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, the Authority finds that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of section 7112 of the Statute:

> All professional and nonprofessional General Schedule and Wage Grade employees including seasonal (WAE) and part-time employees employed at the Internal Revenue Service, North Atlantic Service Center, Andover, Massachusetts, excluding all management officials, supervisors, guards, and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, the Authority finds that the following two groups of employees constitute separate units appropriate for the purpose of exclusive recognition within the meaning of section 7112 of the Statute:

> (a) All professional General Schedule and Wage Grade employees including seasonal (WAE) and part-time employees, employed at the Internal Revenue Service, North Atlantic Service Center, Andover, Massachusetts, excluding all nonprofessional General Schedule and Wage Grade employees, management officials, supervisors, guards and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).
>
> (b) All nonprofessional General Schedule and Wage Grade employees including seasonal (WAE) and part-time employees, employed at the Internal Revenue Service, North Atlantic Service Center, Andover, Massachusetts, excluding all professional General Schedule and Wage Grade employees, management officials, supervisors, guards and employees described in 5 U.S.C. 7112(b)(2), (3), (4), (6) and (7).

DIRECTION OF ELECTION

Elections by secret ballot shall be conducted among employees in the voting groups described above, as early as possible, but not later than 60 days from the date below. The appropriate Regional Director shall supervise the election, subject to the Authority's Rules and Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 2078, AFL-CIO; by the National Treasury Employees Union; or by neither.

Issued, Washington, D.C., June 10, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

THE ADJUTANT GENERAL'S OFFICE
PUERTO RICO AIR NATIONAL GUARD

Respondent

and

Assistant Secretary
Case No. 37-01985(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1665 (INDEPENDENT)

Complainant

DECISION AND ORDER

The Administrative Law Judge issued his Recommended Decision and Order, in the subject case, finding that the Respondent had violated §§ 19(a)(1) and 19(a)(6) of Executive Order 11491, as amended, by its actions in utilizing new procedures to effectuate a reduction in force without first notifying the Complainant, the exclusive representative of affected employees, and affording it the opportunity to bargain over the implementation and impact of the reduction on the affected employees. The Administrative Law Judge recommended that the Respondent be ordered to (1) cease and desist from implementing a reduction in force involving employees represented by the Complainant without affording it an opportunity to request negotiations concerning the impact and implementation of such a reduction, and (2) to take certain affirmative actions. The Respondent filed exceptions and supporting brief to Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, as amended, were transferred to the Authority under § 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by § 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in § 7135(b) of the Federal Service Labor Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to § 2400.2 of the Authority's rules and regulations and § 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the entire record, including the Respondent's exceptions and supporting brief, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation, as modified below.

In a memorandum dated March 21, 1977, the National Guard Bureau, the national headquarters of the National Guard, directed the Respondent to conduct a reduction in force (RIF) according to the procedures specified in the recently prepared Technician Personnel Manuel 351 (TPM 351). The Respondent received the memorandum on March 31, the same date on which TPM 351 became effective. The Complainant, through its president and other union officials, was informed of the RIF order and provided a copy of TPM 351 on April 12, at a meeting with the Respondent's Technician Personnel Officer. The procedures to be used to implement the RIF were not discussed at that time because the representatives of both parties were unfamiliar with TPM 351.

Technician Personnel Pamphlet 910 ("TPP 910") contained the procedures that the Respondent followed in implementing RIF's between March 1973 and March 1977. Several procedures specified in TPM 351 differed significantly from the procedures set forth in TPP 910.

The Respondent met with its technicians on April 13 and 14 to notify them of the RIF order and to give a general explanation of the RIF procedures. The Complainant was not notified of these meetings. The Complainant's first vice president, Angel Parra, attended one of the meetings in his role as a technician, not as a union representative. He and several other employees asked questions about the RIF, but most of the questions were not answered because the Respondent's representatives were not familiar with TPM 351.

The parties met with Federal Aviation Administration (FAA) officials on April 22 to discuss the possibility of the FAA hiring employees who would be separated by the RIF. When the discussion ended, the Complainant directed two requests to General Llensa, the Adjutant General. The Complainant believed that military appraisals would not be fair and, therefore, asked that they not be used. The Complainant also requested that employees receive identical appraisal scores, making seniority a primary factor in ranking employees. In response, General Llensa stated that the requests would be considered and that he would give management's response later. Eighteen employees received RIF notices on May 25 and were separated on July 31. Neither Llensa nor any other management official has given the Complainant the response to its requests of April 22, 1977.

In reaching his conclusion, the Administrative Law Judge found that the Respondent utilized new procedures to implement a RIF without first notifying and affording the Complainant an opportunity to bargain about the implementation or impact of the RIF. Although the Administrative Law Judge found that the Complainant had not made a specific request to bargain, he further found that such request was unnecessary because the Complainant was confronted with a fait accompli on April 12 when informed that the new RIF procedures already had become effective. In addition, he found that negotiations had not taken place at the April meetings; that the meetings of April 12, 13, and 14 were exclusively informational in character, and the meeting of April 22 was merely a conference with FAA officials.

In agreement with the Administrative Law Judge, the Authority concludes that the Respondent violated § 19(a)(1) and (6) of the Order; however, the Authority reaches this conclusion for different reasons. Contrary to the Administrative Law Judge, the Authority finds that the request made by the Complainant at the

meeting of April 22 was, in effect, a general request to bargain. Although the specific proposals clearly were not negotiable because they conflicted with TPM 351, a regulation for which a compelling need existed [see American Federation of Government Employees, Local 2953 AFL-CIO, and Nebraska National Guard, FLRC No. 77A-106, 6 FLRC 182 (1978)], the nature of the requests did not alter the Respondent s obligation to respond and bargain in good faith. In the Authority's view, the Activity's statement that a response to the requests would be given later created the impression that the Respondent was willing to consider the proposals concerning the implementation and impact of the RIF. The Activity's failure to respond, as promised, precluded the Complainant from considering the option of presenting alternative proposals. Under these circumstances, the Authority concludes that the Respondent did not fulfill its duty to bargain as to the impact and implementation of its decision on unit employees after the Complainant requested bargaining, and thus, violated § 19(a)(1) and (6) of Executive Order 11491, as amended.

As the Respondent did not have an obligation to meet and confer with the Complainant concerning the provisions of TPM 351, the Authority does not find that a remedial order is warranted which would require that the Respondent's action in conducting a RIF pursuant to the provisions of TPM 351 be rescinded. Rather, the Authority will require that the Respondent cease and desist from engaging in the future in the conduct found violative of the Order and require that, upon request, it afford the Complainant the opportunity to bargain concerning the impact and implementation of the RIF action as it affected those employees represented exclusively by the Complainant. */

ORDER

Pursuant to 2400.2 of the rules and regulations of the Federal Labor Relations Authority and § 7135 of the Federal Service Labor-Management Relations Statute, the Authority orders that the Adjutant General's Office of the Puerto Rico Air National Guard shall:

1. Cease and desist from:

(a) Instituting a reduction in force procedure under TPM 351, or any other regulation, involving employees represented exclusively by the National Federation of Federal Employees, Local 1665 (Independent), without first notifying the exclusive representative and affording it the opportunity to meet and confer, to the extent consonant with law and regulation, concerning the implementation of such procedure and its impact on affected employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491 as amended or now available to them under the Civil Service Reform Act.

*/ In conformity with § 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended.

(a) Upon request, meet and confer with the National Federation of Federal Employees, Local 1665 (Independent), to the extent consonant with law and regulations, concerning the impact and implementation of the 1977 reduction in force on employees at the 140th Aircraft and Warning Squadron.

(b) Post at the Adjutant General's Offices, Puerto Rico Air National Guard, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. The forms shall be signed by the Commanding Officer upon receipt and posted for 60 days thereafter in conspicuous places, including all places where notices to employees customarily are posted. The Commanding Officer shall take reasonable steps to insure that the notices are not removed, altered, defaced, or covered by other material.

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply with the order.

Issued, Washington, D.C., June 3, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUTATE THE POLICIES OF

CHAPTER 71 OF THE TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement a reduction in force procedure involving employees represented by the National Federation of Federal Employees, Local 1665 (Independent), without first affording such representative the opportunity to meet and confer concerning the implementation and impact of such procedure.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request by the National Federation of Federal Employees, Local 1665 (Independent), meet and confer, to the extent consonant with law and regulations, concerning the impact of the 1977 reduction in force on employees at the 140th Aircraft Control and Warning Squadron.

_____
(Agency or Activity)

Dated:_____ By:_____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, whose address is: Room 241, 26 Federal Plaza, New York, New York, 10007, and whose phone number is (212) 264-4934.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of

THE ADJUTANT GENERAL'S OFFICE
PUERTO RICO AIR NATIONAL GUARD
Respondent

and

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, INDEPENDENT
LOCAL 1665
Complainant

Case No. 37-01985(CA)

JAIME A. RODRIGUEZ LECOEUR, ESQ.
Puerto Rico Air National Guard
P.O. Box 3786
San Juan, Puerto Rico 00904
For the Respondent

JANET COOPER, ESQ.
General Counsel
National Federation of Federal
Employees
1016 16th Street, NW.
Washington, D.C. 20036
For the Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on May 15, 1979 by the Regional Director for the Federal Labor Relations Authority, New York Region, a hearing was held before the undersigned on June 20 and 21, 1979 at San Juan, Puerto Rico.

This proceeding was initiated under Executive Order 11491, as amended (herein called the Order). A complaint was filed on January 16, 1978 by National Federation of Federal Employees, Independent Local 1665 (herein called Complainant) against the Adjutant General's Office, Puerto Rico Air National Guard (herein called Respondent). It alleged that Respondent violated Sections 19(a)(1) and (6)

of the Order by (a) changing its procedures for a reduction in force (RIF) in April, 1977 without consulting or negotiating with Complainant, (b) failing and refusing to bargain over the impact of the ongoing reduction in force.

Respondent submitted a response to the complaint, dated January 30, 1978, denying the commission of any unfair labor practice. It averred that the reduction in force was accomplished by strict adherence to the procedures set forth in a directive (TPM 351) from the National Guard Bureau, and that it met and discussed the RIF procedures with Complainant union.

Both parties were represented at the hearing, and were afforded full opportunity to be heard, to adduce evidence and to examine as well as cross-examine witnesses. Thereafter, the parties filed briefs which have been duly considered.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following finidngs, conclusions and recommendations:

Findings of Fact

1. At all times material herein Complainant union has been, and still is, the collective bargaining representative of all technicians of the Puerto Rico Air National Guard.

2. Since 1970 both Complainant and Respondent have been parties to a collective bargaining agreement covering said technicians. The said agreement provides, inter alia, as follows:

> Article 11.4 Reduction In Force: Management shall inform the technicians organization before it institutes any reduction-in-force action affecting unit technicians. It is agreed that in re hiring from the re-employment priority list, technicians will be rehired in the inverse order from which laid off.
>
> Article 15 - Subjects For Consultation and Negotiation:
> a. Matters appropriate for negotiation under this agreement shall consist of, but are not confined to the following:

> . . . (8) Application of procedures relating to promotion, disciplinary actions, appeals, reduction in force and technician appraisal. (underscoring supplied).

3. By a memorandum dated March 21, 1977 1/ the National Guard Bureau, Washington, D.C. ordered the Respondent to institute a reduction in force. The RIF involved the 140th Aircraft Control and Warning Squadron (140th ACW Sq.) whose employees were stationed at Punta Salinas and Punta Borinquen.

4. The aforesaid memorandum advised the Puerto Rico Air National Guard (PRANG) that the RIF procedures will be governed by TPM 351 which became effective on March 31.

5. Prior to March 31 the RIF procedures were controlled or regulated by TPP 910. The system for establishing a retention register was based on a 100 point scale in the evaluation, and a military appraisal form was utilized in rating the employees. Under TPP 910 all vacancies in PRANG were frozen during a reduction in force.

6. Several changes were affected as a result of TPM 351 which replaced the old procedure. Under the new directive (a) the military appraisal form was changed, (b) the point system was altered so as to be based on a 20 point scale in the evaluation, and (c) only the vacancies in the area involved in the RIF, the 140th ACW Sq. in this instance, were frozen. Under this system longevity would not be a factor in selecting those to be separated. Further, those employees included in the RIF would not have, under the TPM 351 procedure, the same opportunities to fill vacancies as prevailed under TPP 910.

7. On April 12 Colonel Faria, Chief of TPO for Respondent met with Diego Nieves, and Angel Parra, President and Vice-President respectively of the Complainant union, as well as with several other union officials. Faria informed them that a reduction in force would take place, and that it would be governed by the procedures set forth in TPM 351. He stated he was unfamiliar with the provisions but gave the union officials a copy of the new procedure. Neither the employer nor the union officers reviewed the contents of TPM 351 at the meeting.

1/ All dates hereinafter mentioned are in 1977 unless otherwise indicated.

8. On April 13 and 14 management m t ith the technicians of the 140th ACW Sq. at the two locations. It distributed a notice of the RIF to the employees and explained the procedure to be followed. Questions were posed by some of those in-attendance, but Respondent's officials were unable to answer many of them. Although Parra was in attendance, the union was not notified of the meeting in advance thereof.

9. Subsequently the Complainant learned that a representative of FAA was visting Puerto Rico, and it requested a meeting with management to discuss the possibility of FAA hiring some of the employees who would be separated by the reduction in force. In addition to discussing this matter, the union officials also requested of General Llensa that the military appraisals not be utilized. Complainant was concerned that the appraisal, which would have a significant impact under the point system, would be unfair and likely to be based on bias. It desired that the appraisal be made when no RIF was in the offing. The union proposed that all the employees receive the same appraisal points so as to put a premium on length of service.

General Llensa stated at the meeting that he would "get back" to the union representatives regarding management's reactions to the proposal. However, Respondent did not reply to the union; the military appraisals were made and a retention register was prepared.

10. In early May Complainant requested it be given copies of the appraisals and the retention register. This request was denied initially. On May 25 specific notices were given of the RIF to 18 employees who were apprised that they would be separated on July 31. 2/ Several weeks later management furnished Complainant with copies of the appraisals and retention register.

11. The RIF, which involved 18 of 47 individuals in the 140th ACW Squadron, resulted in a separation of three union stewards. A first vice-president of the union was not terminated. Each steward who was terminated from his job had more than 10 years of service and was senior in service to non-stewards who were retained. Of the 18 individuals separated by the RIF, five persons were not employed at the date of the hearing herein.

2/ The RIF was in progress during June.

Conclusions

In alleging that Respondent violated Sections 19(a)(1) and (6) of the Order, the Complainant makes several contentions in this regard. It is contended that management (1) unilaterally changed its procedures in effecting the RIF at PRANG, and failed to bargain with Complainant re the impact and implementation thereof; (2) failed to provide information (military appraisals and retention register) to the union which was necessary to fulfill the bargaining representative's responsibilities; (3) conducted formal discussions on April 13 and 14, 1977 with groups of unit employees re the forthcoming RIF, but failed to notify the Complainant and give it an opportunity to be present thereat; (4) manipulated the RIF so as to separate the union stewards of the 140th ACW Squadron.

While the Complainant makes several allegations in its brief as to conduct by the employer which it deemed illegal, note is taken by the undersigned that the complaint herein is limited in scope. The averment in the complaint concerns itself with the unilateral changes made by Respondent in the procedures followed to accomplish the reduction in force at PRANG. It is alleged that management failed to bargain re the impact and implementation of such procedures. However, no allegation is found in the complaint in respect to Respondent's (a) failure to furnish information requested by the union; (b) meeting with employees in a formal discussion but failing to notifying Complainant or give it an opportunity to be present; (c) effecting the RIF in order to terminate the union stewards.

Past decisions under the Order reflect that unless a complaint contains a particular allegation of misconduct, no finding will be made in regard thereto. As set forth in Part 203 of the Regulations governing this proceeding, the matters to be litigated must be alleged in the complaint. If they are not so raised, the merits thereof will not be considered during a hearing or passed upon thereafter. FAA, William R. Hobby Airport Traffic Control Tower, et. al. A/SLMR No. 1039; Naval Weapons Station, Concord, California, A/SLMR No. 1020.

Accordingly, and in view of the fact that the complaint herein is confined to allegation regarding the unilateral change in procedures adopted by Respondent in effectuating its RIF, the undersigned will restrict his decision to a determination of this issue. As to the other contentions raised by Complainant, as aforesaid, the merits thereof will not be passed upon by the undersigned nor will a recommendation be made in regard thereto.

Refusal to Bargain Re Impact and Implementation of Reduction in Force

It is now well established in the public sector that an employer, while it may properly reduce its force, must meet and confer with the bargaining agent concerning the implementation of the RIF and its impact upon affected employees. Environmental Protection Agency, Region IV, A/SLMR No. 999. Further, any changes by management in working conditions, such as reassignments or a review system, require that the union agent be notified thereof and afforded an opportunity to bargain over the implementation and impact of such change. Department of the Treasury, Internal Revenue Service, Austin Service Center, Austin, Texas, A/SLMR No. 1142, Department of the Treasury, Internal Revenue Service, Fresno Service Center, A/SLMR No. 983.

In the case of bar Respondent insists it fully complied with its obligations in this regard. Thus it argues that management duly informed the union of the RIF and met with Complainant's representative to discuss the matter immediately. Respondent contends it furnished the bargaining representative a copy of the TPM 351 which governed the reduction in force; that it later met with the union officials to consider possible relocation of personnel within the FAA; and that the RIF procedures, as well as benefits, were explained by management at several meetings. Despite the foregoing, I am persuaded that Respondent's actions belied any efforts to bargain over the procedures for implementing the RIF as well as the impact upon adversely affected employees. In reaching this conclusion, I rely upon the following:

(a) The new regulation (TPM 351) which governed the reduction in force became effective on March 31. Thus, the procedures were operative prior to April 12, the date when management informed Complainant of the impending RIF and TPM 351. Under these circumstances the union was afforded little, if any, opportunity to bargain re the new procedure. Although the parties met on April 12 and Respondent furnished Complainant with a copy of the regulation, no input by the union could have been meaningful since the adoption of TPM 351 was already a fait accompli. As Judge Halpern stated in Department of the Treasury, Internal Revenue Service, Fresno Service Center, A/SLMR No. 983:

> ". . . in order that the Union be given a meaningful opportunity to consult and confer on impact issues, it would have to be informed of the action sufficiently in advance of implementation to allow for the preparation of proposal and the good faith exchange of views contemplated by the Order."

As indicated in the cited case, the right to bargain would be meaningless unless the union was advised of the procedures for implementation in sufficient time to consider them and bargain thereon. In the instant case management informed Complainant that TPM 351 would control the RIF - and there was no attempt to elicit the union's views concerning this new procedure, nor to exchange views with respect thereto. As such, I conclude no meaningful opportunity was afforded Complainant to bargain as to either its implementation or impact upon employees. 3/ See Community Services Administration, A/SLMR No. 913.

(2) The RIF procedures were, prior to April 1977, governed by TPP 910 and PRANG. Significant changes regarding a reduction in force were imposed by TPM 351. These involved the evaluation point system, the forms to be utilized, and the areas frozen at PRANG during a RIF for filling vacancies. The institutions of changes re personnel practices by management require, under the Order, that such changes be negotiated with the bargaining agent as to this implementation and impact upon employees. See Department of the Treasury, Internal Revenue Service, Fresno Service Center, supra. At none of the meetings conducted by Respondent was any attempt made to bargain in such respects. Management simply informed the union and the employees that new procedures were operative as to the RIF. As the record reflects, the changes in procedures as to the reduction in force were made unilaterally, and no input from the bargaining representative was sought or encouraged.

(3) While Respondent met with the union and its employees to explain that the RIF would occur to be governed by TPM 351, those meetings fell short of bargaining re implementation and impact as mandated under the Order. The meetings on April 13 and 14 were designed solely to explain to the employees that the RIF would be governed by the new regulation. Although questions were posed by those in attendance, no effort was made by the employer to discuss with union representative Parra the procedural changes. Moreover, at the meeting on April 22 the union raised several concerns

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3/ It does not appear that the union herein made a specific request to bargain on impact and implementation. However, where management has unilaterally made changes in personnel policies, as it did here in adopting TPM 351, it is not necessary for the bargaining representative to request bargaining after the fact. Department of the Treasury, Internal Revenue Service, Austin Service Center, Austin, Texas, A/SLMR No. 1142.

re the appraisal. Management agreed to consider them and reply thereto. It never did so, nor did it communicate with Complainant re the problems raised by the union. At that meeting discussions centered upon having the FAA absorb some of those affected by the separation. The procedures to be followed were not discussed, nor did management itself bargain over the impact upon those employees adversely affected. Those meetings, as I view the record, were not designed to meet and confer with the union re the procedures or impact of the RIF. The meeting on April 22 was held at the instance of Complainant and was, in truth, a conference with FAA officials. No bargaining occurred at any of the sessions re the method of selection of the impact of the RIF upon the technicians.

In view of the foregoing, I conclude that Respondent did not meet and confer with Complainant herein re the implementation of TPM 351, which governed the RIF of employees at the 140th ACW Squadron at PRANG, as well as the impact of the RIF upon adversely affected employees. Accordingly, I find that Respondent thereby violated Sections 19(a)(1) and (6) of the Order.

Recommendation

Having found that Respondent has engaged in conduct prohibited by Sections 19(a)(1) and (6) of the Order, I recommend that the Federal Labor Relations Authority adopt the following order which is designed to effectuate the policies of the Order.

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Federal Labor Relations Authority orders that the Adjutant General's Office, Puerto Rico Air National Guard, shall:

1. Cease and desist from:

a) Instituting a reduction in force procedure under TPM 351, or any other regulation, involving employees represented exclusively by the National Federation of Federal Employees, Independent, Local 1665, without first notifying the National Federation of Federal Employees, Independent, Local 1665, and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the implementation of such procedure and its impact on adversely affected employees.

b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended.

a) Rescind Regulation TPM 351 which procedure management followed in the 1977 reduction in force of the employees at 140th Aircraft Control and Warning Squadron, and reinstate TPP 910 as the procedure to govern reduction in force at PRANG.

b) Reappraise and reevaluate, under TPP 910, all employees at the 140th Aircraft Control and Warning Squadron, who were involved in the 1977 reduction in force, to determine which employees would be properly separated in the said reduction in force.

c) Upon request, meet and confer with the National Federation of Federal Employees, Independent, Local 1665, to the extent consonant with law and regulations, concerning the procedures which management followed under TPM 351 in reaching its decision as to who should be separated in the 1977 reduction in force of the employees at the 140th Aircraft Control and Warning Squadron, and as to the impact the said reduction in force had on adversely affected employees.

d) If, following negotiation with the National Federation of Federal Employees, Independent, Local 1665, in accordance with paragraph 2(c) above, it is determined that any employees was adversely affected by the procedures followed by management under TPM 351 in the 1977 reduction in force of employees at the 140th Aircraft Control and Warning Squadron, such employee shall be made whole, including reimbursement of any loss of monies occasioned thereby, consistent with applicable laws, regulations, and decisions of the Comptroller General.

e) Notify the National Federation of Federal Employees, Independent, Local 1665 of any intended reduction in force procedure and afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the implementation of such procedure and its impact on adversely affected employees.

f) Post at the Adjutant General's Offices, Puerto Rico National Guard, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notice to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

g) Pursuant to Section 203.27 of the Regulations, notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

WILLIAM NAIMARK
Administrative Law Judge

Dated: 5 SEP 1979
Washington, D.C.

APPENDIX

N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

We hereby notify our employees that:

WE WILL NOT unilaterally institute a new reduction in force procedure involving employees represented exclusively by the National Federation of Federal Employees, Independent, Local 1665, without first affording such representative the opportunity to meet and confer concerning the implementation and impact of such procedure.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind regulation TPM 351 governing the procedure for reduction in force of employees at PRANG, and reinstate TPP 910 as the procedure for evaluating and appraising our employees to determine those individuals attached to the 140th Aircraft Control and Warning Squadron who would be affected by the 1977 reduction in force.

WE WILL re-evaluate and reappraise under TPP 910 our employees who were attached to the 140th Aircraft Control and Warning Squadron and were involved in the 1977 reduction in force to determine, in accordance with the procedures set forth in TPP 910, which employees should have been separated in the 1977 reduction in force.

WE WILL, upon request by the National Federation of Federal Employees, Independent, Local 1665, meet and confer, to the extent consonant with law and regulations, concerning the procedure which management followed under TPM 351 in reaching its decision as to who should be separated in the 1977 reduction in force of employees at the 140th Aircraft Control and Warning Squadron, and as to the impact such reduction in force had upon adversely affected employees.

WE WILL, following negotiations with the National Federation of Federal Employees, Independent, Local 1665, make whole any employee who is determined to have been adversely affected by the procedures followed by management under TPM 351 in the 1977 reduction in force of employees at the 140th Aircraft Control and Warning Squadron, including reimbursement for any loss of monies occasioned thereby, consistent with applicable law, regulations and decisions of the Comptroller General.

_____
Agency or Activity

Dated: _____ By _____
Signature

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority whose address is Room 1751, 26 Federal Plaza, New York, N.Y. 10007.

3 FLRA No. 57

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE ARMY
FORT BRAGG SCHOOLS

Respondent

and

NORTH CAROLINA FEDERATION OF
TEACHERS, AFT, AFL-CIO

Labor Organization

Case Nos. 4-CA-148
4-CA-149
4-CA-150
4-CA-151
4-CA-152

DECISION AND ORDER

The Administrative Law Judge in the above-entitled proceeding issued his Recommended Decision and Order finding that the Respondent had engaged in the unfair labor practices alleged in the complaints, and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

Therefore, pursuant to section 2423.29 of the Authority's rules and regulations (45 F.R. 3511, January 17, 1980) and section 7118 of the Federal Service Labor-Management Relations Statute (5 U.S.C. section 7101 et seq.), the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, including the Respondent's exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendations. In adopting the Administrative Law Judge's findings, conclusions and recommendations, the Authority has not considered any issues not raised in the proceedings before the Administrative Law Judge, in accordance with section 2429.5 of the Authority's rules and regulations (45 F.R. 3517) which states, in pertinent part, "[t]he Authority will not consider...any issue...which was not presented in the proceedings before the...Administrative Law Judge...."

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's rules and regulations and section 7118 of the Statute, the Authority hereby orders that the Department of the Army, Fort Bragg Schools, Fort Bragg, North Carolina, shall:

1. Cease and desist from:

(a) Permitting school principals or other supervisors to attend duly authorized informational meetings designed to solicit the membership of teachers in the North Carolina Federation of Teachers, AFT, AFL-CIO, or any other labor organization.

(b) Permitting the Superintendent of Schools, or any other representative of management, to make statements which tend to discourage employees from engaging in collective bargaining.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities located in Fort Bragg, North Carolina, copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Installation Commander at Fort Bragg, Fort Bragg, North Carolina, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Installation Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director of Region IV, Suite 501, 1776 Peachtree Street, NW., Atlanta, Georgia 30309, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., June 10, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT permit school principals or other supervisors to attend duly authorized informational meetings designed to solicit the membership of teachers in the North Carolina Federation of Teachers, AFT, AFL-CIO, or any other labor organization.

WE WILL NOT permit the Superintendent of Schools, or any other representative of management, to make statements which tend to discourage employees from engaging in collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Statute.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice, or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region IV, whose address is: Suite 501, North Wing, 1776 Peachtree Street, NW., Atlanta, Georgia 30309, and whose telephone number is (404) 881-2324.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	:	
DEPARTMENT OF THE ARMY FORT BRAGG SCHOOLS Respondent	:	Case Nos. 4-CA-148 4-CA-149 4-CA-150 4-CA-151 4-CA-152
and	:	
NORTH CAROLINA FEDERATION OF TEACHERS, AFT, AFL-CIO Charging Party	:	

Samuel S. Horn, Esq.
Office of the Judge Advocate General
Fort Bragg, North Carolina 20310

Captain James J. Lynch, Esq.
Captain Allan Sirmans, Esq.
Office of the Staff Judge Advocate
18th Airborne Corps
Fort Bragg, North Carolina 28307

For the Respondent

Douglas E. Canders, Esq.
112 Old Street
Fayetteville, North Carolina 28301

For the Charging Party

William N. Cates, Esq.
Regional Attorney
Mathilda L. Genovese, Esq.
Attorney
Federal Labor Relations Authority
1776 Peachtree Street, NW.
Atlanta, Georgia 30309

For the General Counsel

Before: RANDOLPH D. MASON
Administrative Law Judge

DECISION

These cases arose pursuant to the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. §7101, et seq., as a result of a consolidated unfair labor practice complaint filed on September 18, 1979, by the Regional Director, Region IV, Federal Labor Relations Authority, Atlanta, Georgia, against the Department of the Army, Fort Bragg Schools.

The complaint alleged that respondent violated 5 U.S.C. §7116(a)(1) when the Superintendent of Schools allegedly spoke against collective bargaining at a union organizational meeting (4-CA-148). It also alleged four additional violations of that section when union informational meetings at four separate schools were attended by their respective principals (4-CA-149, 150, 151, 152). Respondent denies each of these allegations and also moves to dismiss the complaint on the ground that the Authority lacks jurisdiction over these employees.

A hearing was held in this matter before the undersigned at Fort Bragg, North Carolina, on November 27, 1979. All parties were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, and examine and cross-examine witnesses. All parties filed briefs which have been duly considered. Based on the entire record herein, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, I make the following findings of fact, conclusions of law, and Order:

Findings and Conclusions

Jurisdiction

The first issue for consideration is whether the Authority has jurisdiction over the teachers at the Fort Bragg Schools. Respondent argues that they are not "employees" within the meaning of §7103(a)(2) of the statute, 5 U.S.C. §7103(a)(2). The statute generally states that it prescribes certain rights and obligations of the "employees of the Federal Government." 5 U.S.C. §7101(b). An "employee" is defined, in part, as an individual "employed in an agency." 5 U.S.C. §7103(a)(2). The section provides for five specified exceptions (e.g., supervisors) having no relevance to this case.

1. Relationship between the Department of the Army and the school system.

Respondent argues that all the employees of the Fort Bragg Schools, including the Superintendent, are "independent contractors"

and that, as such, the entire school system is an entity separate and apart from the Federal Government, i.e. the respondent Department of the Army. 1/ I disagree.

The Fort Bragg Schools were established pursuant to Section 6, Title I, Public Law 81-874, 20 U.S.C. §241 (hereinafter "Section 6"). The history of that law indicates that it was the intent of Congress that, wherever possible, free public education for children living on Federal property would be provided by the regularly constituted State and local educational agencies. However, it was recognized that in certain cases the latter would not be able to provide such education. In such cases, Section 6 authorized the establishment of schools by the Federal Government. The Fort Bragg School system falls into this category.

Respondent's argument that the superintendent, principals, and teachers at the Fort Bragg Schools are independent contractors is based on the fact that they are all employed under personal service contracts. However, the fact that they are designated as "contractors" in their contracts is of minor significance for the purpose of determining whether an individual is an "independent contractor" or works under a "master-servant" relationship as those terms are used in the law of agency. Under common law, the most important element in a master-servant relationship is the right to control the work activities of the individual; the labels used by the parties are relatively unimportant. W. SEAVEY, AGENCY, §84 (1964). 2/

I have concluded that the Army has a right to control the employees of the Fort Bragg School system and that the latter is an integral part of the Department of the Army. Respondent's argument that all school employees, including the Superintendent and Principals, are independent contractors is contrary to respondent's

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1/ Respondent admits, and I find, that these individuals are paid by the Army, and are eligible for Civil Service retirement, Federal employees group life insurance, Federal employees health benefits coverage, and severance pay.

2/ The traditional common law tests are dispositive in the private sector, where independent contractors are specifically excluded from the protection of the National Labor Relations Act as amended, 29 U.S.C. §152(3). N.L.R.B. v. United Insurance Company of America, 390 U.S. 254, 88 S. Ct. 988 (1968). Unlike its private sector counterpart, the Federal Service Labor-Management Relations Statute does not specifically exclude independent contractors from protection. In view of my finding below that the Fort Bragg personnel are government employees and not independent contractors, I need not decide whether independent contractors might in certain cases be protected by the statute.

own regulations. In this regard Army Regulation ("AR") 352-3, effective April 1, 1976, states in part:

> §3-2 ... Personnel employed in Section 6 dependents schools [such as Fort Bragg] are employed under conditions which meet the tests of Federal employment in S3-3a, Federal Personnel Manual Supplement 831-1.

Section S3-3a, F.P.M. Supp. 831-1, generally defines federal employees as those who are (1) engaged in federal functions under an Act of Congress or Executive Order, (2) appointed or employed by a federal officer, and (3) work under the supervision and direction of a federal officer. Thus AR 352-3 provides that all personnel at the Fort Bragg Schools, including the Superintendent, work under the supervision and direction of federal officers of the Department of the Army.

The Army Regulations also provide further evidence that the Department of the Army has the power to control personnel in the instant schools. For example, section 2-1 of AR 352-3 provides that the Adjutant General is responsible for the operation and administration of the Section 6 school program, and that the Director of Personnel and Community Activities is normally responsible at the installation level. Section 2-2 states that the Installation Commander is responsible for approving and reviewing the actions of the school board. 3/ Finally, Army Procurement Procedure, section 4-5602(a), refers to these schools as "Army operated schools".

It is clear, then, that Fort Bragg school personnel are "employees" as that term is used in the law of agency, 4/ and that all such employees, including the Superintendent, are subject to the supervision and control of the Department of the Army. Therefore, I must disagree

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3/ The board's duties include establishing policy, approving the budget, expenditures, personnel selections, and selecting the superintendent. id.

4/ Respondent has never seriously argued that the relationship between the school principals and the teachers was anything other than a "master-servant" relationship under agency law. On brief respondent stated that "the power to control the detailed performance of the personnel employed by the Fort Bragg Schools is vested in ... [the Superintendent and principals] and not the Department of the Army." (p. 2). Respondent was merely attempting to divorce the school system from the Department of the Army by urging that the school supervisors were independent contractors. In any event, the facts of record clearly establish that the principals controlled the daily duties of the teachers.

with respondent's argument that the school system is a separate and autonomous entity from the Department of the Army.

2. Fort Bragg teachers are "employees" protected by the statute.

The statute defines an "employee", in relevant part, as an individual employed in an agency. 5 U.S.C. §7103(a)(2). That section then specifically enumerates only five categories of people who are not included in the definition (e.g., supervisors). Since teachers employed at "Section 6" schools such as those at Fort Bragg are not listed as an excluded category, it would appear that these government employees are protected by the statute. However, respondent argues that Section 6, Title I of Public Law 81-874, 20 U.S.C. §241, which initially authorized the hiring of these employees, places them in a unique category which Congress did not seek to protect by the Federal Service Labor-Management Relations Statute. Section 6 provides, in part, as follows:

> ... To the maximum extent practicable ... the head of the Federal department or agency ... shall take such action as may be necessary to ensure that the education provided pursuant to such arrangement is comparable to free public education provided for children in comparable communities in the State .... For the purpose of providing such comparable education, personnel may be employed and the compensation, tenure, leave, hours of work, and other incidents of the employment relationship may be fixed without regard to the Civil Service Act and rules and the following: (1) the Classification Act of 1949, as amended; (2) the Annual and Sick Leave Act of 1951, as amended; (3) the Federal Employees' Pay Act of 1945, as amended; (4) the Veterans' Preference Act of 1944, as amended, and (5) the Performance Rating Act of 1950, as amended. [Emphasis supplied] 20 U.S.C. §241(a).

Respondent argues that the above-quoted section "mandates" that the working conditions and rights of the Fort Bragg teachers be equivalent to those of North Carolina state public school teachers. The latter are forbidden from entering into collective bargaining agreements by State law. N.C. Gen. Stat. §95-98 (Repl. Vol. 1965). I disagree with respondent's construction.

First, Congress was attempting to provide "comparable education" for children where local agencies were unable to supply facilities. It was only "for the purpose of providing such comparable education"

that Congress said personnel, such as teachers, "may" be employed and the incidents of the employment relationship "may" be fixed without regard to certain specifically enumerated Acts of Congress. Thus in order to attain the desireable end of comparable education, Congress gave the responsible agencies the option of exempting their school personnel from certain specified statutes. Thus Congress did not intend to "mandate" anything regarding working conditions as they relate to the enumerated Acts.

Secondly, 20 U.S.C. §241, as presently amended, does not provide for an exemption from the Federal Service Labor-Management Relations Statute. Section 241 was amended in 1965 to name five additional Acts (only the Civil Service Act was previously named) from which the personnel could be exempted. At that time, Executive Order 10988, a predecessor of the FSLMR Statute had been in effect since January of 1962. However, the rights conferred by E.O. 10988 were not taken away by the 1965 amendment. If Congress had intended to do so, it would have specifically mentioned that Executive Order. Respondent's argument that the enumerated Acts of Congress are "not an all-inclusive list" constitutes an unreasonable construction of section 241, 5 U.S.C. §241.

The Comptroller General of the United States has held that Section 6 school employees are entitled to the rights given by the Back Pay Act of 1966, 5 U.S.C. §5596. Fort Rucker Elementary School Employees, __Comp. Gen.__ (1979), File B-192528, April 20, 1979. That case also cites additional Comptroller General decisions holding that Section 6 school employees are subject to all statutes pertaining to government employment except those for which an exemption is specifically authorized. Section 241 does not specifically authorize an exemption with respect to the Federal Service Labor-Management Relations Statute.

Therefore, I must conclude and hold that the Fort Bragg teachers are "employees" protected by the Federal Service Labor-Management Relations Statute, 5 U.S.C. §7101, et seq. 5/ Respondent's motion to dismiss for lack of jurisdiction is denied.

5/ Respondent also argued that the application of the grievance and arbitration procedures of the statute to these employees would ultimately conflict with procedures provided by the Contract Disputes Act of 1978, 41 U.S.C. §601, et seq. Since no such conflict exists in the instant case, I need not address that issue. Respondent also argued that the Section 6 school program is only temporarily being administered by the federal government, and that it will eventually be turned over to the state governments. This argument finds no support in the law or legislative history; moreover, the Fort Bragg Section 6 school program has been in existence for at least 25 years.

Surveillance

The next issue is whether the attendance of school principals at several union informational meetings held for the teachers constituted a violation of 5 U.S.C. §7116(a)(1).

During the first few months of 1979, Virginia D. Ryan, State Director of the North Carolina Federation of Teachers, AFT, AFL-CIO, ("AFT") contacted Dr. Haywood Davis, the Superintendent of the Fort Bragg Schools. Her purpose was to get permission to use school mailboxes, bulletin boards, and rooms in order to organize a new AFT chapter and solicit membership among the teachers. 6/ On April 19 Davis granted her request and told her that meetings could be held in the various schools at 3:30 p.m. 7/

On April 24, 1979, Ryan contacted Donald H. Orr, principal of the Irwin Junior High School. She scheduled a meeting with the Irwin teachers for May 2 and told Orr that he should not attend union informational meetings. She explained the history and objectives of AFT to Orr at an informal gathering on April 24.

Ryan met with Superintendent Davis on May 2 and requested that he ask the school principals not to attend AFT informational meetings. Davis immediately got a legal opinion on the matter by telephone and informed her that he could not prevent their attendance. Subsequently, at 3:30 p.m., Ryan held the scheduled meeting at Irwin School with about 12 teachers. Principal Orr and his assistant were in attendance. Ryan discussed the history of AFT and some of the benefits, goals and objectives of the organization; she also discussed the rights granted to employees and explained how AFT could help the Fort Bragg teachers in this regard. AFT literature and membership applications were made available to the teachers at the meeting. The meeting included a question and answer period.

Subsequently, Ryan held identical meetings with seven to 10 teachers at the McNair Elementary School (May 3), Bowley Elementary School (May 8), and Butner Elementary School (May 10). The May 3 meeting was attended by Principal Richard M. Ensley, the May 8 meeting by Principal Forrest H. Deshields, and the May 10 meeting by Principal Stahle H. Leonard, Jr. In each case the principal was sitting in full view of all teachers attending. Deshields attended in spite of Ryan's specific request to him just before the May 8 meeting that he not

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6/ The Fort Bragg Federation of Teachers, Local 3976, was chartered on July 1, 1979.

7/ Children were expected to be off school grounds by that time and the teachers' "normal" duty day was over at 3:45 p.m. (G.C. Ex. 4, p. 32-33).

attend and her warning that she might have to file a charge against him if he did.

Counsel for the General Counsel argues that the presence of the principals at the four above-mentioned informational and organizational meetings constituted a violation of 5 U.S.C. §7116(a)(1) because, in each case, it interfered with, restrained, or coerced the employees in the exercise of their §7102 rights to form, join or assist a labor organization. It is well settled in the private sector that overt surveillance by management supervisors of employees while the latter are attending union organizational meetings is prohibited by §8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) because it interferes with comparable protected rights. National Labor Relations Board v. Collins & Aikman Corp., 146 F2d 454 (4th Cir. 1944); N.L.R.B. v. M & B Headwear Co., 349 F2d 170, 172 (4th Cir. 1965).

Respondents argue that the employees in the instant case were not shown to be affected by the presence of the school principals. However, this is not a necessary element of proof to sustain a violation. The test is whether the action by the supervisors "tended" to have a chilling effect on the exercise by the employees of their protected rights. N.L.R.B. v. Huntsville Manufacturing Co., 514 F2d 723, 724 (5th Cir. 1975). In the instant case the teachers were aware that their immediate supervisor was watching them and, for example, was in a position to take note of any indication during the question and answer period of an employee's interest in how working conditions could be improved by means of collective bargaining. It is reasonable to infer that some employees might have felt inhibited by the presence of their supervisor from showing an interest and asking questions. Some may have been concerned that their supervisor even knew that they attended the meeting for fear of subsequent reprisal. 8/ The meetings in question were designed and advertised for teachers, not principals; therefore, the awkward presence of the principals tended to highlight their anxiety about union organization. 9/ Accordingly, it is held that the presence of the principals tended to interfere with, restrain, or coerce the teachers in the exercise of their rights to form, join, or assist a labor organization.

8/ In an analogous case it was held that management cannot interrogate an employee concerning the names and number of employees who had signed a representation petition. Federal Energy Administration, Region IV, Atlanta, Georgia, A/SLMR No. 541, 5 A/SLMR 509 (1975).

9/ Respondent argues that the principals had a right to attend the meetings since they were on federal property. However, management authorized the use of certain rooms for the meetings and there is no evidence that any appropriate function of management was served by the attendance of the principals.

The Superintendent's statement

The final issue is whether respondent violated section 7116(a)(1) of the statute when the Superintendent of the Fort Bragg Schools made a statement to a group of employee teachers.

On May 14, 1979, the North Carolina Association of Educators ("NCAE") held a meeting at the Irwin School for the purpose of enlightening the teachers at Fort Bragg about collective bargaining. The speaker was a representative from the state office of NCAE. The meeting was attended by about 50 or 60 teachers and the Superintendent of the Fort Bragg Schools, Dr. Haywood Davis.

At one point during the question and answer period after the lecture, the speaker was in the process of explaining the process by which the teachers could obtain collective bargaining. He noted that it would be necessary for a certain number of teachers to request it. At this point Superintendent Davis walked up to the podium and made a statement to the audience. The intent and effect of Davis' statement was to discourage the teachers from filing a petition with the Authority for collective bargaining. He told the teachers that although he supported the right of any teacher to join any labor organization, he did not want to see collective bargaining in his school system because it would put administrators and teachers "on opposite sides of the table." He prefaced his remarks by acknowledging that it might be improper for him to make such a statement, but that he wished all of his teachers were there to hear it. 10/

The General Counsel and the Charging Party both argue that the above statement violated 5 U.S.C. §7116(a)(1) because it interfered with, restrained, or coerced the employee teachers in the exercise of their rights under the statute. Section 7102 gives each employee the right to form, join, or assist any labor organization freely and without fear of penalty or reprisal. This right specifically includes the right to engage in collective bargaining with respect to conditions of employment through chosen representatives. 5 U.S.C. §7102(2). The Superintendent's statement at the May 14 meeting clearly interfered with and restrained the Fort Bragg teachers from exercising their protected right to engage in collective bargaining. The charging party, AFT, only a few days earlier, had conducted several meetings with the teachers to explain collective bargaining and solicit membership. Davis' statement had the effect of discouraging

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10/ Findings with respect to Davis' statement are based on the credible testimony of three teachers; I do not credit Davis' testimony that he was merely trying to say that it is possible to have exclusive representation without collective bargaining.

this effort. Moreover, Davis' remarks were particularly coercive since he was in charge of the entire Fort Bragg school system, including the discipline and annual rehiring of the teachers. It is irrelevant that Davis did not specifically threaten the employees with reprisal if they did not act in accordance with his wishes. 11/ Accordingly, it is held that respondent violated section 7116(a)(1) of the statute.

ORDER

Pursuant to 5 U.S.C. §7118(a)(7) and section 2423.26 of the Final Rules and Regulations, 45 Fed. Reg. 3482, 3510 (1980), it is hereby ORDERED that the Department of the Army, Fort Bragg Schools, Fort Bragg, North Carolina, shall:

1. Cease and desist from:

(a) Permitting school principals or other supervisors to attend duly authorized informational meetings designed to solicit the membership of teachers in the North Carolina Federation of Teachers, AFT, AFL-CIO, or any other labor organization;

(b) Permitting the Superintendent of Schools, or any other representative of management, to make statements which tend to discourage employees from engaging in collective bargaining.

(c) In any like or related manner interfering, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute, 5 U.S.C. §7101, et seq.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities in Fort Bragg, North Carolina, copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Installation Commander at Fort Bragg, Fort Bragg, North Carolina, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all

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11/ A contrary result may have obtained under one unenacted bill which provided that the expression of any personal views would not constitute an unfair labor practice if it did not contain a "threat of reprisal or force or promise of benefit or undue coercive conditions." S.2640, 95th Cong., 2d Sess., §7216(g). This subsection was ultimately modified to provide for limited freedom of expression in three instances not applicable herein. 5 U.S.C. §7116(e).

bulletin boards and other places where notices to employees are customarily posted. The Installation Commander shall take reasonable steps to insure that said notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 2423.30 of the Final Rules and Regulations, 45 Fed. Reg. at 3511, notify the Regional Director of Region IV, Suite 501, 1776 Peachtree Street, NW., Atlanta, Georgia 30309, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Randolph D. Mason

RANDOLPH D. MASON
Administrative Law Judge

Dated: February 14, 1980
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

We hereby notify our employees that:

WE WILL NOT permit school principals or other supervisors to attend duly authorized informational meetings designed to solicit the membership of teachers in the North Carolina Federation of Teachers, AFT, AFL-CIO, or any other labor organization;

WE WILL NOT permit the Superintendent of Schools, or any other representative of management, to make statements which tend to discourage employees from engaging in collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employee in the exercise by the employee of any right under the Statute.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice, or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region 4, whose address is: Suite 501, North Wing, 1776 Peachtree Street, NW., Atlanta, Georgia 30309.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES UNION

(Union)

and

Case No. 0-NG-92

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON, D.C.

(Activity)

DECISION ON NEGOTIABILITY APPEAL

This case comes before the Federal Labor Relations Authority pursuant to section 7105 (a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. section 7101 et seq.).

The U.S. Customs Service, Washington, D.C., announced plans to implement guidelines concerning inspectional overtime. In response to this announcement, the National Treasury Employees Union (NTEU) sought to negotiate on the substance, implementation and impact of these guidelines, asserting that they changed past practices and instituted significant changes in working conditions. Thereafter, the NTEU submitted 54 proposals concerning the impact of the guidelines. The parties met and bargained over the Union's proposals on several occasions. During the course of negotiations, the Activity notified the Union of its refusal to bargain on six of the proposals, stating that they bore no relation to the subject matter under consideration.

The NTEU filed an appeal from the Activity's action. */ In its statement of position, the Union alleges that the implementation of the announced policies will change established working conditions by revising work schedules and reducing the amount of overtime available to unit employees. The Union contends that the proposals on which the Activity refused to bargain are reasonably related to the matter under negotiation. Further, it urges the Authority

*/ The Union subsequently filed three unfair labor practice charges, two of which concern the issue of the obligation to bargain over the proposed guidelines. Pursuant to section 2423.5 of the rules and regulations, proceedings on these unfair labor practice charges have been suspended pending the outcome of this decision.

to adopt a policy whereby proposals that address the impact of a proposed agency action and are not in conflict with management rights are fully negotiable in the collective bargaining context.

In its submission to the Authority, the Activity asserts that the petition does not present a proper negotiability issue, but rather that the six proposals bear no relation to the subject matter under negotiation and that the Activity, consequently, has no obligation to bargain about them. The Activity also asserts that the Union's proposals addressed matters already governed by existing policies and regulations that are unaffected by implementation of the announced guidelines. Finally, the Activity argues that the issue presented to the Authority as a negotiability appeal actually involves a question concerning the obligation to bargain.

In American Federation of Government Employees, AFL-CIO, Local 1617 and Department of the Air Force, Headquarters, Air Force Logistics Command, Kelly Air Force Base, Texas, 2 FLRA No. 55, (1980), the Authority dismissed a petition for review of a negotiability determination on the grounds that the circumstances of the case presented an unfair labor practice issue. In making this determination, the Authority found that the appeal concerned a refusal to bargain on an alleged unilateral change in working conditions, rather than the question of whether the proposals themselves were negotiable. Thus, the Authority concluded:

> [T]o the extent that the case arose out of an alleged unilateral change coupled with a refusal to bargain and a defense, essentially, that no change has occurred, the proper forum to raise these issues . . . would be an unfair labor practice proceeding pursuant to section 7118 of the Statute.

It is clear from the record in the instant case that the essence of the parties' allegations and contentions relates to whether a past practice has been changed by the implementation of guidelines detailed in a manual supplement. Thus, the fundamental issue in this case, as in Kelly Air Force Base, supra, concerns the Activity's obligation to bargain. The proper forum in which to raise these issues would be an unfair labor practice proceeding pursuant to section 7118 of the Statute. In this regard, resolution of the instant dispute is dependent upon the resolution of factual issues related to the parties' conduct. Such factual determinations can be best accomplished through use of the investigatory and hearing procedures set forth in part 2423 of the Authority's rules and regulations, which govern unfair labor practice proceedings (45 F.R. 3506).

Based on the foregoing, the union's appeal does not present issues that the Authority can appropriately resolve at this time under section 7117 of the Statute and Part 2424 of its rules and regulations. Accordingly, the appeals are dismissed without prejudice to the union's right to resubmit to the

Authority any negotiability dispute which remains concerning the union's proposals, after resorting to the procedures discussed above.

Issued, Washington, D.C., May 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU BUFFALO DISTRICT
JOINT COUNCIL

(Union)

and Case No. 0-NG-133

INTERNAL REVENUE SERVICE
BUFFALO DISTRICT

(Activity)

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NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 49

(Union)

and Case No. 0-NG-134

INTERNAL REVENUE SERVICE
MANHATTAN DISTRICT

(Activity)

- -

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 54

(Union)

and Case No. 0-NG-135

INTERNAL REVENUE SERVICE
PROVIDENCE DISTRICT

(Activity)

- -

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 61

(Union)

and Case No. 0-NG-136

INTERNAL REVENUE SERVICE
ALBANY DISTRICT

(Activity)

CONSOLIDATED DECISION ON NEGOTIABILITY APPEALS

These four cases come before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.). Inasmuch as all four cases involve the same agency (IRS) and union (NTEU), and raise the identical issues, the agency's unopposed request that the cases be consolidated for consideration and decision is granted.

The record before the Authority discloses that, during the term of a negotiated agreement, the agency issued changes in its Handbook of Employee Responsibilities and Conduct (IRM 0735.1-7) applicable to all IRS employees nationwide. The union thereafter submitted the following proposals to each activity involved herein:

(1) Each employee shall be given forty (40) hours of administrative time to become familiar with the contents of IRM 0735.1-7 as required by that regulation.

(2) Management shall hold training sessions for all IRS employees covered under IRM 0735.1-7 monitored by representatives of NTEU to clarify the contents of IRM 0735.1-7 as suggested by Acting Commissioner Williams.

With regard to the first proposal, management responded that the established policy was to permit employees a reasonable amount of time to familiarize themselves with changes in the IRM and that, as no change in such policy had been made, there was no duty to bargain. As to the second proposal, management's position was that the training sessions requested by the union were already negotiated into the Multi-District Agreement between the parties. Thereafter, the union filed timely petitions for review of the agency head's final determination of nonnegotiability with the Federal Labor Relations Council (Council). The Council dismissed the petitions for review as in effect moot, without passing upon the merits of the appeals and without prejudice to the union's submission of the disputes to the Authority in conformity with the provisions of the new Statute and with the Authority's regulations issued thereunder.

By letter dated February 9, 1979, after the Statute had become effective, the union requested the agency head to reconsider his original determination with regard to the union's proposals in light of the provisions contained in the new Statute.

On July 18, 1979, having received no response from the agency, the union filed the instant petitions for review with the Authority. The union's appeal asserted as to the first proposal, in essence, that management did have an obligation to bargain over the granting of administrative time for employees to become familiar with the significant changes in the Handbook of Employee Responsibilities and Conduct which the employees were required to learn and follow, and that there was no past practice with regard to the newly issued IRM 0735.1-7. As to the second proposal, the union essentially disputed the

agency's assertion that the parties' Multi-District Agreement covered training sessions for IRS employees subject to IRM 0735.1-7. In its statement of position filed with the Authority, the agency's only argument was that the union's petitions were untimely filed under section 7117(c) of the Statute 1/ and § 2424.3 of the Authority's rules and regulations. 2/ The union did not file a response thereto.

Contrary to the agency's assertion, the union's petitions for review herein were timely filed. Thus, section 7117(c) of the Statute (supra note 1)

1/ Section 7117(c) of the Statute (92 Stat. 1206) provides, in pertinent part, as follows:

> (c) (1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.
>
> (2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by --
>
> (A) filing a petition with the Authority; and
>
> (B) furnishing a copy of the petition to the head of the agency.

2/ Section 2424.3 of the Authority's interim rules and regulations (44 Fed. Reg. 44765 (1979)) states as follows:

> § 2424.3 Time limits for filing.
>
> The time limit for filing a petition for review is fifteen [15] days after the date the agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained is served on the exclusive representative. The exclusive representative shall request such allegation in writing and the agency shall make the allegation in writing and serve a copy on the exclusive representative: Provided, however, that review of a negotiability issue may be requested by an exclusive representative under this subpart without a prior written allegation by the agency if the agency has not served such allegation upon the exclusive representative within five [5] days after the date of the receipt by any agency bargaining representative at the negotiations of a written request for such allegation.

In the Authority's final regulations (45 Fed. Reg. 3512 (1980)), the only amendment to § 2424.3 is to provide ten (10) days rather than five (5) days for the agency to serve its written allegation upon the exclusive representative.

provides that where an agency alleges that the duty to bargain under the Statute does not extend to any matter, the exclusive representative must file a petition for review with the Authority within 15 days of such agency allegation. However, as previously set forth (supra note 2), the Authority's implementing regulations state that where the exclusive representative has made a written request for such allegation and the agency has failed to provide the written allegation as requested within a specified period of time, the exclusive representative may thereafter request the Authority to review the negotiability issue(s) without a prior written allegation. In the circumstances of the instant case, the agency never provided the written allegation under the Statute as specifically requested by the union in writing, and therefore the 15 day time limit (measured from the date of an agency's allegation) specified in section 7117(c)(2) of the Statute for filing a petition for review never began to run. Accordingly, the union's petitions for review were timely filed pursuant to section 7117(c) of the Statute and § 2424.3 of the Authority's regulations.

Turning to the proposals at issue, based on the record herein, it is clear that the essence of the contentions and arguments of the parties with respect to the first proposal is whether there was a past practice of providing a sufficient amount of administrative time for employees to familiarize themselves with changes in IRM 0735.1-7; if so, whether the past practice had been changed; and whether management had any obligation to bargain during the term of the parties' agreement concerning the union's first proposal. It does not, however, at this point in the proceedings focus on issues ripe for resolution under the procedures set forth in section 7117 of the Statute and part 2424 of the Authority's rules and regulations, concerning whether particular union proposals are themselves nonnegotiable, i.e., inconsistent with law, rule or regulation. Rather, the substance of the dispute concerns unfair labor practice issues which would be appropriate for resolution at this time under the procedures set forth in section 7118 of the Statute. See American Federation of Government Employees, Local 1931 and Department of the Navy, Naval Weapons Station, Concord, California, Case No. 0-NG-55, 2 FLRA No. 19 (Dec. 5, 1979), and National Federation of Federal Employees, Local 1141 and Department of the Interior, Bureau of Mines, Albany Metallurgy Research Center, Albany, Oregon, Case No. 0-NG-80, 2 FLRA No. 28 (Dec. 13, 1979).

With respect to the second proposal, as previously stated, the parties are essentially in dispute concerning the threshold question as to whether their current Multi-District Agreement covers the matter of training sessions for IRS employees subject to IRM 0735.1-7. To the extent that such dispute concerns the meaning of terms contained in the parties' agreement, the proper forum in which to resolve such questions is not the negotiability appeal but, instead, would be pursuant to whatever procedures the parties themselves have adopted for such purpose through such agreement. See American Federation of Government Employees, Local 1931 and Department of the Navy, Naval Weapons Station, Concord, California, Case No. 0-NG-55, 2 FLRA No. 19 (December 5, 1979). See also American Federation of Government Employees, AFL-CIO, Local 1661 and Department of Justice, Bureau of Prisons, Federal Correctional Institution, Danbury, Connecticut, Case No. 0-NG-43, 2 FLRA No. 56 (Jan. 9, 1980), and American Federation of Government Employees, AFL-CIO, Local 2272 and Department of Justice, U.S. Marshals Service, District of Columbia, Case No. 0-NG-101, 2 FLRA No. 113 (Mar. 14, 1980).

Based on the foregoing, the union's appeals do not present issues that the Authority can appropriately resolve at this time under section 7117 of the Statute and Part 2424 of its rules and regulations. Accordingly, the appeals are dismissed without prejudice to the union's right to resubmit to the Authority any negotiability dispute which remains concerning the union's proposals, after resorting to the procedures discussed above.

Issued, Washington, D.C., May 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1451

(Union)

and

Case No. 0-NG-160

NAVY EXCHANGE, NAVAL ADMINISTRATIVE
COMMAND, ORLANDO, FLORIDA

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

Union Proposal

Consideration of outside applicants may be undertaken when there are less than three minimally qualified internal applicants being considered for the promotional vacancy and when the Qualification Screening Committee determines that no qualified candidates are among the applicants, external recruitment will be effected. This shall not exclude concurrent consideration of volunteer applicants or consideration of re-promotion or special consideration eligibles. However, vacancy announcements will be posted only in the minimum area of consideration.

Question Here Before the Authority

The question is whether the proposal which concerns the filling of promotional vacancies violates section 7106(a)(2)(C) of the Statute, 1/ as alleged by the agency.

Opinion

Conclusion: The proposal violates section 7106(a)(2)(C) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 45 F.R. 3513, the agency's allegation that the disputed proposal is not within the duty to bargain is sustained.

Reasons: In its statement of position filed with the Authority pursuant to section 7117(c)(3) of the Statute, the agency argues, in essence, that the proposal would negate the activity's right to select from among properly ranked and certified candidates for promotion or from any other appropriate source within the meaning of section 7106(a)(2)(C) by limiting the consideration of outside applicants to instances when there are fewer than three minimally qualified internal applicants being considered for the promotional vacancy and when a Qualification Screening Committee determines that there are no qualified candidates among the applicants. The agency further argues that the proposal would in fact require the promotion of an internal unit employee if three minimally qualified employees are available. On its face, the disputed proposal is subject to the interpretation suggested by the agency. Since there is no indication in the record that the union intended the proposal to have a different meaning, the agency's interpretation is adopted for the purpose of this decision.

1/ Section 7106(a)(2)(C) of the Statute (92 Stat. 1198) provides:

§7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws--

. . . . . .

(C) with respect to filling positions, to make selections for appointments from--

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source. . . .

As noted above, section 7106(a)(2)(C) reserves to management the right, with respect to filling positions, to make selections from among properly ranked and certified candidates for promotion or from any other appropriate source. The proposal here involved, which would restrict management's right to consider properly ranked and certified candidates for promotion or outside applicants (with the exception of volunteer applicants or re-promotion or special consideration eligibles) would infringe upon the exercise of the right to select. Thus, this case is distinguishable from American Federation of Government Employees, AFL-CIO, Local 331 and Veterans Administration Hospital, Perry Point, Maryland, Case No. 0-NG-17, 2 FLRA No. 59 (Jan. 17, 1980), wherein the Authority concluded that a proposal which would require only that consideration be given to employees within the bargaining unit in filling vacant positions but would not prevent management from considering other applicants, or expanding the area of consideration once bargaining unit employees were considered, or using any other appropriate source in filling such vacancies, did not prevent management from exercising its reserved right to select. 2/

Furthermore, as the agency notes, to the extent that the proposal would require the selection of an internal unit employee if three minimally qualified employees are available, the proposal would conflict with section 7106(a)(2)(C) of the Statute. 3/

2/ Compare also Association of Civilian Technicians, Delaware Chapter and National Guard Bureau, Delaware National Guard, Case No. 0-NG-104, 3 FLRA No. 9 (April 14, 1980).

3/ See The National Council of CSA Locals, A.F.G.E., AFL-CIO and the Community Services Administration, Case No. 0-NG-127, 3 FLRA No. 13 (April 28, 1980), in which the Authority found nonnegotiable a proposal which would require selection from within a minimum area of consideration and would permit the agency to consider other candidates only if the minimum area of consideration did not yield a certain specified number of qualified employees.

Accordingly, the agency's allegation that the proposal is not within the duty to bargain is sustained.

Issued, Washington, D.C., June 11, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. O-PS-11

DECISION ON REQUEST FOR GENERAL STATEMENT OF POLICY AND GUIDANCE

As previously announced,*/ the Authority received a request from the American Federation of Government Employees (AFGE) that the Authority issue a general statement of policy or guidance as to the obligation to negotiate during the term of a collective bargaining agreement.

The specific matter at issue, substantially as stated by AFGE, is the following:

> Does the employer, in a bargaining relationship, have an obligation to bargain at the demand of the exclusive representative on a mandatory subject for bargaining during the term of an agreement, whether the matter upon which bargaining is demanded is covered by the terms of a collective bargaining agreement or not? Styled from the exclusive representative's perspective, does the union have the right to demand bargaining on a matter covered by the terms of an agreement or not covered in an agreement, and have the employer bargain in good faith?

Before deciding whether issuance of a policy statement was warranted, the Authority invited interested persons to express their views in writing with respect to the question of whether the Authority should issue a policy statement on this matter.

The Authority has carefully considered this request, including the views submitted in response to the Notice issued by the Authority, and determined that the request does not satisfy the standards governing the issuance of general statements of policy and guidance set forth in section 2427.5 of the Authority's Rules and Regulations (45 Fed. Reg. 3516 (1980)), which provide in pertinent part:

> § 2427.5 Standards governing issuance of general statements of policy and guidance.
>
> In deciding whether to issue a general statement of policy or guidance, the Authority shall consider:

*/ Federal Labor Relations Authority, Notice Relating to the Issuance of a Policy Statement, 44 Fed. Reg. 63580 (Nov. 5, 1979).

(a) Whether the question presented can more appropriately be resolved by other means;

(b) Where other means are available, whether an Authority statement would prevent the proliferation of cases involving the same or similar question[.]

The matter raised in this request for a general statement of policy or guidance can be more appropriately resolved by other means. For example, the procedures set forth in the Statute and appropriate regulations for the resolution of unfair labor practices provide a mechanism for the resolution of the various factual issues involved in a charge that a party has refused to negotiate in good faith as required by the Statute. Those procedures also provide a mechanism for the resolution of issues of law, that may be ancillary to such factual issues, as to whether a matter proposed for negotiations is within the duty to negotiate.

Also, Authority action on this request is not warranted since it would not prevent the proliferation of cases involving the same or similar questions. In the Authority's view, a meaningful statement on the matter raised in the request would require conjecture by the Authority on a wide variety of potential circumstances. Such a statement would carry the potential of unsettling rather than facilitating the understanding of other parties as to how the statement would apply in their particular situation.

Accordingly, the request for a general statement of policy or guidance is denied.

Issued, Washington, D.C., May 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. O-PS-17

DECISION ON REQUEST FOR GENERAL STATEMENT
OF POLICY OR GUIDANCE

The Authority received a request from the National Treasury Employees Union (NTEU) that the Authority issue a major policy determination concerning the question of whether an agency is required to maintain the status quo when the exclusive representative appeals the agency's determination that a proposal is nonnegotiable pursuant to section 7117 of the Federal Service Labor-Management Relations Statute.1/

The specific matter at issue, substantially as stated by NTEU, is as follows:

> Whether the provisions of the Statute require an agency engaged in negotiations with the exclusive representative to maintain the status quo when the exclusive representative pursuant to section 7117 of the Statute appeals to the Authority the agency's determination that a proposal of the exclusive representative is nonnegotiable.

The Authority has carefully considered this request and has determined that it does not satisfy the standards governing the issuance of general

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1/ Section 7117 of the Statute provides in pertinent part:

> § 7117. Duty to bargain in good faith; compelling need; duty to consult
>
> . . . . . .
>
> (b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.
>
> . . . . . .
>
> (c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

statements of policy and guidance set forth in section 2427.5 of the Authority's rules and regulations, 45 F.R. 3516, which provides in pertinent part:

> § 2427.5 Standards governing issuance of general statements of policy and guidance.
>
> In deciding whether to issue a general statement of policy or guidance, the Authority shall consider:
>
> (a) Whether the question presented can more appropriately be resolved by other means;
>
> (b) Where other means are available, whether an Authority statement would prevent the proliferation of cases involving the same or similar question[.]

The question presented in this request for a major policy determination can be more appropriately resolved by other means. As NTEU itself points out in its request, procedures are provided in the Statute and appropriate regulations for the resolution of unfair labor practices, such as a refusal to negotiate in good faith. Moreover, where an agency engaged in negotiations allegedly takes unilateral action to alter the status quo and thereby fails to meet its obligation to bargain in good faith, the unfair labor practice procedures provide an appropriate mechanism to resolve issues of fact and law relating thereto.

Authority action on this request also is not warranted since it would not prevent the proliferation of cases involving the same or similar question. In the request, it is indicated that the question presented is currently facing many other parties. However, given the variety of disputed circumstances wherein such issues could be involved, issuance of an Authority statement would not necessarily be dispositive of possible cases growing out of other circumstances.

Accordingly, the request for a major policy determination is denied.

Issued, Washington, D.C., June 10, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

CORRECTED COPY

3 FLRA No. 66

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS
LOCAL F-61

(Union-Petitioner)

and

Case No. O-NG-6

PHILADELPHIA NAVAL SHIPYARD

(Activity)

DECISION ON NEGOTIABILTIY ISSUES

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 et seq.).

Union Proposal I

ARTICLE XX

TRAINING

Section 1 - The Employer and the Union agree that any given training session or drill will not exceed one (1) hour duration. It is further agreed that only one (1) training session or drill, of one (1) hour duration or less, will be assigned to any given workday. Training sessions or drills must be concluded by 1500 hours on weekdays. No training sessions will be held on Saturdays, Sundays or holidays.

Section 2 - The Employer and the Union agree that no outdoor training sessions or drills will be held on days when the outside temperature exceeds 80 degrees fahrenheit, or drops below 45 degrees fahrenheit. It is further agreed that high humidity, high winds and precipitation shall be considered reason for cancellation of outdoor training sessions or drills. The Employer and the Union further concur that all on-duty personnel will participate in training sessions or drills with the exception of men on overtime status, completing ship inspection or extinguisher detail, whenever possible.

NEGOTIABILITY CASES

3 FLRA No. 66 (June 24, 1980)

International Association of Fire Fighters, Local F-61 and Philadelphia Naval Shipyard, Case No. 0-NG-6. The dispute involved the negotiability of four proposals concerning (1) training, (2) holidays, (3) promotions and (4) overtime. As to (1), the Authority held that the union's proposal concerning training, by placing absolute limits on the agency's ability to assign training to unit personnel during duty hours, violated the agency's right to assign work under section 7106(a)(2)(B) of the Statute; and, therefore, sustained the agency's allegation that the proposal was outside the duty to bargain. With regard to (2), the Authority held that the union's proposal concerning holidays, by prescribing the duties employees could be assigned on certain days, violated management's right under section 7106(a)(2)(B) of the Statute to assign work; and, in addition, by including in a list of holidays days which are not recognized as holidays in Federal law, the proposal to that extent also violated 5 U.S.C. § 6103. The Authority, therefore, sustained the agency's allegation of nonnegotiability as to this proposal. As to (3), the Authority found that, to the extent that the union's proposal concerned promotion procedures for unit positions, it was within the obligation to bargain under section 7117 of the Statute; however, to the extent that the proposal would apply to nonbargaining unit supervisory positions it was negotiable only at the election of the agency. Accordingly, since the agency had elected not to negotiate promotion procedures for nonbargaining unit supervisory positions, the Authority sustained the agency's allegation that the proposal was not within the duty to bargain. Finally, with regard to (4), the Authority held that the union's overtime proposal did not concern a matter which is specifically provided for by Federal law and, further, did not violate section 7106(a)(1) of the Statute. Accordingly, the Authority set aside the agency's allegation that this proposal was not within the duty to bargain. (Decision attached.)

3 FLRA No. 67 (June 25, 1980)

National Federation of Federal Employees, Local 862 and Tooele Army Depot, Tooele, Utah, Case No. 0-NG-44. The dispute involved a union proposal that would authorize hazard pay differential to certain categories of General Schedule employees. The activity declared the proposal nonnegotiable, claiming that it conflicted with a specific statute (5 U.S.C. 5545(d)) which authorized the

Office of Personnel Management (OPM) to establish a schedule of pay differentials for certain categories of employees performing hazardous duties on an irregular or intermittent basis; and that negotiations over the proposal would thwart the position classification process specifically excluded from "conditions of employment" as defined in section 7103(a)(14)(B) of the Statute. The Authority requested an advisory opinion from OPM pursuant to section 7105(i) of the Statute concerning the proper interpretation of rules, regulations, or policy directives issued by OPM; more specifically, whether the union's proposal conflicted with any laws, rules or regulations over which OPM had responsibility. Based on the record in the case, including the advisory opinion rendered by OPM and the comments submitted by the parties on that opinion, the Authority concluded that the dispute involved issues appropriate for resolution through the classification appeals process rather than under the procedures set forth in section 7117 of the Statute. Accordingly, the Authority held that the union's appeal had been prematurely filed, and denied the appeal, but without prejudice to the renewal of its contention that the matters in dispute are negotiable in a petition duly filed with the Authority after it is resolved, under applicable procedures, that the hazardous duties at issue are irregular and intermittent and have not been taken into account in classifying the positions involved. (Decision attached.)

ARBITRATION CASES

3 FLRA No. 61 (June 11, 1980)

Marine Corps Logistics Support Base, Pacific, Barstow, California and American Federation of Government Employees, AFL-CIO, Local 1482 (Adler, Arbitrator), Case No. 0-AR-23. The arbitrator, relying on section 7106 of the Statute, found that the union's grievance concerning a particular work assignment was not arbitrable. The arbitrator therefore declined to proceed further and did not rule on the merits of the grievance. The Authority accepted the union's petition for review of the arbitrator's award pursuant to the then applicable rules of procedure (Report No. 19). On review, the Authority found that the arbitrator's award was deficient, holding that nothing in section 7106 of the Statute precludes an arbitrator from reaching and deciding the merits of a grievance where, as here, a party has alleged a violation of provision in a collective bargaining agreement. Accordingly, the Authority set aside the arbitrator's award. (Decision attached.)

3 FLRA No. 62 (June 11, 1980)

National Border Patrol Council and National Immigration and Naturalization Service Council and United States Department of Justice, Immigration and Naturalization Service (Harkless, Arbitrator), Case No. 0-AR-12. The arbitrator held that the activity was not required to bargain with the union about certain inclusions which the union wanted the activity to make in its Operating Instruction, and that therefore the activity did not violate the parties' agreement by unilaterally putting the Operating Instruction into effect. The arbitrator denied the union's grievance and the union filed a petition for review of the arbitrator's award with the Authority, contending: (1) that the award violated E.O. 11491 and the Statute; (2) that the arbitrator failed to conduct a fair hearing; and (3) that the arbitrator exceeded his authority. The Authority denied the union's petition because it failed to meet the requirements for review set forth in the applicable rules of procedure. (Decision attached.)

3 FLRA No. 63 (June 11, 1980)

Naval Ordance Station, Louisville, Kentucky and Local Lodge No. 830, International Association of Machinists and Aerospace Workers (Dunsford, Arbitrator), Case No. 0-AR-11. The dispute arose when, due to extreme weather conditions, the activity was closed for a number of days by order of its commanding officer; employees who were excused from work were required to use annual leave or take leave without pay for certain of those days. The arbitrator, in part of his award, determined that the activity violated the parties' agreement by not granting administrative leave on the days in question after it had decided to close. The agency filed a petition for review of that part of the arbitrator's award with the Authority, contending that it violated section 12(b)(3) of E.O. 11491. The Authority found that the agency's petition did not contain a description of facts and circumstances to support its exception. Accordingly, the Authority denied the agency's petition because it failed to meet the requirements for review set forth in the applicable rules of procedure. (Decision attached.)

3 FLRA No. 68 (June 25, 1980)

Mare Island Naval Shipyard and Federal Employees Metal Trades Council of Vallejo, AFL-CIO (Meyers, Arbitrator), Case No. 0-AR-105. The Authority dismissed the union's exceptions to the arbitrator's award as untimely filed under section 2425.1 of the Authority's regulations. (Order Dismissing Exceptions attached.)

3 FLRA No. 70 (June 25, 1980)

Office of Hearings and Appeals, Social Security Administration, HEW and Local 3615, American Federation of Government Employees (Weiss, Arbitrator), Case No. 0-AR-94. The Authority dismissed the union's exceptions to the arbitrator's award as untimely filed under section 2425.1 of the Authority's regulations. (Order Dismissing Exceptions attached.)

3 FLRA No. 71 (June 25, 1980)

Naval Air Development Center and American Federation of Government Employees, Local No. 1928 (Mullaly, Arbitrator), Case No. 0-AR-103. The Authority dismissed the union's exceptions to the arbitrator's award as untimely filed under section 2425.1 of the Authority's regulations. (Order Dismissing Exceptions attached.)

GENERAL STATEMENT OF POLICY OR GUIDANCE

3 FLRA No. 69 (June 25, 1980)

National Association of Government Employees, Federal Aviation Science and Technological Association, Case No. 0-PS-18. NAGE, on behalf of its affiliate, FASTA, requested that the Authority issue a general statement of policy or guidance on the question of "[w]hether or not a bargained-for privilege in a collective bargaining agreement covering certain, ascertainable, definite employees can be extended by the Comptroller General to include employees not included in the unit covered by the agreement." The union had negotiated the privilege of a bargaining unit employee operating a privately owned vehicle during training under certain circumstances. The Authority determined that because the question could more appropriately be resolved by other means, such as an unfair labor practice proceeding, and resolution of the issue would not prevent the proliferation of cases involving the same or similar questions, the union's request did not satisfy the Authority's standards governing the issuance of general statements of policy and guidance. Accordingly, the union's request was denied. (Decision attached.)

Attachments (11)

3 FLRA No. 64

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE NAVY,
NAVAL UNDERWATER SYSTEMS CENTER,
NEWPORT NAVAL BASE

Respondent

and

Assistant Secretary
Case No. 31-11669(CA)

FEDERAL UNION OF SCIENTISTS AND ENGINEERS,
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES,
LOCAL R1-144

Complainant

DECISION AND ORDER

The Administrative Law Judge issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the two unfair labor practices alleged in the complaint and recommending that the complaint be dismissed. The Complainant, Federal Union of Scientists and Engineers, National Association of Government Employees, Local R1-144, (NAGE), filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under § 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by § 2400.2 of the Authority's rules and regulations (45 F.R. 3402, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in § 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to § 2400.2 of the Authority's rules and regulations and § 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the exceptions filed by the Complainant, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendations, except as modified herein.

The amended complaint herein alleged, in substance, that the Respondent violated § 19(a)(1) and (6) of the Executive Order by its actions in August, September and November 1977, in unilaterally imposing restrictions on the utilization of official time by the NAGE's president, for representational purposes, and additionally, by refusing the Complainant's request for a copy of a monthly

retention register prepared by the Respondent. In recommending that the complaint be dismissed in its entirety, the Administrative Law Judge found that the NAGE and Respondent had not negotiated an agreement concerning the use of official time for representational purposes; the use of official time for such purposes is not an inherent right under the Executive Order; that the NAGE's president could not possibly have spent legitimately the amount of official time credited to him on "union business"; and the Activity's action was not an unreasonable restriction, was a reasonable interpretation of the Federal Personnel Manual, and was consistent with management's prerogatives under § 12(b) of the Order. In addition, the Administrative Law Judge found, in essence, that the monthly retention register sought by the NAGE was not necessary and relevant information needed by the NAGE in order to discharge its responsibilities as the exclusive representative.

Contrary to the Administrative Law Judge, the Authority concludes that the Respondent violated § 19(a)(1) and (6) of the Executive Order by its action in restricting the utilization of official time by the president of the NAGE for representational purposes. It is well settled under the Executive Order that the use of official time for representational activities of an exclusive bargaining representative is subject to bargaining by the parties and, upon agreement, to be reduced to writing. See Matter of GAO, No. B-152287, 3 FLRC 874, FLRC No. 75P-1 (1975). It is also well established that parties may establish terms and conditions of employment by practice, or other form of tacit or informal agreement, and that this, like other established terms and conditions of employment, may not be altered by either party in the absence of agreement or impasse following good faith bargaining. See U.S. Department of Treasury, Internal Revenue Service, New Orleans District, 8 A/SLMR 497, A/SLMR No. 1043 (1978).

As more fully set forth in the attached Administrative Law Judge's Recommended Decision and Order, the utilization by the president of the NAGE of official time for representational purposes for up to 40 hours per week had been consistently exercised for an extended period of time with the knowledge and consent of the Respondent's supervisors. In the Authority's view, the parties' actions constitute the establishment by practice of a term and condition of employment. Under these circumstances, the Authority concludes that Respondent's actions in restricting the amount of official time available to be utilized by the president of the NAGE without first notifying and bargaining in good faith with the NAGE constituted a violation of § 19(a)(1) and (6) of the Order.

We reach this conclusion without deciding whether or not there was an abuse of the official time allowed for representational purposes by the union president herein. However, the Authority does not wish to leave the impression that it condones, in any way, abuse or misuse of official time by union officials. If agency management believes that a union official is not using official time for the permitted representational purposes but rather, is abusing or misusing its official time, it may take whatever corrective action, including disciplinary action, deemed appropriate. However, as noted above, such corrective or disciplinary action would not involve the restriction or alteration of an established practice of allowing a certain amount of official time for representational purposes without first negotiating with the exclusive representative.

Finally, in agreement with the Administrative Law Judge, the Authority concludes that, in the absence of evidence that the Monthly Retention Register was necessary and relevant to the NAGE in discharging its obligation to effectively represent employees in the bargaining unit, the refusal of the Respondent to provide the NAGE a copy without charge did not violate § 19(a)(1) and (6) of the Order. */

ORDER

Pursuant to § 2400.2 of the rules and regulations of the Federal Labor Relations Authority and § 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Officer In Charge of the Naval Underwater Systems Center, Newport Naval Base, Department of the Navy, shall:

1. Cease and desist from:

(a) Instituting changes with respect to the practice of using official time for the performance of representational duties, or any other term or condition of employment, without first notifying and, upon request, bargaining in good faith with the Federal Union of Scientists and Engineers, National Association of Government Employees, Local R1-144, the exclusive representative of these employees.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions:

(a) Rescind and revoke the terms and conditions of employment set forth in the memorandum of August 5, 1977, concerning the use of official time by union officials performing representational duties, and any subsequent memoranda issued to effectuate them.

(b) Upon request, negotiate with the Federal Union of Scientists and Engineers, National Association of Government Employees, Local R1-144, with respect to any proposed changes relating to the utilization by union officials of official time to perform representational duties, or any other established term or condition of employment.

(c) Post at the Naval Underwater Systems Center, Newport Naval Base, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of the forms, they shall be signed by the Officer In Charge, and they shall be posted and maintained by him

*/ In conformity with § 902 (b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees customarily are posted. The Officer In Charge shall take reasonable steps to insure that notices are not altered, defaced, or covered by any material.

(d) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint in Assistant Secretary Case No. 31-11669(CA), insofar as it pertains to the failure of the Respondent to provide a monthly retention register, ought to be, and it hereby is, dismissed.

Issued, Washington, D.C., June 16, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute changes with respect to the practice of using official time for the performance of representational duties, or any other term or condition of employment, without first notifying and, upon request, bargaining in good faith with the Federal Union of Scientists and Engineers, National Association of Government Employees, Local R1-144, the exclusive representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind and revoke the terms and conditions of employment set forth in our memorandum of August 5, 1977, concerning the use of official time by union officials performing representational duties, and any subsequent memoranda issued to effectuate them.

WE WILL, upon request, negotiate with the Federal Union of Scientists and Engineers, National Association of Government Employees, Local R1-144, with respect to any proposed changes relating to the utilization by union officials of official time to perform representational duties, or any other established term or condition of employment.

_____

(Agency or Activity)

Dated: _____ By: _____

(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, for the Federal Labor Relations Authority whose address is: 441 Stuart Street, 8th Floor, Boston, Massachusetts 02116, and whose telephone number is (617) 223-0920.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
WASHINGTON, D.C. 20036

Department of the Navy
Naval Underwater Systems Center,
Newport Naval Base
Activity-Respondent

Case No. 31-11669(CA)

and

Federal Union of Scientists and Engineers,
National Association of Government Employees,
Local R1-144
Complainant

BEFORE: ROBERT G. MAHONY
Administrative Law Judge

A. Gene Niro, Esq.
Department of the Navy
666 Summer St.
Boston, Massachusetts 02210
For the Respondent

Richard Remmes, Esq.
285 Dorchester Ave.
South Boston, Massachusetts
For the Complainant

RECOMMENDED DECISION AND ORDER

This proceeding arises under the provisions of Executive Order 11491, as amended, (herinafter referred to as the Order). Pursuant to the Regulations of the Assistant Secretary for Labor Management Relations (hereinafter referred to as the Assistant Secretary), a Notice of Hearing on Complaint issued on September 19, 1978 with reference to alleged violations of Section 19(a)(1) and (6) of the Order. 1/

1/ Section 19 states, in pertinent part:

(a) Agency management shall not -
(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

The complaint was filed on April 24, 1978 and amended on July 25, 1978 and August 24, 1978. The amended complaint alleged, in essence, that management, in violation of a verbal agreement, unilaterally imposed restrictions on the time the union president could devote to representational duties, and, additionally, management refused to provide the union with a copy of a monthly retention register.[2/]

The Activity answered on June 1, 1978 and contended that any official time spent on union activities must be negotiated or, in the absence of a negotiated period, with the permission of management. It was the Activity's position that, absent a negotiated agreement, a period of one hour per day was sufficient for the union president to conduct normal union business. However, if the union felt that his was insufficient, management invited negotiations on the matter. The Activity further stated that the union did not get a retention register until it agreed to pay for the duplication costs, and, in any event, suffered no prejudice by not having the register.

A hearing was held on December 7, 1978 at Boston, Massachusetts at which time the parties were given an opportunity to examine witnesses, introduce documentary evidence and present oral argument. The record remained open until February 15, 1979 for the filing of briefs which have been carefully considered.

STATEMENT OF THE CASE

The Federal Union of Scientists and Engineers (FUSE), a division of the National Association of Government Employees, Local R1-144, became the exclusive bargaining agent for the professionals at the Naval Underwater Systems Center (NUSC), Newport, Rhode Island on May 21, 1976. Dominic Lepore was elected president of the local, which consisted of about 500 to 600 employees. No collective bargaining agreement was in existence during the time covered by the complaint.

From May 22, 1976 through September 24, 1977, Mr. Lepore accounted for practically all of his working hours by alloca-

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2/The second amended complaint withdrew the allegation that management improperly interfered in the internal affairs of the union. Therefore, this issue will not be discussed herein.

ting it to union business. Only 12 percent of his time was allocated to activity tasks.[3] Lepore told Mr. Louis Bisci, his supervisor, that because this was a new local, he was spending a great deal of time on union business to develop a "package" for negotiations. However, by September 1976, Bisci testified that Lepore's work performance became unacceptable because he spent so much time on alleged union business.

On October 4, 1976, Mr. Bisci asked Mr. Lepore, to critique a report involving the advanced Light Weight Torpedo Program. Bisci considered this a one or two day job, but he gave Lepore until November 1, 1976. Lepore advised Bisci that he would accept this assignment but he didn't know if he could complete the task in the allotted time because union business had priority, and he intended to work on union matters.[4] Bisci testified that he did not know that official time could not be used for negotiations. Lepore was also unable to complete another work assignment although extentions were granted, because he took the position that union business came first and activity work assignments second.

On October 4, 1976, Bisci, by memorandum, sought advice from a personnel specialist, Ms. Debbie Petti as to how Lepore would be allowed to spend his time between the union and his work tasks, because Bisci was, for all practical purposes, completely losing Lepore's services. Ultimately, the issue of

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Dates	Union Time		Leave Time	Work Time	Total Hours
May-June, 1976	68		22	150	240
July-Sept. 1976	422		82	56	560
Oct-Dec. 1976	364		107	19	490
Jan-Mar. 1977	434		97	29	560
Apr.-June 1977	382(13 hrs.TNG.)		64	21	480
July-Sept. 1977	380		50	58	488
Total	2050	13	422	333	2818
Percent	72.54	.46	15	12	100

4/ Bisci testified that Lepore met the Nov., 1st deadline but the work product was unsatisfactory. Lepore was given to November 22nd to complete the task. He met the November 22nd deadline, but advised Bisci that he wished he could do a better job, however; union business took precedence.

Lepore's use of time was brought to the attention of the activity's labor relations specialist, Stewart Fisher, he advised that Lepore was not automatically entitled to representational time, and it could be obtained only by management granting him time or through negotiations. Stewart also advised that Lepore was required to do the work assigned to him, and that assignments to Lepore should be documented, and a record kept of his work progress. However, although management officials continued to discuss what to do about the time Lepore was allegedly spending on union business, nothing was done to restrict Lepore's time until August 5, 1977 when Lepore was advised in writing by the Officer-in-Charge, CPT. W. E. Trueblood, that he would be granted one hour per day, immediately prior to his lunch hour, for the conduct of union business.[5/]

5/ ...The following excerpts taken from reference (c) (FPM Ltr 711-114 dtd 14 Oct. 1976) aptly state the position taken by this Center relative to the balance between the use of official time allowed to labor organization officials when performing representational duties and the performance of the government's business:

a. "In all cases, the amount of official time to be authorized and the number of employees authorized to be on official time for representational functions should be determined by balancing the effective conduct of the government's business with the rights of employees to be represented in matters relating to their employment."

b. "Also relevant to this decision is management's judgment as to the impact upon employee performance and efficiency, as well as on the efficient administration of government that will derive from employee representation in the decision making process."

c. "In no circumstances should the amount approved result in serious interference with the assigned responsibilities of the activity or be unjustifiable in light of the benefits, including sound labor sound labor management relations, to be derived."

By memorandum dated August 19, 1977. Mr. Lepore, on behalf of FUSE requested to negotiate reasonable time "for representational duties and responsibilities beginning on September 13, 1977. In addition FUSE requests a Status Quo Ante until the issue is resolved". The Sept. 13th date was suggested so the union chief negotiator could be available.

By letter dated August 23, 1977., CPT. Trueblood denied the union request for a Status Quo Ante, and insisted that Lepore restrict his time to the one hour per day. However, the effective date of this directive was extended from August 23, 1977 until September 6, 1977 "to provide for the transition in the internal work load of your organization". Nevertheless, Lepore effectively ignored this directive and continued to spend most of his time on alleged union business.

By letters dated September 12, 1977 and November 23, 1977, CPT. Trueblood, expressed concern that Mr. Lepore felt he could

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5/ (cont'd)

d. Therefore, using the above guidance, you are required to perform all assigned tasks in a manner commensurate with your grade level and within the imposed time limitations. You are hereby authorized one (1) hour per day to spend on union representational duties and responsibilities. This hour will be spent in the NAGE union office on the second floor of Building 148, and will be the hour immediately prior to your lunch period. You will, therefore, be accountable to your supervisor for the performance of assigned government business on the basis of seven (7) hours per day, exclusive of leave or other officially assigned or accepted duties. All normal union business will be deferred to this one (1) hour that you will be located in the NAGE office. Telephone calls and visists from external union sources and emergency calls and visits from employees may be received at your normal work site; however, you must first seek permission from your supervisor prior to leaving your work to handle these situations. If you find that complications arise between trying to satisfy the balance between the government's business and your representational responsibilities, you must first seek approval from your supervisor to deviate from his direction. Ultimately, you must abide by this direction and bring the issue to my attention if you feel that it is necessary to do so. If you do not feel that this is a reasonable position, then your request to negotiate this issue is welcomed.

not abide by the one hour per day limit. It was pointed out that in the seven weeks from Sept. 12, 1977 to October 29, 1977 Mr. Lepore utilized a minimum of 33% and a maximum of 100% of his time on union representational activities. CPT. Trueblood went on to state:

> In as much as there has not been an improvement in the amount of time you have spent conducting government business as a result of my letter to you dated 5 August 1977 and 12 September 1977, you are hereby directed to use no more than one (1) per day performing representational duties. All visits, all calls, those situations that you have classified as "emergencies" during the past few months, and any other union representational responsibilities, must be deferred to a time between the hours of 1100 and 1200 daily, or during non-work hours. Non-work hours are those hours before and after work and during your lunch period, and anytime for which your Supervisor has approved your request for leave. Deviations from this requirement which will become effective the beginning of the first workday following your receipt of this letter, will not be allowed.

The union also alleges that it was improperly denied a document referred to as a "retention register". The activity's position is that a "sanitized" version of the retention register would be provided if the union agreed to pay for it. Further, in the event of a Reduction in Force (RIF), a register would be provided to the union free of charge.

The evidence concerning the "retention register" is as follows.

By letter dated Feb. 14, 1977, Mr. Stewart Fisher, the activity's labor relations specialist stated to Mr. Lepore:

> Sometime ago you requested to be provided with a copy of the NUSC Retention Register on a monthly basis. I initially informed you that because of the Privacy Act we could only provide you with a sanitized version of this register. This sanitized

> version would include position title, series and grade, name and specialty title (when they became effective). All registers are set up by competitive area and competetive level. The cost of a copy of the initial register would be $15.00 plus five cents per page with approximately 20 pages. Subsequent monthly copies of this register would cost 2.00 plus five cents per page, with the same approximate number of pages. If you desire copies of this register, please notify me and arrangements will be made for your receipt of same.

Almost six months later on August 3, 1977, Lepore replied as follows:

> FUSE exercises its rights to request a copy of the retention register based on the facts of the announcement of a RIF (large or small) in the near future, to meet ceiling requirements.

On January 26, 1978 Lepore, on behalf of FUSE, wrote to Fisher contending that the Union requested a copy of the retention register on October 6, 1976 as well as on several other occasions and stated that it was negotiated that the Union was to get a monthly copy of the sanitized register. In this letter FUSE accused the Activity of dilatory tactics in supplying the register. After some further correspondence, the register was provided to the union on April 4, 1978, the union paid the $10.35 charge on May 27, 1978. In August, 1978 the union was given a second retention register free of charge that management used in connection with (RIF), although this RIF did not affect members of Lepore's union.

ISSUES

1. Did the use of up to forty hours per week from May 21, 1976 to August 5, 1977 for union representational functions by the union President constitute an established past practice?

2. Did the Activity violate Section 19(a) (1) and (6) of the Order by unilaterally restricting to one hour per day the amount of time the union president could devote the representational functions?

3. Did the Activity violate section 19(a) (1) and (6) of the Order by requiring payment from the union in order for the union to receive a monthly retention register for periods other than when a Reductuion in Force was to be effectuated.

DISCUSSION

I. Use of Official Time

Complainant contends, in essence, that it was an established practice for the union president to spend up to 40 hours per week for union-related business; that this practice continued for over one year, and when the Activity unilaterally imposed a limitation on the amount of time Mr. Lepore could spend on union business, it violated Section 19(a)(1) and (6) of the Order.

It has been held by the Assistant Secretary that the use of official time for the conduct of union business in not an inherent right under the Order. Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base California, A/SLMR No. 485 (1975); Department of the Army, Picatinny Arsenal Dover, New Jersey A/SLMR No. 512 (1975).

When the bargaining unit was formed in May 1976, and Mr. Lepore became President, he apparently persuaded his first line Supervisor, Mr. Bisci, that the large amount of time being spent on union business was required to put together a bargaining "package" for negotiations. Bisci testified that management in the initial days of the union existence, wanted to be cooperative in assisting the union is establishing itself. Based on Lepore's representations, Bisci was under the impression that Lepore's time on alleged union business would not continue over a prolonged period.

Once, however, it became apparent that Lepore could not or would not meaningfully perform activity tasks because of his alleged representational duties, this became the subject of discussions between Mr. Bisci and the activity's personnel and labor management specialists. However, the Officer-in-Charge of the activity, CPT. Trueblood, was not aware of the problem until about one month before he issued his August 5, 1977 letter restricting Lepore's time to one hour per day.

Since, the parties did not have a negotiated agreement that covered the use of official time for representational purposes, the Officer-in-Charge based his decision upon the FPM guidelines imposing what he determined to be a reasonable amount of time for union business.

Of course, what is reasonable has to be determined in the context of a given set of facts and circumstances.

After observing Mr. Lepore's demeanor, and listening to his testimony in his effort to account for the time he alledgedly spent on union business, I find that his entire testimony is totally unbelievable and I accord it no weight whatsoever. He was evasive, unresponsive and unpersuasive. His documentation, which generally consisted of a few pieces of paper with cryptic notes documenting his "help and advise" to union members, was totally unreliable as a gauge of time spent on union business. I find and conclude that Lepore could not possibly have legitimately spent anywhere near the hundreds of hours on "union business" that he attempted to justify. More likely, he used his position as union president to avoid performing his activity tasks.

On the record in this case, I find and conclude that the decision of the activity to provide Mr. Lepore one hour per day for union business was, in the absence of any negotiated agreement or credible evidence that this was an unreasonable restriction, a reasonable interpretation of the Federal Personnel Manual concerning the use of official time for union business, and consistent with management's prerogatives under Section 12(b) of the Order.

There is no credible evidence that management refused to consult, confer or negotiate with the complainant on the issue of representational time and I find and conclude that the direction to Mr. Lepore, to limit his time spent on union business to one hour per day, which in any event he effectively ignored, was not a violation of Section 19(a)(1) and (6) of the Order.

The Monthly Retention Register

"Retention Registers" are documents used by management for job reassignments or separations in the event of a reduction in force (RIF). The activity maintains a "monthly retention

group report," which could not be used in the event of a RIF, until it was updated because it does not reflect personnel changes that occur on a daily basis.

In July 1976, Mr. Lepore requested a "retention register" from Mr. Fisher. Fisher told Lepore he could get a "sanitized" version (deleting information covered by the Privacy Act) if the union paid for it, because it would have to be specially prepared for the union as it was not kept in the ordinary course of business. Fisher testified that, by regulation, the union is only entitled to a free copy of the actual retention register after a RIF is announced. During October the issue of obtaining a register was brought up in discussions between the parties, but there is no credible evidence that establishes whether at this time, management requested payment in advance or whether the union agreed to pay after it was sent.

The most credible evidence on the issue of the retention register begins with the February 14, 1977 letter from the Activity which advised Lepore that he could have a copy of the register and the approximate cost. Lepore, on behalf of the union, did not respond until October 3, 1977 requesting a copy of the register on the assumption that a RIF was coming in the near future. Certainly, by waiting almost eight months to reply it appears that the union was in no hurry to obtain the register prior to receiving some information that a RIF might occur.

Lepore renewed his request on January 26, 1978 contending that the parties had "negotiated" on October 7, 1976 that the union would be provided with a "sanitized" version of the register. Subsequently, Lepore advised Fisher that the union would pay, and on April 4, 1978 a validated retention register was furnished to Lepore. The cost was $10.35 and was paid on May 27, 1978. In August, 1978 a RIF occurred and the union was given, without charge, a second retention register that was used in the RIF.

I find and conclude that there is no credeble evidence of any agreement between the parties to either provide or pay for a retention register in October, 1976. The first definitive piece of evidence that I credit on this issue is the February 14, 1977 letter which consisted an offer to sell a copy of the register, which was ultimately accepted and payment tendered. The union offered no credible evidence that

it needed such a document, absent a bona fide RIF, in order to exercise its rights and responsibilities under section 10(e) of the Order.

For the foregoing reasons I find that there is no evidence that Section 19(a)(1) and (6) of the Order was violated by the alleged failure to provide a retention register.

I further find and concluded that based upon the entire record in this case the Complainant has failed to prove by a preponderance of the evidence that the Activity committed any violation of Section 19(a)(1) and (6) of the Order.

RECOMMENDATION

It is recommended that the complaint be dismissed in its entirety.

ROBERT G. MAHONY
Administrative Law Judge

Dated: July 26, 1979
Washington, D.C.

RFM:pac

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION MEDICAL
CENTER, SHREVEPORT, LOUISIANA

Respondent

and

Assistant Secretary
Case Nos. 64-4243(CA)
64-4265(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2000

Complainant

DECISION AND ORDER

The Administrative Law Judge in the above-entitled proceeding issued his Recommended Decision and Order finding that the Respondent had not engaged in the unfair labor practices alleged in the complaints and recommending that the complaints be dismissed in their entirety. Thereafter, the Complainant filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendations. In adopting the Administrative Law Judge's findings, conclusions and recommendation in Case No. 64-4265(CA), the Authority notes particularly that the Administrative Law Judge, in dismissing the 19(a)(1) complaint with respect to Respondent's statement concerning the

documentation of an employee's complaints, found that the statement in question "had nothing to do with the documentation of any of [the employee's] work problems." */

ORDER

IT IS HEREBY ORDERED that the complaints in Assistant Secretary Case Nos. 64-4243(CA) and 64-4265(CA) be and are hereby dismissed.

Issued, Washington, D.C., June 16, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
VETERANS ADMINISTRATION MEDICAL CENTER, SHREVEPORT, LOUISIANA Respondent	
and	Case Nos. 64-4243(CA) 64-4265(CA)
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2000 Complainant	

LYNDA BECK FENWICK, Attorney
Office of District Counsel
VARO
1400 North Valley Mills Drive
Waco, Texas

and

MR. JOHN MALONE, Chief Personnel Officer
Veterans Hospital Medical Center
Shreveport, Louisiana

For the Respondent

MR. CARL HOLT, National Representative
American Federation of Government Employees
3108 Avon Drive
Arlington, Texas 76015

and

GEORGIE PARKER LUCAS, Chief Steward
Veterans Hospital Medical Center
Shreveport, Louisiana

For the Complainant

Before: ELI NASH, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

These consolidated cases are before the Federal Labor Relations Authority based on amended complaints, filed by the American Federation of Government Employees Local 2000, AFL-CIO hereinafter called "the Complainant" alleging that the Veterans Administration Medical Center, hereinafter called "Respondent" violated Section 19(a)(1) of Executive Order 11491, as amended based on certain actions and statements made by Earl Kephart, Chief of Nursing Services. The Decision and Order herein is issued for the Federal Labor Relations Authority in accordance with the Transition Rules and Regulations published in the Federal Register, Vol. 44, No. 1, January 2, 1979, pp. 5-8.

A hearing was held in Shreveport, Louisiana on August 2, 1979. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved herein. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, the arguments of the parties and the brief submitted by Respondent, I make the following findings of fact and conclusions of law.

Findings of Fact

The Complainant Union, is, and at all times material herein has been, the exclusive representative of all regular employees of the Respondent Medical Center. At all times material herein Respondent and the Union were parties to a collective bargaining agreement which contains a grievance procedure.

Although there is a substantial amount of background evidence in the record showing the labor relations climate between the parties, the specific issues in this matter involve only two specific events which are set out below:

Case No. 64-4265(CA) - The February 24 Meeting

At the request of Chief Steward, Georgia Lucas, a meeting was held on February 24, 1978, at which Complainant was represented by Mrs. Lucas and Carl Holt, Complainant's National Representative. Respondent was represented by Mr. Kephart and assistant personnel officer Gustavo Guerra. The parties agreed that the purpose of the meeting was to discuss disagreement over interpretation relating only to handling of grievances. However, during the course of this meeting certain statements were allegedly made regarding the documenting of complaints of employee Fannie Harper.

Mr. Guerra did not recall any specific reference to Ms. Harper's

grievance although stating there may have been some conversation along that line.

According to Mr. Kephart, Mr. Holt mentioned to him that he understood Ms. Harper was a problem employee. Kephart's response was "you might say that." He then allegedly mentioned that Ms. Harper did stop at either the personnel office or on several occasions at the director's office in the morning when she came off duty. Holt then asked if these occurrences had been documented and Kephart replied that they had not been documented since they were not visits with him. Holt asked, "Don't you think they should have been documented." Kephart replied, "perhaps so." On further examination, Mr. Kephart testified that the reference to documenting complaints was to those complaints Ms. Harper was herself making and not to documenting of mistakes she had made on the job. He further testified that complaints of other employees made at the director's office were not documented.

There is record evidence that Ms. Harper sometimes deviated from the agreed upon contract procedure and in contacting the proper parties in order to present her grievances.

Mr. Holt testified that Kephart mentioned that they had had trouble with Ms. Harper. Mr. Holt responded that, "I would suggest to you as I do all management officials, when having a problem with an employee, let us know and we will see what we can do to help." Finally, Mr. Holt testified that he felt a threat to document an employee's actions after filing a grievance is a definite threat.

Mrs. Lucas stated that at the February 24 meeting she was told by Mr. Kephart, "that certain things had gone on and had not been documented in Ms. Harper's job performance, but that they would in the future be documented, and the only way that she interpreted the statement as a threat. Mrs. Lucas further testified that Mr. Kephart indicated that Ms. Harper would be documented very closely.

Case No. 64-6243(CA) - The March 17 Meeting

On March 17, 1978, Mr. Kephart met in his office with Mrs. Lucas and grievant Fannie Harper. According to all of the parties the purpose of this meeting was to receive an answer to the second step of a grievance presented under the contract. Also present during this meeting was, Mr. Kephart's secretary, LaVenia Allend.

Mrs. Lucas testified that when she saw Mrs. Allend in the meeting that she pointed out to Mr. Kephart that her presence was not proper but Mr. Kephart would not ask Mrs. Allend to leave.

The record established that Mrs. Allend is the secretary to the Chief of Nursing Service, but is a member of the bargaining unit. She

typed the reply to Ms. Harper's grievance and was present at the meeting, at the request of Mr. Kephart. Also, she was aware that the purpose of the meeting was to give the written reply to Ms. Harper. Finally, she testified that she normally sat in on the type of meeting that was held that day.

Mr. Kephart recalls that Mrs. Allen's presence was requested at this meeting simply to have a representative with him in the office.

The purpose of this meeting, as previously stated was to present to the grievant, Ms. Harper the Agency's response to the second step of the grievance under the contract. 1/ Mrs. Lucas contended that, it is customary that any questions grievant has regarding the reply is discussed before proceeding to the next step. Clearly, Mr. Kephart refused to discuss the matter during this meeting and the meeting was apparently very heated.

Discussion and Conclusions

In Case No. 64-4243(CA) Complainant contends that, in allowing Mr. Kephart's secretary to be present when he discussed a grievance with the grievant Ms. Harper, Respondent violated Section 19(a)(1) of the Order. The gravamen of the Complaint is that of the secretary, who was a bargaining unit member, destroyed the confidentiality of the meeting. The Complainant contends, in essence, that the presence of management officials and others at grievance meetings is not conducive to holding a constructive meeting. 2/

In my view, the purpose of this meeting was merely to present the agency's response to the grievant's second step grievance. Despite Complainant's contentions to the contrary, there is no provision in the contract under Article VII for discussion at this level nor does the record establish a past practice of such discussions. Therefore, it is found that no discussion was underway with which the presence

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1/ Article VII, Step 2 provides, in pertinent part that: "The service chief shall answer, in writing, within five (5) workdays. [Emphasis added.]

2/ Although the issue of whether or not management is entitled to have representatives of its own choosing at grievance meetings was not directly raised, the Complainant appears to be raising a question of contractual interpretation by its repeated reference to managements having additional representatives at this and other meetings. If indeed, there is a breach or misunderstanding arising out of the parties disagreement, it would not appear violative of Section 19(a) of the Order. General Services Administration, Region 5, Public Buildings Service, Chicago Field Office, A/SLMR No. 528.

of Mrs. Allend could have interfered. Moreover, the record reveals no other reason why the presence of Mrs. Allend, either as an observer or representative, would interfere with or restrain employee rights. Having considered the entire record before me, I find no basis to support a finding that the presence of Mrs. Allend at the March 17, 1978 meeting constituted a violation of the Order.

With respect to the issue in Case No. 64-4265(CA) that Mr. Kephart threatened Ms. Harper by telling her that he had let certain problems go undocumented; but since she had filed a grievance, he was going to document everything involving Ms. Harper and would take appropriate action, I find that Complainant has not established by a preponderance of the evidence that such statement, if made, was violative of the Order.

A determination of whether a statement violates Section 19(a)(1) must take into consideration the entire circumstances surrounding the making of the statement. Cf. Internal Revenue Service, Mid Atlantic Center, 4/ASLMR 516, A/SLMR No. 421 (1974).

Interestingly, Ms. Harper against whom the threat was allegedly made was not present during the meeting. Further, there was no refusal to process a grievance of Harper's or any other employee at this meeting, but there was considerable discussion as to how grievances would be handled. Within the context of the discussions which occurred during the meeting it is entirely possible that Mr. Kephart made reference to documentation and appropriate action and that these remarks could have been directed at Ms. Harper's situation. However, it must be demonstrated that such statement or action was made because Harper exercised rights protected by the Order. Cf. Veterans Administration, North Chicago Veterans Hospital, North Chicago, Illinois, A/SLMR No. 1024. On the basis of the record, I am convinced that Ms. Harper's prior actions, in not following the established procedure may have prompted such a statement by Respondent, that all her complaints would be documented under the agreement, and had nothing to do with the documentation of any of her work problems. Accordingly, I conclude that no violation was present in Respondent's statement regarding documentation of Ms. Harper's complaints.

Recommendation

It having been found that Respondent did not engage in any conduct violative of Section 19(a)(1) of the Order, it is recommended that the complaints be dismissed in their entirety.

ELI NASH, JR.
Administrative Law Judge

Dated: October 29, 1979
Washington, D.C.

CORRECTED COPY

3 FLRA No. 66

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS
LOCAL F-61

(Union-Petitioner)

and

Case No. 0-NG-6

PHILADELPHIA NAVAL SHIPYARD

(Activity)

DECISION ON NEGOTIABILTIY ISSUES

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 et seq.).

Union Proposal I

ARTICLE XX

TRAINING

Section 1 - The Employer and the Union agree that any given training session or drill will not exceed one (1) hour duration. It is further agreed that only one (1) training session or drill, of one (1) hour duration or less, will be assigned to any given workday. Training sessions or drills must be concluded by 1500 hours on weekdays. No training sessions will be held on Saturdays, Sundays or holidays.

Section 2 - The Employer and the Union agree that no outdoor training sessions or drills will be held on days when the outside temperature exceeds 80 degrees fahrenheit, or drops below 45 degrees fahrenheit. It is further agreed that high humidity, high winds and precipitation shall be considered reason for cancellation of outdoor training sessions or drills. The Employer and the Union further concur that all on-duty personnel will participate in training sessions or drills with the exception of men on overtime status, completing ship inspection or extinguisher detail, whenever possible.

Question Here Before the Authority

The question is whether the union's proposal violates section 7106(a)(2)(B) of the Statute[1/] as alleged by the agency.

Conclusion: The provision violates management's right under section 7106(a)(2)(B) of the Statute to assign work. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 45 F.R. 3513, the agency's allegation that the proposal is not within the duty to bargain is sustained.

Reasons: The workweek of the fire fighters involved in this case can include, in any given week, a Saturday, a Sunday or a holiday. Further, as is apparent from the positions of the parties before the Authority, fire fighters are assigned a certain amount of training as a regular part of their fire fighting duties. An agency retains the right under section 7106(a)(2)(B) to assign work. Such right clearly encompasses the training involved in this case, i.e., training assigned during the duty hours of fire fighters. Section 1 of the union's proposal, however, would place absolute limits on the ability of the agency to assign such training at all after specified hours or on certain days of a fire fighter's workweek. To that extent the proposal violates management's right to assign work.

In addition, while it must be emphasized that health and safety considerations such as inclement weather or high winds are legitimate factors to consider in conducting outdoor training, section 2 of this proposal clearly goes beyond consideration of such factors in implementing a decision to assign training. Instead, this proposal would establish arbitrary absolute limits on the assignment of outdoor training, which limits are not based on health and safety considerations. Thus, the union's proposal, by placing absolute limits on the agency's ability to assign training to unit personnel during duty hours violates the agency's right to assign work under section 7106(a)(2)(B) of the Statute.

1/ Section 7106(a) of the Statute provides, in pertinent part, as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws --

. . . . . .

(B) to assign work . . . .

Union Proposal II

ARTICLE XXIV

HOLIDAYS

The following days are recognized as holidays under this Agreement:

New Years Day
Lincoln's Birthday
Washington's Birthday
Memorial Day
Fourth of July
Labor Day
Columbus Day
Veterans Day
Thanksgiving Day
Christmas Eve Day
Christmas Day

1) Working conditions on the above days will be minimal based on the reduced workload in the Shipyard on the above days.

2) In-station duties shall only consist of those details whose completion is necessary for normal station maintenance and safe living conditions.

3) Any day declared a Federal Holiday by any Federal Agency, the above provisions will be observed.

4) Saturday afternoon and Sundays shall apply to the above provisions.

Question Here Before the Authority

The question is whether the union's proposal violates section 7106(a)(2)(B) of the Statute[2/] since it concerns the assignment of work and, in addition, whether that portion of the proposal listing holidays violates 5 U.S.C. § 6103.[3/]

2/ Section 7106(a)(2)(B) which is set out in full in note 2 supra, provides as here relevant that "nothing . . . shall affect the authority of any management official . . . to assign work."

3/ 5 U.S.C. § 6103 provides, as here relevant, as follows:

§ 6103. Holidays

(a) The following are legal public holidays:

New Year's Day, January 1.
Washington's Birthday, the third Monday in February.

(Continued)

Opinion

Conclusion: The proposal violates management's right under section 7106(a)(2)(B) of the Statute to assign work and, in addition, that portion of the proposal listing holidays violates 5 U.S.C. § 6103. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 45 F.R. 3513, the agency's allegation that the proposal is not within the duty to bargain is sustained.

Reasons: By its express provisions, the proposal seeks to limit the particular duties which may be assigned to unit employees on Saturday afternoons, Sundays and holidays. Notwithstanding the fact that the basic workweek of fire fighters includes Saturdays, Sundays and holidays, there is nothing in the Federal Service Labor-Management Relations Statute or its legislative history which indicates that the right to assign work is limited to normal duty days. Thus, the union's proposal by proscribing the duties fire fighters may be assigned on certain days violates management's right under section 7106(a)(2)(B) to assign work. In addition, by including in a list of holidays days which are not recognized as holidays in Federal law, the proposal, to that extent, also violates 5 U.S.C. § 6103.

Proposal No. III

Article XV

Section 5 - Merit promotion evaluation procedures will be so conducted as to determine the most highly qualified candidates from a list of eligibles. All evaluation methods will be administered so as to determine skill levels on a cumulative basis up to the vacancy announcement date. Evaluation data must be determined by supervisors evaluation, performance evaluation, oral interview, and academic achievement. Each of the methods outlined in sub-paragraphs 5A, 5B, 5C, will count 30% toward the final score. Academic achievement outlined in sub-paragraph 1D, will count the additional 10% needed to total 100%.

A. Supervisor's Evaluation

1. Supervisory evaluation will be limited to two supervisors.

a. No evaluation will cover any period of performance in excess of 2 1/2 years past.

(Continued)

Memorial Day, the last Monday in May.
Independence Day, July 4.
Labor Day, the first Monday in September.
Columbus Day, the second Monday in October.
Veterans Day, November 11.
Thanksgiving Day, the fourth Thursday in November.
Christmas Day, December 25. . . .

2. The evaluator must have been employee's supervisor for a period of three months except in cases where employee's prior supervisor is unable to tender an evaluation due to sickness or death.

3. No evaluation is to be submitted by any supervisor below rank of GS-6 (Except in cases of temporary promotions to GS-6, and then only during the time the promotion is in effect, and the supervisor is himself not competing for the same position.)

4. Evaluations will be discussed with applicant by rater prior to submission of evaluation form to the Civilian Personnel Officer if requested by the applicant. (Any evaluation based on potential will not be discussed with applicant).

5. Supervisors evaluations will carry the following relative weight:

   a. Current Supervisor = 100%

   b. Any other Supervisor = 80%

   c. Supervisors evaluations will be computed as follows:

      1. Subtract low score from high score.

      2. Take 80% of the difference.

      3. Divide the difference by 2.

      4. Add the result to the current supervisor's score if it is lower than the "other" supervisor's score, or subtract the result from the current supervisor's score if it is higher than the "other" supervisor's score. An example follows:

         Current Supervisor's rate = 92.0

         Other Supervisor = 76.0

         Difference in scores = 16.0

         80% of 16 = 12.8

         1/2 of 12.8 = 6.4

         92.0 - 6.4 Final Evaluation Score of 85.6

6. No employee will be rated by a former supervisor who has left the employ of the Fire Department of Philadelphia Naval Shipyard.

7. Every effort will be made to secure two evaluations. In cases where this is not possible, due to an employee only having one supervisor, death of a supervisor, or under the conditions outlined in No. 6 above, a second evaluation will be obtained from the employee's platoon Assistant Chief. The Assistant Chief may not then be designated as the selecting official if the employee rated by him is in the area of consideration.

B. Performance Evaluation

1. The type of evaluation will be determined by Fire Department Chief Officers. The Union President will be consulted regarding the type of evaluation. (If Union President is to be evaluated, the consultation will be with the next in line Union Officer not to be evaluated.)

2. The evaluation will be observed by a non-participating Union Representative unless an individual objects, objections to be submitted in writing.

3. Grades will be determined by panel of at least two fire department designated GS-5's and/or GS-6's who will use a numerical scoring system and award each applicant an average of his total points. In the event the applicant's driving ability is to be evaluated, the services of a third party such as the Motor Vehicle Operator Licensing Examiner or a Motor Vehicle Operator Foreman, will be acquired for that purpose. (Example: #1 evaluator scores 90, #2 - 85 Score, #3-84 Score = 86.3)

C. Oral Interview

1. Interview will be conducted by at least three but not more than five Fire Department Chief Officers.

2. All interviewers will ask same amount of job related questions. The applicant's score will then be totaled and averaged to determine each applicant's oral interview rating.

3. Appropriate measures will be taken to insure that there will be no related verbal exchanges between those applicants already interviewed and those not yet interviewed.

4. Interview will be observed by a non-participating Union Representative unless an individual objects; such objection to be submitted in writing.

D. Credit for academic achievement will be given as follows:

1. 60 units of college credit will count 100% of the 10% designated for academic achievement.

2. Fire Science and job related courses count full value.

3. Other courses included in the Fire Science A.A. degree curriculum (with the exception of Physical Education, and credits given without classroom attendance) will receive one-half value.

4. Credits earned by course challenges will get their proper value as long as they meet the requirements of 2 and 3 above.

Section 6 - It shall be the responsibility of Management, with cooperation of the Union, to make every effort to insure that all Fire Department personnel be given a complete briefing on all respects of this evaluation procedure.

Section 7 - Promotion registers to GS-5 and GS-6 will stand for no longer than nine (9) months.

Question Here Before the Authority

The question is whether the union's proposal is outside the obligation to bargain under section 7117 of the Statute,[4/] because it concerns matters that are not conditions of employment of unit employees.

Opinion

Conclusion: To the extent that the proposal concerns promotion procedures for bargaining unit positions it is within the obligation to bargain under section 7117 of the Statute. However, to the extent that the proposal would apply promotion procedures to nonbargaining unit supervisory positions it is

4/ Section 7117(a)(1) of the Statute provides as follows:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

The term "matters" as used in section 7117(a)(1) is explained by reference to the definition of "collective bargaining" in section 7103(a)(12) and "conditions of employment" in section 7103(a)(14) of the Statute:

§ 7103. Definitions; application

. . . . . .

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees . . . . [Emphasis added.]

. . . . . .

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . .

negotiable only at the election of the agency. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 45 F.R. 3513, since the agency has elected not to negotiate promotion procedures for non-bargaining unit supervisory positions, the agency's allegation that the proposal is not within the duty to bargain becuase it extends to such nonbargaining unit supervisory positions is to that extent sustained.

Reasons: The duty to bargain under the Statute extends only to the conditions of employment of bargaining unit employees.5/ In this regard, supervisors are specifically excluded from inclusion in collective bargaining units.6/ As relevant in the circumstances of this case, the agency claims and the union tacitly admits, that the GS-6 positions identified in the proposed promotion procedures are classified as supervisory and, thus, are outside of the bargaining unit.7/

While an agency is not prohibited from bargaining on and, therefore, may, at its election, bargain on the promotion procedures for such nonbargaining unit supervisory positions, it is not obligated to do so. Consequently, since the agency in this case has elected not to bargain on the promotion procedures for supervisory personnel, the agency's allegation that the proposal is not within the duty to bargain, is to that extent, sustained.

5/ Id.

6/ Section 7112(b) of the Statute provides, in pertinent part, as follows:

> § 7112. Determination of appropriate units for labor organization representation
>
> . . . . . .
>
> (b) . . . nor shall a unit be determined to be appropriate if it includes--
>
> (1) . . . any . . . supervisor . . . .

7/ No determination is made in this case as to whether GS-6 "fire captain" positions would be considered supervisory under section 7103(a)(10) of the Statute. Such a determination would properly be the subject of a petition for clarification of an existing unit filed under Part 2422 of the Authority's rules and regulations, 45 F.R. 3498.

Union Proposal IV

ARTICLE X

OVERTIME

Section 4 - The Employer agrees that for the purpose of applying Section 7(k) of the Fair Labor Standards Act,[8/] the work period shall consist of a 7 day period. [Footnote added.]

Question Here Before the Authority

The question is whether the union's proposal is outside the duty to bargain either because it concerns a matter specifically provided for by Federal statute and is, thus, excluded from the definition of conditions of employment under section 7103(a)(14) of the Federal Service Labor-Management Relations Statute,[9/] or because it violates management's right under section 7106(a)(1) of the Statute[10/] to determine the agency's budget, organization and number of employees.

8/ Section 7k of the Fair Labor Standards Act (FLSA) (29 U.S.C. § 207(k)) provides, in pertinent part, as follows:

> (k) No public agency shall be deemed to have violated [the requirement to pay overtime for hours worked in excess of 40 hours] with respect to the employment of any employee in fire protection activities . . . if--
>
> . . . . . .
>
> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period . . . as 216 hours bears to 28 days . . . compensation at a rate not less than one and one-half times the regular rate at which he is employed.

9/ Section 7103(a)(14) of the Statute provides, in pertinent part, as follows:

> (14) "conditions of employment" . . . does not include policies, practices, and matters--
>
> . . . . . .
>
> (C) to the extent such matters are specifically provided for by Federal statute.

10/ Section 7106(a)(1) of the Statute provides, in pertinent part as follows:

> § 7106. Management rights

(Continued)

Conclusion: The union's proposal does not concern a matter which is specifically provided for by Federal statute and, further, does not violate section 7106(a)(1) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 45 F.R. 3513, the agency's allegation that the proposal is not within the duty to bargain is set aside.11/

Opinion

Reasons: As previously indicated, (note 8, supra) section 7(k) of the FSLA provides, as relevant in this case, that fire fighters will receive overtime under the FLSA for all hours worked in excess of 216 hours in a 28 day period or proportionally fewer hours for a proportionally shorter work period, e.g., 108 hours for a 14 day work period (as is currently utilized by the agency) or 54 hours for a seven day work period (as proposed by the union).12/

This utilization of a seven day work period results in some circumstances in a different overtime entitlement than if a fourteen day work period is selected. For example, the fire fighters in this case are scheduled to work three 24 hour days each week for a total of 144 hours for the two week period. Thus, under the agency's practice these fire fighters will be entitled to 36 hours (144 minus 108) of overtime.

Under the union's proposal on the other hand, which contemplates a seven day period for the calculation of overtime, fire fighters would be entitled to overtime compensation for all hours worked in excess of 54 a week. Assuming the fire fighters work the same 72 hours (three 24 hour days) each week they would be entitled to 18 hours of overtime each week (72 minus 54) or 36 hours for two weeks. In this situation then, the union's proposal will result in the same overtime entitlement as under the current agency procedure.

In two other situations however, the union's proposal would result in more overtime being payable than under the agency's current practice. The first of those two situations would occur when a fire fighter is on leave for one day during the two week period. Under the FLSA, time not worked is subtracted from the scheduled time to determine the fire fighters potential overtime entitlement as follows:

(Continued)

> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--
>
> (1) to determine the . . . budget, organization, number of employees . . . of the agency . . . .

11/ In so deciding that the subject proposal is within the duty to bargain, no judgment is made as to the merits of the proposal.

12/ In addition to FLSA overtime, fire fighters receive under 5 U.S.C. § 5545(c) a fixed percentage of their basic pay (up to 25%) as compensation for standby time, Sunday work and holiday work.

1. Under the agency's current procedure (Overtime for hours worked in excess of 108 in a 14 day period)

scheduled work (3-24 hour periods per week)	144 hours for two weeks
less time not worked (one day leave)	-24
hours worked	120
overtime calculation	-108
overtime entitlement for the 14 day period	12 hours

2. Under the union's proposal (overtime for hours worked in excess of 54 in a seven day period)

	Week 1	Week 2
scheduled work (3-24 hour periods)	72	72
less time not worked (one day leave)	-24	--
hours worked	48	72
overtime calculation	-54	-54
overtime entitlement	0	18

Thus, under the union's proposal the fire fighter would be entitled to six more hours overtime than under the agency's current practice (18 hours instead of 12 hours).

In the second situation, where a fire fighter is off one day the first week and then works an additional shift the second week, the fire fighter would be entitled to more overtime under the union's proposal than under the agency's current practice as follows:

1. Under the agency's current practice

scheduled work (3-24 hour periods per week)	144 hours for two weeks
less time not worked (one day leave)	-24
plus additional unscheduled shift	+24
total hours worked	144
overtime calculation	-108
overtime entitlement	36

2. Under the union's proposal

	Week 1	Week 2
scheduled work (3-24 hour periods per week)	72	72
less time not worked (one day leave)	-24	--
plus additional unscheduled shift	--	+24
total time worked	48	96
overtime calculation	-54	-54
overtime entitlement	0	42

Thus, in this situation the fire fighter would be entitled to 42 hours of overtime instead of 36 hours under the agency's current practice.

The agency first claims that under section 7(k) of the FLSA the agency head has sole discretion to determine the length of the work period referred to in section 7(k). Thus, the agency argues, since the determination of work periods is specifically provided for by Federal statute, such determination is excluded from the obligation to bargain by section 7103(a)(14) of the Federal Service Labor-Management Relations Statute. In support the agency principally relies on the legislative history of section 7(k) of the FLSA, two unsuccessful legislative attempts to achieve a reduction in the work week and a Federal court decision sustaining the use of the 14 day work period in calculating FLSA overtime.

The agency's claim cannot be sustained. It is clear from the legislative history of section 7103(a)(14) of the Statute that only those matters specifically provided for by other Federal statutes are excepted from the obligation to negotiate.13/ In this regard, the agency has failed to demonstrate that the determination of the length of the work period used to calculate FLSA overtime cannot under section 7(k) of the FLSA be arrived at through negotiations as long as the constraints specified in section 7(k) are met, i.e., that the length of the work period be at least seven and not more than 28 days. In addition, there is no indication in the implementing regulations contained in the Federal Personnel Manual14/ that the discretion delegated to agency heads to determine the length of the work period also could not be exercised through negotiations.

13/ See statement of Congressman Clay concerning that portion of the bill passed by the House (the "Udall substitute") which excluded matters specifically provided for by other Federal statutes from the obligation to bargain which portion was enacted as 7103(a)(14)(C):

> Mr. CLAY.
>
> . . . . . .
>
> Section 7103(a)(14)(D), removing from subjects of bargaining those matters specifically provided for by Federal statute, was adopted by the committee and retained in the Udall substitute with the clear understanding that only matters "specifically" provided for by statute would be excluded under this subsection. Thus, where a statute merely vests authority over a particular subject with an agency official with the official given discretion in exercising that authority, the particular subject is not excluded by this subsection from the duty to bargain over conditions of employment.

124 CONG. REC. H 9638 (daily ed. Sept. 13, 1978).

See also the statement of Congressman Ford of Michigan 124 CONG. REC. H9638 (daily ed. Sept. 13, 1978).

14/ See Federal Personnel Manual (FPM) letter No. 551-5, Jan. 15, 1975.

As to the agency's reliance on two unsuccessful legislative attempts to change the work week of fire fighters as support for the claim that the section 7(k) determination is within the agency's sole discretion, such reliance is misplaced. Both H.R. 4634 introduced in the 94th Congress and H.R. 3161 introduced in the 95th Congress would have caused a reduction in the actual hours fire fighters work from 72 to an average of 54 (H.R. 4634) or an average of 56 (H.R. 3161) with no reduction in title 5 overtime (note 12, supra). The union's proposal here involved however, concerns only the calculation of FLSA overtime and would not require any reduction in the 72 hour workweek of fire fighters.

Finally, the agency's reliance on a Federal court decision sustaining the use of a 14 day work period is also misplaced. In that case,15/ the court rejected a union contention that an agency was mandated by title 5 to utilize a seven day work period. The Court indicated that the FLSA-sanctioned work periods which ranged from seven to 28 days and that "Congress intended to vest discretion with the . . . Civil Service Commission in establishing the applicable work periods . . . ." As noted above, such discretion was in turn delegated to agency heads.

Therefore, since nothing in section 7(k) of the FLSA specifically provides for the length of the work period used to calculate FLSA overtime or precludes the negotiation of such period, the matter is not excluded from the duty to bargain by section 7103(a)(14) of the Federal Service Labor-Management Relations Statute.

Turning now to the agency's allegations that the union's proposal would violate management's 7106(a)(1) rights to determine the budget, organization and numbers of employees, such allegations will be dealt with in turn.

There is no question but that Congress intended that any proposal which would directly infringe on the exercise of management rights under section 7106 of the Statute would be barred from negotiation.16/ The right to determine the

15/ International Association of Fire Fighters v. United States, 23 WH Cases 471 (D.D.C. July 15, 1977).

16/ See, for example, the statement of Congressman Clay, one of the proponents of the "Udall substitute," concerning the management rights clause of the "Udall substitute:"

> Mr. Clay.
>
> . . . . . .
>
> The Udall substitute contains a management rights clause substantially enlarged beyond that in the committee print. An important element in our agreeing to entrust such an expanded management rights clause to the hands of the new Authority is the example of the protection afforded the collective bargaining process by conscientious scrutiny of management claims of infringements on management rights, especially as found in the

(Continued)

"budget" was interpreted and applied in the Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio case.17/ That decision stated in pertinent part:

> . . . the agency's authority to determine its budget extends to the determinations of the programs and operations which will be included in the estimate of proposed expenditures and the determination of the amounts required to fund them. Under the Statute, therefore, an agency cannot be required to negotiate those particular budgetary determinations. That is, a union proposal attempting to prescribe the particular programs or operations the agency would include in its budget or to prescribe the amount to be allocated in the budget for them would infringe upon the agency's right to determine its budget under section 7106(a)(1) of the Statute.
>
> [However], where a proposal which does not by its terms prescribe the particular programs or amounts to be included in an agency's budget, nevertheless is alleged to violate the agency's right to determine its budget because of increased cost, consideration must be given to all the factors involved. That is, rather than basing a determination as to the negotiability of the proposal on increased cost alone, that one factor must be weighed against such factors as the potential for improved employee performance, increased productivity, reduced turnover, fewer grievances, and the like. Only where an agency makes a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits can an otherwise negotiable proposal be found to violate the agency's right to determine its budget under section 7106(a) of the Statute.

The proposal here in dispute does not by its express terms prescribe the particular amount to be included in the agency's budget. The agency argues that adoption of the proposal would result in an increased cost in excess of $3.1 million per year "with no countervailing benefits to the Government."

(Continued)

> two 1978 decisions above. If the new Authority is faithful to these interpretative guidelines, the ultimate exercise of the specified managerial responsibility, the only subject exempted from the bargaining obligation, will be protected and the general obligation to bargain over conditions of employment will be unimpaired. However, it is essential that only those proposals that directly and integrally go to the specified management rights be barred from the negotiations. [Emphasis supplied.]

124 CONG. REC. H9638 (daily ed. Sept. 13, 1978).

See also the statement of Congressman Ford of Michigan, 124 CONG. REC. H9649 (daily ed. Sept. 13, 1978).

17/ American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, Case No. O-NG-40, 2 FLRA 77 (Jan. 31, 1980), Report No. 31 at 5 of decision.

This claimed increase in cost is not based solely on adoption of the proposal in the bargaining unit here involved which contains less than 50 fire fighters.[18/] Rather, it is the product of computations involving all the more than 10,000 fire fighters in the Department of Defense and assumes that they all arrange for work and leave schedules which would entitle them to the maximum amount of overtime to which one could be entitled under the disputed proposal. Moreover, the agency has made no substantial demonstration that the increased costs, which it hypothesizes, are unavoidable and will not be offset by increased employee performance, reduced turnover, fewer grievances and the like. Consequently, proposal IV does not violate the right of the agency to determine its budget under section 7106(a)(1) of the Statute.

As to the agency's arguments that the union's proposal would require the agency to alter its organization and number of employees assigned, such arguments cannot be sustained. There is nothing in the proposal which would require or result in a change of either the number of fire fighters assigned or a change in the 72 hour per week work schedule. The union's proposal only would establish a different work period for the calculation of FLSA overtime, and in this regard, the agency has cited no law or regulation indicating that this work period must coincide with an already established pay period or an already established work schedule. Therefore, since the union's proposal is not directly related to the "organization" of the agency or to "the number of employees assigned," it is not excluded from the duty to bargain by section 7106(a)(1) of the Statute.

In summary, the agency has discretion under section 7(k) of the FLSA and implementing regulations to establish the work period to be used to calculate overtime as at least seven and not more than 28 days. There is no indication that such discretion was intended to be sole and exclusive and could not be exercised through negotiation with the union. Furthermore, negotiation of the work period within the statutory limits does not violate the rights reserved to management under the Federal Service Labor-Management Relations Statute.

18/ See Office of Labor Management Relations, U.S. Civil Service Commission, Union Recognition in the Federal Government, 252 (1978).

Accordingly, since union proposal IV concerns a matter within the agency's duty to bargain under the Statute, the agency's allegation to the contrary is set aside.

Issued, Washington, D.C., June 24, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D. C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 862

(Union)

and

Case No. 0-NG-44

TOOELE ARMY DEPOT, TOOELE, UTAH

(Activity)

DECISION ON NEGOTIABILITY APPEAL

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

During contract negotiations, the union submitted the following proposal which would authorize hazard pay differential to certain categories of General Schedule employees:

Union Proposal

Section 2: Hazardous Duty Pay

a. It is expressly recognized that while the criteria established by law for hazard pay determination (FPM and CPR) is not a proper subject for negotiation, the application of that criteria to specific factual situations is a matter of mutual concern. It is, therefore, agreed and understood that environmental differential pay is authorized for and limited to the below listed occupational tasks when performance is appropriately certified by supervisory personnel:

POSITION	LOCATION	CIRCUMSTANCES
GS-4 Security Guard	South Area	Any time a GS-4 Security Guard is assigned to duties normally performed by a GS-5 Security Guard.
GS-4 or GS-5 Firefighter	South Area	The 10 hours of the tour of duty considered as working time (See Article IX, Hours of Work and Basic Work Week, Section 3a).
GS-5 Security Guard	Restricted Access Area	When actually engaged in the performance of security duties during a CAIC/SOI calling for the individual to remain in areas of contamination. When required to enter on the "hot" side of line or toxic areas.
	Agent Escort	Escort of nonstandard test munitions before the safety evaluation test has been accomplished. Escort of Chemical agents and/or explosives either on or off depot.
	Impact Area	Pursuit of intruders into or through an impact area.
	Storage Area	When on the first workday following the weekend or holiday during which a surveillance inspection for leakers has not been performed and a leaker is found, environmental differential will be paid for duty performed during the weekend or holiday.

The agency declared the proposal nonnegotiable on the basis that it would conflict with 5 U.S.C. 5545(d), 1/ which authorizes the Office of Personnel Management (OPM) to establish a schedule of pay differentials for certain categories of employees performing hazardous duties on an irregular or intermittent basis. In this regard, the agency took the position that the hazardous duties specified in the union's proposal were regular and recurring and had already been factored into the evaluation and grade determination of the guard and firefighter positions in question. The agency also argued that negotiations over the proposal would thwart the position classification process which is specifically excluded from "conditions of employment" as defined in section 7103(a)(14)(B) of the Statute 2/ over which there is an obligation to

1/ 5 U.S.C. 5545(d) provides, in relevant part, that:

> The [Office of Personnel Management] shall establish a schedule or schedules of pay differentials for irregular or intermittent duty involving unusual physical hardship or hazard. Under such regulations as the [Office of Personnel Management] may prescribe, . . . an employee . . . is entitled to be paid the appropriate differential for any period in which he is subjected to physical hardship or hazard not usually involved in carrying out the duties of his position. However, the pay differential --
>
> > (1) does not apply to an employee in a position the classification of which takes into account the degree of physical hardship or hazard involved in the performance of the duties thereof;
> >
> > . . . . . .

2/ Section 7103(a)(14)(B) of the Statute provides as follows:

> § 7103. Definitions; application
>
> (a) For the purpose of this chapter --
>
> . . . . . .

(Continued)

bargain collectively. 3/ The union, on the other hand, asserted that the hazardous duties were irregular or intermittent and had not been taken into account in the classification process.

The Authority thereafter requested an advisory opinion from the Office of Personnel Management pursuant to 5 U.S.C. 7105(i) (section 7105(i) of the

(Continued)

> (14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters --
>
> . . . . .
>
> (B) relating to the classification of any position; . . .

3/ Section 7117(a)(1) of the Statute provides:

> § 7117. Duty to bargain in good faith; compelling need; duty to consult
>
> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

The term "matters" as used in section 7117(a)(1) is explained by reference to the definition of "collective bargaining" in section 7103(a)(12) of the Statute as set forth below and "conditions of employment" in section 7103(a)(14), supra note 2:

> § 7103. Definitions; application
>
> (a) For the purpose of this chapter --
>
> . . . . . .
>
> (12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees. . . .

Statute) 4/ concerning the proper interpretation of rules, regulations, or policy directives issued by the OPM, more specifically whether the union's proposal in the instant case would conflict with laws, rules or regulations over which OPM has responsibility.

On March 11, 1980, the OPM issued its advisory opinion to which the parties were given an opportunity to comment pursuant to section 2429.15(b) of the Authority's rules and regulations. 5/ The agency and the union filed submissions, which submissions have been duly considered by the Authority.

In its advisory opinion, the OPM cited 5 U.S.C. 5545(d)(1)(see note 1, supra) and the following sections of OPM's implementing regulations contained in Subpart I of Part 550 in the Code of Federal Regulations:

§ 550.902 Definitions.

In this subpart:

(d) "Hazardous duty" means a duty performed under circumstances in which an accident could result in serious injury or death. . . .

(e) "Hazard pay differential" means additional pay for the performance of irregular or intermittent hazardous duty. . . . [Emphasis added by OPM]

§ 550.904. Authorization of hazard pay differential.

(a) An agency shall pay the hazard pay differential listed in Appendix A to an employee who is assigned to and performs any irregular or intermittent duty specified in the appendix when that duty is not usually involved in carrying out the duties of his position. Hazard pay differential may not be paid an employee when the hazardous duty has been taken into account in the classification of his position. [Emphasis added by OPM]

(b) For the purpose of this section:

(continued)

4/ 5 U.S.C. 7105(i) provides:

In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

5/ 45 F.R. 3518 (1980).

(1) "Not usually involved in carrying out the duties of his position" means that even though the hazardous duty may be embraced within the employee's position description it is not performed with sufficient regularity to constitute an element in fixing the grade of the position.

(2) "Has been taken into account in the classification of his position" means that the duty constitutes an element used in establishing the grade of the position.

Applying these regulations in the context of the instant dispute, the OPM thereafter concluded:

> In our view, the dispute essentially concerns position classification; i.e., whether certain duties are typical to the job series, or otherwise considered in the classification of positions and/or given sufficient weight. These matters may be raised as individual or group classification appeals.
>
> If the use of this procedure should result in a finding that the duties referred to in the union proposal are not properly considered in the classification process, there would be no bar in law or regulation to negotiation on the application of OPM's schedule of pay differentials to such duties.

Section 7103(a)(14) of the Statute (note 2, supra), provides that matters relating to the classification of any position are expressly excluded from the definition of "conditions of employment." Hence, such matters are not within the scope of the duty to bargain under section 7117 of the Statute which is limited to "conditions of employment" by section 7103(a)(12) (note 3, supra). Therefore, based upon the entire record in the instant case, including OPM's advisory opinion, it is concluded that the subject dispute involves issues which would be appropriate for resolution through the classification appeals process rather than under the procedures set forth in section 7117 of the Statute and Part 2424 of the Authority's rules and regulations. That is, as noted above (supra p. 3-4), the parties herein are essentially in disagreement as to whether specific hazardous duties associated with certain guard and firefighter positions are performed on an "irregular or intermittent" basis and whether such hazardous duties have been taken into account in the classification of these positions. Until the foregoing questions are resolved through the classification appeals process, the Authority has insufficient information to decide the instant negotiability appeal. Accordingly, the Authority finds that the union's appeal has been prematurely filed and therefore must be denied, without prejudice to the renewal of its contention that the matters in dispute are negotiable under the Statute in a petition duly filed with the Authority after it is resolved, under applicable procedures,

that the hazardous duties at issue are irregular or intermittent and have not been taken into account in classifying the positions specified in the union's proposal.

Issued, Washington, D.C., June 25, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

MARINE CORPS LOGISTICS SUPPORT
BASE, PACIFIC, BARSTOW,
CALIFORNIA

Activity

and

Case No. 0-AR-23

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 1482

Union

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator Sara Adler filed by the union under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)).

From the record before the Authority, it appears that the union filed a grievance over a particular work assignment made by the activity. The grievance was ultimately submitted to arbitration. The arbitrator stated that the parties were not in agreement on the framing of a specific issue. The union's proposed issue, as stated by the arbitrator, was:

> Did management violate Article 33, Section 3 of the negotiated Agreement by misassigning a supervisor to perform journeyman duties?
>
> Did management violate Article 7, Section 1 of the negotiated Agreement?

The activity's proposed issue, as stated by the arbitrator, was:

> Is the work assignment which gave rise to the grievance . . . a grievable matter. If so, did management violate Article 7, Section 1 of the Agreement . . . ?

The parties agreed to allow the arbitrator to first resolve the issue of arbitrability of whether "the work assignment which gave rise to the grievance . . . [was] a grievable matter." The arbitrator's award was as follows:

> The work assignment which gave rise to the grievance . . . is not arbitrable and the Arbitrator must decline to proceed.

In reaching this award, the arbitrator determined that under section 7106 of the Statute,[1/] management has the right

> to assign personnel, including supervisors, as it sees fit and that right is nonnegotiable except as the agency chooses under the Civil Service Reform Act of 1978 and the Employer has not here chosen.

On this basis the arbitrator concluded that "the assignment of personnel is not subject to grievance and arbitration."

The union filed a petition for review of the arbitrator's award pursuant to the rules of procedure set forth in 5 C.F.R. part 2411 (1978), which, to the extent consistent with the provisions of section 7122(a) of the Statute (5 U.S.C. § 7122(a)) and as amended by section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority, 44 F.R. 44741, remain operative with respect to this case. Pursuant to section 7122(a) of the Statute and section 2411.32 of the amended rules of procedure, the Authority accepted the union's petition for review on the issue of whether the award violates section 7106 of the Statute. Both parties filed post-acceptance briefs.

As previously noted, the arbitrator's award was confined to the issue of whether the grievance was arbitrable. Finding that the grievance was not subject to arbitration, she declined to proceed and therefore did not rule on the merits of the grievance. The arbitrator based her award on section 7106 of the Statute. She found that the grievance was not arbitrable because section 7106 reserves to management the right to assign work. The question presented to the Authority is whether this award, finding on the basis of section 7106 that this grievance was not arbitrable and consequently that there was no authority to proceed to resolve the grievance on the merits, is deficient under the Statute.

For the reasons that follow, the Authority finds that the arbitrator's award is deficient. The Authority notes that the arbitrability question

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1/ Section 7106 pertinently provides:

> §7106. Management rights
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
>
> . . . . . .
>
> (2) in accordance with applicable laws—
>
> . . . . . .
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted[.]

submitted to the arbitrator concerned whether the dispute in this case, which involved a work assignment and allegations by the union that such assignment was made in violation of specific provisions of the parties' negotiated agreement, could be properly subject to arbitration. Section 7106 of the Statute, on which the arbitrator relied in finding the dispute nonarbitrable, specifies and enumerates rights which are reserved to management. However, nothing in section 7106 precludes an arbitrator from reaching the merits of a grievance in cases where, as in this case, the union has alleged a violation of certain specified provisions of a collective bargaining agreement. Thus, while an arbitrator may find, on the merits of the grievance, that there has been no violation of the specified provisions of the agreement because the actions taken by management which gave rise to the grievance were within the ambit of the rights reserved under section 7106, or that, while there has been a violation, the scope and nature of possible remedies available to the arbitrator is limited by section 7106, nothing in section 7106 in and of itself prevents an arbitrator from deciding if there has been a violation of a particular contract provision.

Accordingly, pursuant to section 7122(a) of the Statute and section 2411.37(a) of the amended rules, the arbitrator's award finding the grievance nonarbitrable is set aside.2/

Issued, Washington, D.C., June 11, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In arriving at this decision, the Authority in no manner addresses the impact or application of section 7106 to the merits of this grievance. That question would be properly for the arbitrator to decide should the parties choose to resubmit the grievance to arbitration subject to any subsequent appeal that might be exercised pursuant to 5 U.S.C. § 7122(a).

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL BORDER PATROL COUNCIL
AND NATIONAL IMMIGRATION AND
NATURALIZATION SERVICE COUNCIL

Union

and

Case No. 0-AR-12

UNITED STATES DEPARTMENT OF
JUSTICE, IMMIGRATION AND
NATURALIZATION SERVICE

Activity

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator James M. Harkless filed by the union*/ under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)).

According to the arbitrator, the Immigration and Naturalization Service (the activity) sent copies of proposed revisions to Operating Instruction 287.10, which deals with the Agency Professional Integrity Program, to the union. After the union was given the opportunity to comment on the proposed revisions, the activity notified the union that the Operating Instruction was being implemented with some of the union's suggestions being incorporated into it, but with other suggestions being rejected "after deliberation on the merits of each."

The union protested that implementation of the revised Operating Instruction, without negotiations over the differences remaining between the parties, violated the activity's bargaining obligation under their negotiated agreement. The matter ultimately was submitted to arbitration.

The arbitrator stated that the two issues before him were:

1. whether the Agency was under a contractual duty to bargain with the [union] over the O.I. before implementing it; [and]

2. if so, whether the Agency lived up to that duty in this case.

*/ The union parties to this matter before the arbitrator were the National Border Patrol Council and the National Immigration and Naturalization Service Council. The American Federation of Government Employees, on behalf of its two member Councils, filed the instant petition before the Authority. For discussion purposes, the two Councils before the arbitrator and the petitioner will all be referred to herein as "the union."

The arbitrator denied the grievances, holding that the activity was not required to bargain with the union about the inclusions which the union wished to make in Operating Instruction 287.10 and that therefore the activity did not violate the parties' agreement in unilaterally putting the Operating Instruction into effect.

In his reasoning, the arbitrator stated that when the matter was submitted to arbitration, only two provisions of the Operating Instruction remained in dispute: (1) a proposal concerning the potential effect on "whistle-blowers" and (2) a proposal concerning allegations by employees against aliens who are about to depart. The arbitrator set forth Article 3, Section G of the parties' collective bargaining agreement, as follows:

> The parties recognize that from time to time during the life of the agreement, the need will arise requiring the change of existing Agency regulations covering personnel policies, practices and/or working conditions not covered by this agreement. The Agency shall present the changes it wishes to make to existing rules, regulations and existing practices to the Union in writing. The Union will present its views (which must be responsive to either the proposed change or the impact of the proposed change) to the Agency within 30 calendar days of receipt of the proposed change. Reasonable extensions to this time limit may be granted on request. Changes in national policy shall be referred to the President of each national council if such changes impact on either of the National Councils.
>
> If disagreement exists, either the Agency or the Union may serve notice on the other of its interest to enter into formal negotiations on the subject matter. Such negotiations must begin within 30 calendar days of the date the Agency receives notice from the Union that it does not agree with proposed changes.

Citing this article, the arbitrator stated:

> There is little dispute that the provision for mid-term negotiations set out in Article 3, Section G of the Agreement only obligates the [activity] to bargain over matters which are mandatory subjects for negotiation under the Executive Order. . . . The O.I. involved here deals with the internal investigations program of the [activity] to insure the professional integrity of the employees who are engaged in important law enforcement functions. As such, it is a Management document delineating certain internal security procedures. It is primarily directed at better organization and defining responsibilities under this program. The revisions do not appear to change existing rights of employees under the Agreement or applicable Civil Service Regulations. Consequently, the Arbitrator is persuaded that it falls outside the scope of mandatory bargaining under the provisions of Sections 11(b) and 12(b)(5) of the Executive Order.
>
> . . . [T]he [activity] correctly points out that the language incorporated in the opening policy statement of the O.I. is neither more nor less than is contained in the standards of conduct binding on all federal employees under federal law. Since this amounts to no change in existing policy, the [activity] was not required to bargain about it in mid-term of the

> Agreement even if the O.I. were within the scope of mandatory bargaining. Also, aside from considerations of Sections 11(b) and 12(b)(5), the proposal [concerning allegations by employees against aliens who are about to depart] . . . does not purport to regulate employee conduct and need not be bargained over as a precondition to imposing a program designed to regulate employees. [Arbitrator's award at 6-7.]

The union filed a petition for review of the arbitrator's award pursuant to the rules of procedure set forth in 5 C.F.R. part 2411 (1978), which, to the extent consistent with the provisions of section 7122(a) of the Federal Service Labor Management Relations Statute (5 U.S.C. §7122(a)) and as amended by section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority, 44 F.R. 44741, remain operative with respect to this case. The union seeks Authority acceptance of its petition on the basis of the exceptions discussed below. The agency did not file an opposition.

Pursuant to section 2411.32 of the amended rules and section 7122(a) of the Statute, the Authority will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award is deficient because it is contrary to law or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its first exception, the union contends that the award violates Executive Order No. 11491, as amended, and title VII of the Civil Service Reform Act of 1978. In support of this exception, the union contends that the arbitrator failed to correctly interpret the Executive Order with respect to the negotiability of the union's proposals, that the two union proposals at issue were negotiable, and that the arbitrator erred in his interpretation of the parties' agreement by finding that the activity was not required to bargain over the inclusion of the proposals into Operating Instruction 287.10.

The Authority will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates law. In this case, however, the union's petition does not contain a description of facts and circumstances to support its exception. In this regard, the union does not show in what manner the arbitrator's award, in which he determined that the activity did not violate the parties' collective bargaining agreement when it put the Operating Instruction into effect, violates either the Executive Order or the Federal Service Labor-Management Relations Statute. The union states only that the proposals are negotiable and cites certain National Labor Relations Board cases to support its position. The cases cited are inapposite to the question of whether a particular matter is negotiable or nonnegotiable under the Executive Order or the Statute. Thus the union provides no support for its general assertion that "[t]he arbitrator failed to correctly interpret the Executive Order . . . ." Further, as to the union's assertion in support of this exception that "[t]he arbitrator committed a gross misinterpretation of the contract," such an assertion does not provide a basis for review of an arbitration award. United States Army Missile Materiel Readiness Command (USAMIRCOM) and American Federation of Government Employees, Local 1858, AFL-CIO, Case No. 0-AR-7, 2 FLRA No. 60 (Jan. 17, 1980). Therefore, the union's first exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules.

In its second exception, the union contends that the arbitrator failed to conduct a fair hearing. In support of this exception, the union contends that the arbitrator allowed an issue to be heard that was never raised during the grievance process. In this regard, the union refers to admission by the arbitrator of evidence going to the activity's defense that the matters over which the union sought to bargain were nonnegotiable.

The Authority will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents a ground similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations cases. In the private sector, Federal courts have sustained challenges to arbitration awards when it has been alleged that the petitioner was not accorded a fair hearing primarily in cases where it appears that the arbitrator's challenged rulings precluded consideration of all the pertinent and material evidence. See Harvey Aluminum v. United Steelworkers of America, AFL-CIO, 236 F.Supp. 488, 493-95 (C.D. Calif. 1967). See generally Shopping Cart, Inc. v. Amalgamated Food Employees Local 196, 350 F.Supp. 1221 (E.D. Pa. 1972) and Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 261 F. Supp. 832 (D.N.J. 1966), aff'd, 397 F.2d 594 (3d Cir.), cert. denied 393 U.S. 954 (1968). Therefore, the Federal Labor Relations Authority will grant a petition for review of an arbitration award on the ground that the arbitrator failed to conduct a fair hearing by refusing to consider pertinent and material evidence.

In this case, however, the union's argument is not that the arbitrator refused to hear pertinent and material evidence, but instead that the arbitrator heard too much evidence, specifically evidence going to the activity's defense that the matter was nonnegotiable. Thus the union argues that it was denied a fair hearing by the failure of the arbitrator to exclude certain profferred evidence. In the private sector, while refusal to hear pertinent and material evidence may constitute a denial of a fair hearing, courts have long recognized that liberal admission of testimony and evidence is the usual practice in arbitration. For example, in Harvey Aluminum, supra, the court quoted favorably from Arbitrator Benjamin Aaron as follows:

> Despite the generally accepted principle that arbitration procedures are necessarily more informal than those in a court of law, objections to evidence on such grounds that it is hearsay, not the best evidence, or contrary to the parol evidence rule, are still frequently raised in ad hoc arbitration. To the extent that these and similar objections are intended to exclude proferred evidence, they generally fail. The arbitrator is interested in gathering all the relevant facts he can, his principal objective is to render a viable decision, and any information that adds to his knowledge of the total situation will almost always be admitted. [Emphasis by court.] 263 F.Supp. at 491, quoting from Aaron, Some Procedural Problems in Arbitration, 10 Vand. L. Rev. 739, 743-44 (1957).

Thus, the union's contentions that the arbitrator should not have admitted certain evidence provide no basis for granting its petition for review. The union states in its petition that it objected at the arbitration hearing to the admission of the evidence and thus the arbitrator had the union's objections before him when determining what weight to give to the disputed evidence in

arriving at his award. Therefore, the union's second exception provides no basis for granting its petition under section 2411.32 of the amended rules.

In its third exception, the union contends that the arbitrator exceeded his authority. In support of this exception, the union states that the plain wording of the contract calls for "formal negotiations" and that the award has the effect of interpreting the agreement as providing for a waiver of the union's right to bargain during the mid-term of an agreement when the agency declares the union's proposals nonnegotiable.

On their face, the union's assertions in support of its exception are directed towards the arbitrator's interpretation of the collective bargaining agreement and constitute disagreement with that interpretation. As pointed out in connection with the first exception, disagreement with the arbitrator's interpretation and application of the provision of the agreement before him does not constitute a basis for reviewing arbitration awards. Therefore, the union's third exception provides no basis for granting its petition under section 2411.32 of the amended rules.

Accordingly, the union's petition is denied because it fails to meet the requirements of section 2411.32 of the amended rules for acceptance of a petition for review of an arbitrator's award.

Issued, Washington, D.C., June 11 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NAVAL ORDNANCE STATION,
LOUISVILLE, KENTUCKY

Activity

and

Case No. 0-AR-11

LOCAL LODGE NO. 830,
INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS

Union

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator John Dunsford filed by the agency under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7122(a)).

According to the arbitrator's award, the dispute in this matter arose when, due to extreme weather conditions, the activity was closed by order of its Commanding Officer on January 13, 17, 18, 20, 26 and 27, 1978. Only guards and building maintenance crews remained on duty. Except for January 26 when administrative leave was granted, employees who did not work on these days were required to use annual leave or take leave without pay. The union filed a grievance alleging, relevantly, that the activity violated Article 8, Section 6(c)[1/] of the parties' collective bargaining agreement (1) because it did not grant administrative leave to the employees who did not work on January 17, 18, 20, and 27 whereas a majority of Federal activities in the Louisville area did grant administrative leave to their employees on these days, and (2) by not authorizing mass excusals for parts of other days, January 16 and 19, although some Federal activities did release their employees early. The matter ultimately went to arbitration.

1/ According to the arbitrator, Article 8, Section 6(c) provides:

Section 6. Emergency Conditions

. . . . . .

c. When mass excusals are authorized, employees must be either actually at their place of duty, or scheduled to report for duty, in order to be excused. Mass excusals shall be on the same basis as other Federal activities of the Louisville area when the same conditions exist.

At the hearing before the arbitrator, the activity challenged the arbitrability of the dispute on the ground that the subject matter of Article 8, Section 6(c) is a reserved management right under section 12(b)(3)[2/] of Executive Order 11491 and, therefore, is nonnegotiable.

According to the arbitrator, the issues before him were as follows:

1. Is the present grievance arbitrable in view of the fact that under Section 12(b)(3) of Executive Order 11491 Station management retains the right "to relieve employees from duties because of lack of work or for other legitimate reasons"?

2. If the grievance is arbitrable, did the Station violate Article 8, Section 6(c) of the negotiated agreement between the parties on January 16-20, 1978 and January 26-27, 1978?

With respect to the arbitrability question, the arbitrator first determined that decisions as to whether or not to authorize mass excusals from work and close the station is a retained management right under section 12(b)(3) of the Order, and therefore that part of the grievance concerning the activity's failure to grant mass excusals for parts of January 16 and 19 was not arbitrable. The arbitrator further determined, however, that the type of leave policy to apply once management has independently made a decision as to whether or not to close a facility is not an infringement on management's reserved rights under section 12(b)(3), but merely concerns the implementing procedures or impact of that decision on adversely affected employees. The arbitrator concluded, therefore, that the part of the grievance concerning the type of leave the activity should have granted its employees once it decided to close was arbitrable.

With respect to the merits of the grievance, the arbitrator found that since the majority of the Federal activities in the Louisville area had granted administrative leave to their employees on January 17, 18, 20, and 27, the activity had violated Article 8, Section 6(c) of the agreement by not granting administrative leave to its employees on those dates after it decided to close. Accordingly, the arbitrator awarded as follows:

> To the extent that the grievance claims that the Station was contractually bound to excuse employees from work because of emergency weather conditions on January 16 and 19, 1978, it is dismissed as nonarbitrable.

2/ Section 12(b)(3) provides:

> Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements—(b) management officials of the agency retain the right, in accordance with applicable laws and regulations--
>
> . . . . . .
>
> (3) to relieve employees from duties because of lack of work or for other legitimate reasons[.]

Decisions if and when mass excusals are to be authorized are retained rights of management under Section 12(b)(3) of Executive Order 11491 and are nonnegotiable subject matter.

In other respects the grievance is arbitrable.

The Station violated Article 8, Section 6(c) of the Basic Agreement when, having made the decision to excuse most employees from work due to emergency weather conditions on January 17, 18, 20, and 27, 1978, it required them to take annual leave or leave without pay on those days rather than granting administrative leave. But for the violation of the Basic Agreement by the Station, these employees would have received administrative leave on January 17, 18, 20 and 27, 1978.

The Station shall take whatever measures are necessary to correct these violations by crediting the affected employees with the administrative leave to which they were entitled under the contract. By agreement of the parties, the arbitrator shall retain jurisdiction in this case only for purposes of resolving any disputes regarding the precise form the remedy should take.

The agency filed a petition for review of the arbitrator's award pursuant to the rules of procedure set forth in 5 C.F.R. part 2411 (1978), which, to the extent consistent with the provisions of section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7122(a)) and as amended by section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority, 44 F.R. 44741, remain operative with respect to the present case. The agency seeks Authority acceptance of its petition on the basis of the exception discussed below. The union filed an opposition.

Under section 2411.32 of the amended rules and section 7122(a) of the Statute, the Authority will grant a petition for review where it appears, based upon the facts and circumstances described in the petition, that the award is deficient because it is contrary to law, regulation, or the Order, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its exception to the arbitrator's award, the agency contends that the award violates section 12(b)(3) of the Order.[3/] In this regard, the agency contends that a decision as to whether to require employees to use annual leave or administrative leave is a retained management right under section 12(b)(3) and is therefore nonnegotiable since: (1) the right to require an employee to use annual leave or administrative leave is indistinguishable from the right to relieve employees from duty; (2) prior Assistant Secretary decisions have indicated that management has a nonnegotiable right under section 12(b)(3) to determine the leave status of employees who are relieved from duties, as well

3/ The agency also makes a general assertion that the award violates section 7106(a)(2)(A) of the Statute (5 U.S.C. § 7106(a)(2)A)), but directs its contentions in support of its exception only to the alleged violation of the Order.

as the nonnegotiable right not to relieve employees from duties; and (3) the right to relieve employees from duties reflects the authority already vested in management by law[4/] and regulation[5/] to require annual leave of an employee. The agency thus concludes that the award violates the Order because it enforces a nonnegotiable collective bargaining agreement provision which requires the activity to "abdicate its retained right to relieve employees from duty when and as it wishes."

The Authority will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates the Order.[6/] However, in this case the agency's petition does not contain a description of facts and circumstances to support its exception. Thus, the agency fails to demonstrate in what way the arbitrator's award, in which he determined that the activity had violated the parties' agreement by not granting administrative leave to its employees after making a decision to close the activity on certain days, violates management's section 12(b)(3) right to relieve employees from duties because of lack of work or for other legitimate reasons. The Assistant Secretary's decisions upon which the agency relies are inapposite. A careful reading of those decisions indicate that they are directed only to the right of management under section 12(b)(3) to make the ultimate decision on whether or not to excuse employees from duty at all, a right clearly recognized by the arbitrator, and not to the type of leave to be granted after management has made the decision to excuse the employees.

Further, nothing in those decisions, or in the language of section 12(b)(3), supports the agency's assertion that the right to require an employee to use annual leave or administrative leave is indistinguishable from the right to relieve employees from duty. It may be that an agency decision to relieve employees from duty may at the same time, in most circumstances, necessitate a

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4/ The agency cites, in this regard, 5 U.S.C. § 6302(d) (1976), which provides:

> (d) The annual leave provided by this subchapter, including annual leave that will accrue to an employee during the year, may be granted at any time during the year as the head of the agency concerned may prescribe.

5/ The agency cites, in this regard, Federal Personnel Manual chapter 630, subchapter 3-4(b), which provides:

> Annual leave provided by law is a benefit and accrues automatically. However, supervisors have the responsibility to decide when the leave may be taken. This decision will generally be made in the light of the needs of the service rather than solely on the desires of the employees. Supervisors should insure that annual leave is scheduled for use so as to prevent any unintended loss at the end of the leave year.

6/ Thus, where, as in the circumstances of case, the grievance was decided by the arbitrator based on his interpretation of the Order, the disposition of the case is governed by the provisions of the Order.

decision as to the type of leave that employees will be required to use. However, nothing in section 12(b)(3) prevents an agency from agreeing to a negotiated agreement provision such as the one the agency agreed to in this case, that is, that after management has made the determination on whether or not to excuse employees from duty under certain circumstances then "excusals shall be on the same basis as other Federal activities of the Louisville area when the same conditions exist." Such a provision could then be enforced through the arbitral process.

Furthermore, as to the agency's assertion that management's retained right under section 12(b)(3) to relieve employees from duties reflects the authority already vested in management by law and regulations to require annual leave of an employee, such assertions do not support an exception that an award violates section 12(b)(3), nor does the agency in any manner show that such laws and regulations would prevent the negotiation of the provision involved herein, or arbitral enforcement of that provision. Therefore, the agency's exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules.

Accordingly, the agency's petition for review of the arbitrator's award is denied because it fails to meet the requirements for review set forth in section 2411.32 of the amended rules of procedure.

Issued, Washington, D.C., June 11, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

MARE ISLAND NAVAL SHIPYARD

(Activity)

and

Case No. 0-AR-105

FEDERAL EMPLOYEES METAL TRADES
COUNCIL OF VALLEJO, AFL-CIO

(Union)

ORDER DISMISSING EXCEPTIONS

On May 28, 1980, Federal Employees Metal Trades Council, AFL-CIO (the union), filed exceptions to the award of Arbitrator Morris L. Myers in the instant case with the Authority, pursuant to section 2425.1 of the Authority's regulations (5 C.F.R. § 2425.1 (1980)). For the reasons indicated below, it has been determined that the subject exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the Authority's regulations (5 C.F.R. § 2425.1(b) (1980)) provides:

> The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in the union's submission, is dated April 24, 1980. Therefore, under section 2425.1(b) of the Authority's regulations, the union's exceptions were due in the office of the Authority no later than May 23, 1980. However, as stated above, the subject exceptions were not filed with the Authority until May 28, 1980. In this regard, the Authority is not empowered to extend or waive the time limit for filing exceptions to arbitrators' awards.

Accordingly, as the union's exceptions were untimely filed, and apart from other considerations, the union's appeal is hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 25, 1980

Samuel A. Chaitovitz, Executive Director

3 FLRA No. 70

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

OFFICE OF HEARINGS AND APPEALS,
SOCIAL SECURITY ADMINISTRATION, HEW

(Activity)

and

Case No. 0-AR-94

LOCAL 3615, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES

(Union)

ORDER DISMISSING EXCEPTIONS

On May 9, 1980, Local 3615, American Federation of Government Employees, AFL-CIO (the union), filed exceptions to the award of Arbitrator Abraham Weiss in the instant case with the Authority, pursuant to section 2425.1 of the Authority's regulations (5 C.F.R. § 2425.1 (1980)). For the reasons indicated below, it has been determined that the subject exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the Authority's regulations (5 C.F.R. § 2425.1(b) (1980)) provides:

> The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in the union's submission, is dated April 9, 1980. Therefore, under section 2425.1(b) of the Authority's regulations, the union's exceptions were due in the office of the Authority no later than May 8, 1980. However, as stated above, the subject exceptions were not filed with the Authority until May 9, 1980. In this regard, the Authority is not empowered to extend or waive the time limit for filing exceptions to arbitrators' awards.

Accordingly, as the union's exceptions were untimely filed, and apart from other considerations, the union's appeal is hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 25, 1980

Samuel A. Chaitovitz, Executive Director

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NAVAL AIR DEVELOPMENT CENTER

(Activity)

and

Case No. 0-AR-103

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL #1928

(Union)

ORDER DISMISSING EXCEPTIONS

On May 21, 1980, American Federation of Government Employees, AFL-CIO (the union), filed exceptions to the award of Arbitrator Edward J. Mullaly in the instant case with the Authority, pursuant to section 2425.1 of the Authority's regulations (5 C.F.R. § 2425.1 (1980)). For the reasons indicated below, it has been determined that the subject exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the Authority's regulations (5 C.F.R. § 2425.1(b) (1980)) provides:

> The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in the union's submission, is dated April 21, 1980. Therefore, under section 2425.1(b) of the Authority's regulations, the union's exceptions were due in the office of the Authority no later than May 20, 1980. However, as stated above, the subject exceptions were not filed with the Authority until May 21, 1980. In this regard, the Authority is not empowered to extend or waive the time limit for filing exceptions to arbitrators' awards.

Accordingly, as the union's exceptions were untimely filed, and apart from other considerations, the union's appeal is hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 25, 1980

Samuel A. Chaitovitz, Executive Director

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. O-PS-18

DECISION ON REQUEST FOR GENERAL STATEMENT
OF POLICY OR GUIDANCE

The Authority received a request from the National Association of Government Employees on behalf of its affiliate the Federal Aviation Science and Technological Association (union) that the Authority issue a general statement of policy or guidance on the following question:

> Whether or not a bargained-for privilege in a collective bargaining agreement covering certain, ascertainable, definite employees can be extended by the Comptroller General to include employees not included in the unit covered by the agreement.

According to the request, the union negotiated the privilege of a bargaining unit employee operating a privately owned vehicle during training at the Federal Aviation Administration's Oklahoma City Training Academy under certain circumstances. Subsequently, the Comptroller General ruled that an employee not covered by the privilege negotiated by the union should also be allowed to use a privately owned vehicle during training at the academy under the same circumstances. The union contends "[t]he decision stands for the principle that a bargained for privilege of an exclusive representative applies to similarly situated employees not subject to the provisions of the bargaining agreement upon the proper and timely filing for the same privilege."

The Authority has carefully considered this request and has determined that it does not satisfy the standards governing the issuance of general statements of policy and guidance set forth in section 2427.5 of the rules of the Federal Labor Relations Authority, 45 Fed. Reg. 3516, which provides in pertinent part:

> § 2427.5 Standards governing issuance of general statements of policy and guidance.
>
> In deciding whether to issue a general statement of policy or guidance, the Authority shall consider:
>
> (a) Whether the question presented can more appropriately be resolved by other means;
>
> (b) Where other means are available, whether an Authority statement would prevent the proliferation of cases involving the same or similar question[.]

The question presented in this request for a general statement of policy or guidance can be more appropriately resolved by other means. For example,

procedures set forth in the Statute and appropriate regulations for the resolution of unfair labor practices provide a more flexible mechanism for the adjudication of issues of fact with respect to the alleged consequences resulting from the Comptroller General's ruling.

Moreover, Authority action on this request is not warranted since it would not prevent the proliferation of cases involving the same or similar question. In this regard, your contentions essentially relate to the unique circumstances of the situation described. Therefore, the statement of policy requested would not necessarily be dispositive of possible cases growing out of other circumstances.

Accordingly, the request for a general statement of policy or guidance is denied.

Issued, Washington, D.C., June 25, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 43 REPORT OF CASE DECISIONS July 24, 1980

UNFAIR LABOR PRACTICE CASES

3 FLRA No. 64 (June 16, 1980)

Department of the Navy, Naval Underwater Systems Center, Newport Naval Base, Assistant Secretary Case No. 31-11669(CA). Upon a complaint filed by the union (Federal Union of Scientists and Engineers, NAGE Local R1-144) under E.O. 11491, the ALJ found that the activity did not violate section 19(a)(1) and (6) of the Order, as the union had alleged, when it unilaterally imposed restrictions on the utilization of official time by the union's president for representational purposes and when it refused the union's request for a copy of a monthly retention register prepared by the activity. Contrary to the ALJ, the Authority concluded that the activity had violated section 19(a)(1) and (6) of the Order by restricting the union president's use of official time for representational purposes. The Authority further found, in agreement with the ALJ, that in the absence of evidence presented by the union that the monthly retention register was necessary and relevant to the union in effectively representing the unit employees, the activity's refusal to provide the union with a copy without charge was not violative of the Order. Accordingly, the Authority issued a remedial order with respect to the conduct found violative of the Order and dismissed the remainder of the complaint. (Decision and Order attached.)

3 FLRA No. 65 (June 16, 1980)

Veterans Administration Medical Center, Shreveport, Louisiana, Assistant Secretary Case Nos. 64-4243(CA) and 64-4265(CA). Upon amended complaints filed by the union (AFGE Local 2000) under E.O. 11491, the ALJ found that the activity had not violated section 19(a)(1) of the Order, as the union had alleged, by the conduct of the Chief of Nursing Services at two separate meetings concerning a unit employee's grievance, either with respect to statements he made at the first meeting concerning documentation of the grievant's complaints or in having his secretary, another unit employee, present at the second meeting. The Authority adopted the findings, conclusions, and recommendations of the ALJ and, accordingly, dismissed the union's complaints. (Decision and Order attached.)

NEGOTIABILITY CASES

3 FLRA No. 66 (June 24, 1980)

International Association of Fire Fighters, Local F-61 and Philadelphia Naval Shipyard, Case No. 0-NG-6. The dispute involved the negotiability of four proposals concerning (1) training, (2) holidays, (3) promotions and (4) overtime. As to (1), the Authority held that the union's proposal concerning training, by placing absolute limits on the agency's ability to assign training to unit personnel during duty hours, violated the agency's right to assign work under section 7106(a)(2)(B) of the Statute; and, therefore, sustained the agency's allegation that the proposal was outside the duty to bargain. With regard to (2), the Authority held that the union's proposal concerning holidays, by prescribing the duties employees could be assigned on certain days, violated management's right under section 7106(a)(2)(B) of the Statute to assign work; and, in addition, by including in a list of holidays days which are not recognized as holidays in Federal law, the proposal to that extent also violated 5 U.S.C. § 6103. The Authority, therefore, sustained the agency's allegation of nonnegotiability as to this proposal. As to (3), the Authority found that, to the extent that the union's proposal concerned promotion procedures for unit positions, it was within the obligation to bargain under section 7117 of the Statute; however, to the extent that the proposal would apply to nonbargaining unit supervisory positions it was negotiable only at the election of the agency. Accordingly, since the agency had elected not to negotiate promotion procedures for nonbargaining unit supervisory positions, the Authority sustained the agency's allegation that the proposal was not within the duty to bargain. Finally, with regard to (4), the Authority held that the union's overtime proposal did not concern a matter which is specifically provided for by Federal law and, further, did not violate section 7106(a)(1) of the Statute. Accordingly, the Authority set aside the agency's allegation that this proposal was not within the duty to bargain. (Decision attached.)

3 FLRA No. 67 (June 25, 1980)

National Federation of Federal Employees, Local 862 and Tooele Army Depot, Tooele, Utah, Case No. 0-NG-44. The dispute involved a union proposal that would authorize hazard pay differential to certain categories of General Schedule employees. The activity declared the proposal nonnegotiable, claiming that it conflicted with a specific statute (5 U.S.C. 5545(d)) which authorized the

Office of Personnel Management (OPM) to establish a schedule of pay differentials for certain categories of employees performing hazardous duties on an irregular or intermittent basis; and that negotiations over the proposal would thwart the position classification process specifically excluded from "conditions of employment" as defined in section 7103(a)(14)(B) of the Statute. The Authority requested an advisory opinion from OPM pursuant to section 7105(i) of the Statute concerning the proper interpretation of rules, regulations, or policy directives issued by OPM; more specifically, whether the union's proposal conflicted with any laws, rules or regulations over which OPM had responsibility. Based on the record in the case, including the advisory opinion rendered by OPM and the comments submitted by the parties on that opinion, the Authority concluded that the dispute involved issues appropriate for resolution through the classification appeals process rather than under the procedures set forth in section 7117 of the Statute. Accordingly, the Authority held that the union's appeal had been prematurely filed, and denied the appeal, but without prejudice to the renewal of its contention that the matters in dispute are negotiable in a petition duly filed with the Authority after it is resolved, under applicable procedures, that the hazardous duties at issue are irregular and intermittent and have not been taken into account in classifying the positions involved. (Decision attached.)

ARBITRATION CASES

3 FLRA No. 61 (June 11, 1980)

Marine Corps Logistics Support Base, Pacific, Barstow, California and American Federation of Government Employees, AFL-CIO, Local 1482 (Adler, Arbitrator), Case No. 0-AR-23. The arbitrator, relying on section 7106 of the Statute, found that the union's grievance concerning a particular work assignment was not arbitrable. The arbitrator therefore declined to proceed further and did not rule on the merits of the grievance. The Authority accepted the union's petition for review of the arbitrator's award pursuant to the then applicable rules of procedure (Report No. 19). On review, the Authority found that the arbitrator's award was deficient, holding that nothing in section 7106 of the Statute precludes an arbitrator from reaching and deciding the merits of a grievance where, as here, a party has alleged a violation of provision in a collective bargaining agreement. Accordingly, the Authority set aside the arbitrator's award. (Decision attached.)

3 FLRA No. 62 (June 11, 1980)

National Border Patrol Council and National Immigration and Naturalization Service Council and United States Department of Justice, Immigration and Naturalization Service (Harkless, Arbitrator), Case No. 0-AR-12. The arbitrator held that the activity was not required to bargain with the union about certain inclusions which the union wanted the activity to make in its Operating Instruction, and that therefore the activity did not violate the parties' agreement by unilaterally putting the Operating Instruction into effect. The arbitrator denied the union's grievance and the union filed a petition for review of the arbitrator's award with the Authority, contending: (1) that the award violated E.O. 11491 and the Statute; (2) that the arbitrator failed to conduct a fair hearing; and (3) that the arbitrator exceeded his authority. The Authority denied the union's petition because it failed to meet the requirements for review set forth in the applicable rules of procedure. (Decision attached.)

3 FLRA No. 63 (June 11, 1980)

Naval Ordance Station, Louisville, Kentucky and Local Lodge No. 830, International Association of Machinists and Aerospace Workers (Dunsford, Arbitrator), Case No. 0-AR-11. The dispute arose when, due to extreme weather conditions, the activity was closed for a number of days by order of its commanding officer; employees who were excused from work were required to use annual leave or take leave without pay for certain of those days. The arbitrator, in part of his award, determined that the activity violated the parties' agreement by not granting administrative leave on the days in question after it had decided to close. The agency filed a petition for review of that part of the arbitrator's award with the Authority, contending that it violated section 12(b)(3) of E.O. 11491. The Authority found that the agency's petition did not contain a description of facts and circumstances to support its exception. Accordingly, the Authority denied the agency's petition because it failed to meet the requirements for review set forth in the applicable rules of procedure. (Decision attached.)

3 FLRA No. 68 (June 25, 1980)

Mare Island Naval Shipyard and Federal Employees Metal Trades Council of Vallejo, AFL-CIO (Meyers, Arbitrator), Case No. 0-AR-105. The Authority dismissed the union's exceptions to the arbitrator's award as untimely filed under section 2425.1 of the Authority's regulations. (Order Dismissing Exceptions attached.)

3 FLRA No. 70 (June 25, 1980)

Office of Hearings and Appeals, Social Security Administration, HEW and Local 3615, American Federation of Government Employees (Weiss, Arbitrator), Case No. 0-AR-94. The Authority dismissed the union's exceptions to the arbitrator's award as untimely filed under section 2425.1 of the Authority's regulations. (Order Dismissing Exceptions attached.)

3 FLRA No. 71 (June 25, 1980)

Naval Air Development Center and American Federation of Government Employees, Local No. 1928 (Mullaly, Arbitrator), Case No. 0-AR-103. The Authority dismissed the union's exceptions to the arbitrator's award as untimely filed under section 2425.1 of the Authority's regulations. (Order Dismissing Exceptions attached.)

GENERAL STATEMENT OF POLICY OR GUIDANCE

3 FLRA No. 69 (June 25, 1980)

National Association of Government Employees, Federal Aviation Science and Technological Association, Case No. 0-PS-18. NAGE, on behalf of its affiliate, FASTA, requested that the Authority issue a general statement of policy or guidance on the question of "[w]hether or not a bargained-for privilege in a collective bargaining agreement covering certain, ascertainable, definite employees can be extended by the Comptroller General to include employees not included in the unit covered by the agreement." The union had negotiated the privilege of a bargaining unit employee operating a privately owned vehicle during training under certain circumstances. The Authority determined that because the question could more appropriately be resolved by other means, such as an unfair labor practice proceeding, and resolution of the issue would not prevent the proliferation of cases involving the same or similar questions, the union's request did not satisfy the Authority's standards governing the issuance of general statements of policy and guidance. Accordingly, the union's request was denied. (Decision attached.)

Attachments (11)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE NAVY,
NAVAL UNDERWATER SYSTEMS CENTER,
NEWPORT NAVAL BASE

Respondent

and

Assistant Secretary
Case No. 31-11669(CA)

FEDERAL UNION OF SCIENTISTS AND ENGINEERS,
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES,
LOCAL R1-144

Complainant

DECISION AND ORDER

The Administrative Law Judge issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the two unfair labor practices alleged in the complaint and recommending that the complaint be dismissed. The Complainant, Federal Union of Scientists and Engineers, National Association of Government Employees, Local R1-144, (NAGE), filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under § 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by § 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in § 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to § 2400.2 of the Authority's rules and regulations and § 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the exceptions filed by the Complainant, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendations, except as modified herein.

The amended complaint herein alleged, in substance, that the Respondent violated § 19(a)(1) and (6) of the Executive Order by its actions in August, September and November 1977, in unilaterally imposing restrictions on the utilization of official time by the NAGE's president, for representational purposes, and additionally, by refusing the Complainant's request for a copy of a monthly

retention register prepared by the Respondent. In recommending that the complaint be dismissed in its entirety, the Administrative Law Judge found that the NAGE and Respondent had not negotiated an agreement concerning the use of official time for representational purposes; the use of official time for such purposes is not an inherent right under the Executive Order; that the NAGE's president could not possibly have spent legitimately the amount of official time credited to him on "union business"; and the Activity's action was not an unreasonable restriction, was a reasonable interpretation of the Federal Personnel Manual, and was consistent with management's prerogatives under § 12(b) of the Order. In addition, the Administrative Law Judge found, in essence, that the monthly retention register sought by the NAGE was not necessary and relevant information needed by the NAGE in order to discharge its responsibilities as the exclusive representative.

Contrary to the Administrative Law Judge, the Authority concludes that the Respondent violated § 19(a)(1) and (6) of the Executive Order by its action in restricting the utilization of official time by the president of the NAGE for representational purposes. It is well settled under the Executive Order that the use of official time for representational activities of an exclusive bargaining representative is subject to bargaining by the parties and, upon agreement, to be reduced to writing. See Matter of GAO, No. B-156287, 3 FLRC 874, FLRC No. 75P-1 (1975). It is also well established that parties may establish terms and conditions of employment by practice, or other form of tacit or informal agreement, and that this, like other established terms and conditions of employment, may not be altered by either party in the absence of agreement or impasse following good faith bargaining. See U.S. Department of Treasury, Internal Revenue Service, New Orleans District, 8 A/SLMR 497, A/SLMR No. 1043 (1978).

As more fully set forth in the attached Administrative Law Judge's Recommended Decision and Order, the utilization by the president of the NAGE of official time for representational purposes for up to 40 hours per week had been consistently exercised for an extended period of time with the knowledge and consent of the Respondent's supervisors. In the Authority's view, the parties' actions constitute the establishment by practice of a term and condition of employment. Under these circumstances, the Authority concludes that Respondent's actions in restricting the amount of official time available to be utilized by the president of the NAGE without first notifying and bargaining in good faith with the NAGE constituted a violation of § 19(a)(1) and (6) of the Order.

We reach this conclusion without deciding whether or not there was an abuse of the official time allowed for representational purposes by the union president herein. However, the Authority does not wish to leave the impression that it condones, in any way, abuse or misuse of official time by union officials. If agency management believes that a union official is not using official time for the permitted representational purposes but rather, is abusing or misusing its official time, it may take whatever corrective action, including disciplinary action, considered appropriate. However, as noted above, such corrective or disciplinary action could not involve the restriction or alteration of an established practice of allowing a certain amount of official time for representational purposes without first negotiating with the exclusive representative.

Finally, in agreement with the Administrative Law Judge, the Authority concludes that, in the absence of evidence that the Monthly Retention Register was necessary and relevant to the NAGE in discharging its obligation to effectively represent employees in the bargaining unit, the refusal of the Respondent to provide the NAGE a copy without charge did not violate § 19(a)(1) and (6) of the Order. */

ORDER

Pursuant to § 2400.2 of the rules and regulations of the Federal Labor Relations Authority and § 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Officer In Charge of the Naval Underwater Systems Center, Newport Naval Base, Department of the Navy, shall:

1. Cease and desist from:

(a) Instituting changes with respect to the practice of using official time for the performance of representational duties, or any other term or condition of employment, without first notifying and, upon request, bargaining in good faith with the Federal Union of Scientists and Engineers, National Association of Government Employees, Local R1-144, the exclusive representative of these employees.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions:

(a) Rescind and revoke the terms and conditions of employment set forth in the memorandum of August 5, 1977, concerning the use of official time by union officials performing representational duties, and any subsequent memoranda issued to effectuate them.

(b) Upon request, negotiate with the Federal Union of Scientists and Engineers, National Association of Government Employees, Local R1-144, with respect to any proposed changes relating to the utilization by union officials of official time to perform representational duties, or any other established term or condition of employment.

(c) Post at the Naval Underwater Systems Center, Newport Naval Base, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of the forms, they shall be signed by the Officer In Charge, and they shall be posted and maintained by him

*/ In conformity with § 902 (b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees customarily are posted. The Officer In Charge shall take reasonable steps to insure that notices are not altered, defaced, or covered by any material.

(d) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint in Assistant Secretary Case No. 31-11669(CA), insofar as it pertains to the failure of the Respondent to provide a monthly retention register, ought to be, and it hereby is, dismissed.

Issued, Washington, D.C., June 16, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute changes with respect to the practice of using official time for the performance of representational duties, or any other term or condition of employment, without first notifying and, upon request, bargaining in good faith with the Federal Union of Scientists and Engineers, National Association of Government Employees, Local R1-144, the exclusive representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind and revoke the terms and conditions of employment set forth in our memorandum of August 5, 1977, concerning the use of official time by union officials performing representational duties, and any subsequent memoranda issued to effectuate them.

WE WILL, upon request, negotiate with the Federal Union of Scientists and Engineers, National Association of Government Employees, Local R1-144, with respect to any proposed changes relating to the utilization by union officials of official time to perform representational duties, or any other established term or condition of employment.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, for the Federal Labor Relations Authority whose address is: 441 Stuart Street, 8th Floor, Boston, Massachusetts 02116, and whose telephone number is (617) 223-0920.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
WASHINGTON, D.C. 20036

Department of the Navy
Naval Underwater Systems Center,
Newport Naval Base
Activity-Respondent

Case No. 31-11669(CA)

and

Federal Union of Scientists and Engineers,
National Association of Government Employees,
Local R1-144
Complainant

BEFORE: ROBERT G. MAHONY
Administrative Law Judge

A. Gene Niro, Esq.
Department of the Navy
666 Summer St.
Boston, Massachusetts 02210
For the Respondent

Richard Remmes, Esq.
285 Dorchester Ave.
South Boston, Massachusetts
For the Complainant

RECOMMENDED DECISION AND ORDER

This proceeding arises under the provisions of Executive Order 11491, as amended, (herinafter referred to as the Order). Pursuant to the Regulations of the Assistant Secretary for Labor Management Relations (hereinafter referred to as the Assistant Secretary), a Notice of Hearing on Complaint issued on September 19, 1978 with reference to alleged violations of Section 19(a)(1) and (6) of the Order. 1/

1/ Section 19 states, in pertinent part:

(a) Agency management shall not -
(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

The complaint was filed on April 24, 1978 and amended on July 25, 1978 and August 24, 1978. The amended complaint alleged, in essence, that management, in violation of a verbal agreement, unilaterally imposed restrictions on the time the union president could devote to representational duties, and, additionally, management refused to provide the union with a copy of a monthly retention register.[2/]

The Activity answered on June 1, 1978 and contended that any official time spent on union activities must be negotiated or, in the absence of a negotiated period, with the permission of management. It was the Activity's position that, absent a negotiated agreement, a period of one hour per day was sufficient for the union president to conduct normal union business. However, if the union felt that his was insufficient, management invited negotiations on the matter. The Activity further stated that the union did not get a retention register until it agreed to pay for the duplication costs, and, in any event, suffered no prejudice by not having the register.

A hearing was held on December 7, 1978 at Boston, Massachusetts at which time the parties were given an opportunity to examine witnesses, introduce documentary evidence and present oral argument. The record remained open until February 15, 1979 for the filing of briefs which have been carefully considered.

STATEMENT OF THE CASE

The Federal Union of Scientists and Engineers (FUSE), a division of the National Association of Government Employees, Local R1-144, became the exclusive bargaining agent for the professionals at the Naval Underwater Systems Center (NUSC), Newport, Rhode Island on May 21, 1976. Dominic Lepore was elected president of the local, which consisted of about 500 to 600 employees. No collective bargaining agreement was in existence during the time covered by the complaint.

From May 22, 1976 through September 24, 1977, Mr. Lepore accounted for practically all of his working hours by alloca-

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2/The second amended complaint withdrew the allegation that management improperly interfered in the internal affairs of the union. Therefore, this issue will not be discussed herein.

ting it to union business. Only 12 percent of his time was allocated to activity tasks.[3] Lepore told Mr. Louis Bisci, his supervisor, that because this was a new local, he was spending a great deal of time on union business to develop a "package" for negotiations. However, by September 1976, Bisci testified that Lepore's work performance became unacceptable because he spent so much time on alleged union business.

On October 4, 1976, Mr. Bisci asked Mr. Lepore, to critique a report involving the advanced Light Weight Torpedo Program. Bisci considered this a one or two day job, but he gave Lepore until November 1, 1976. Lepore advised Bisci that he would accept this assignment but he didn't know if he could complete the task in the allotted time because union business had priority, and he intended to work on union matters.[4] Bisci testified that he did not know that official time could not be used for negotiations. Lepore was also unable to complete another work assignment although extentions were granted, because he took the position that union business came first and activity work assignments second.

On October 4, 1976, Bisci, by memorandum, sought advice from a personnel specialist, Ms. Debbie Petti as to how Lepore would be allowed to spend his time between the union and his work tasks, because Bisci was, for all practical purposes, completely losing Lepore's services. Ultimately, the issue of

3/Dates	Union Time		Leave Time	Work Time	Total Hours
May-June, 1976	68		22	150	240
July-Sept. 1976	422		82	56	560
Oct-Dec. 1976	364		107	19	490
Jan-Mar. 1977	434		97	29	560
Apr.-June 1977	382	(13 hrs.TNG.)	64	21	480
July-Sept. 1977	380		50	58	488
Total	2050	13	422	333	2818
Percent	72.54	.46	15	12	100

4/ Bisci testified that Lepore met the Nov., 1st deadline but the work product was unsatisfactory. Lepore was given to November 22nd to complete the task. He met the November 22nd deadline, but advised Bisci that he wished he could do a better job, however; union business took precedence.

Lepore's use of time was brought to the attention of the activity's labor relations specialist, Stewart Fisher, he advised that Lepore was not automatically entitled to representational time, and it could be obtained only by management granting him time or through negotiations. Stewart also advised that Lepore was required to do the work assigned to him, and that assignments to Lepore should be documented, and a record kept of his work progress. However, although management officials continued to discuss what to do about the time Lepore was allegedly spending on union business, nothing was done to restrict Lepore's time until August 5, 1977 when Lepore was advised in writing by the Officer-in-Charge, CPT. W. E. Trueblood, that he would be granted one hour per day, immediately prior to his lunch hour, for the conduct of union business.[5/]

5/ ...The following excerpts taken from reference (c) (FPM Ltr 711-114 dtd 14 Oct. 1976) aptly state the position taken by this Center relative to the balance between the use of official time allowed to labor organization officials when performing representational duties and the performance of the government's business:

a. "In all cases, the amount of official time to be authorized and the number of employees authorized to be on official time for representational functions should be determined by balancing the effective conduct of the government's business with the rights of employees to be represented in matters relating to their employment."

b. "Also relevant to this decision is management's judgment as to the impact upon employee performance and efficiency, as well as on the efficient administration of government that will derive from employee representation in the decision making process."

c. "In no circumstances should the amount approved result in serious interference with the assigned responsibilities of the activity or be unjustifiable in light of the benefits, including sound labor sound labor management relations, to be derived."

By memorandum dated August 19, 1977. Mr. Lepore, on behalf of FUSE requested to negotiate reasonable time "for representational duties and responsibilities beginning on September 13, 1977. In addition FUSE requests a Status Quo Ante until the issue is resolved". The Sept. 13th date was suggested so the union chief negotiator could be available.

By letter dated August 23, 1977., CPT. Trueblood denied the union request for a Status Quo Ante, and insisted that Lepore restrict his time to the one hour per day. However, the effective date of this directive was extended from August 23, 1977 until September 6, 1977 "to provide for the transition in the internal work load of your organization". Nevertheless, Lepore effectively ignored this directive and continued to spend most of his time on alleged union business.

By letters dated September 12, 1977 and November 23, 1977, CPT. Trueblood, expressed concern that Mr. Lepore felt he could

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5/ (cont'd)

d. Therefore, using the above guidance, you are required to perform all assigned tasks in a manner commensurate with your grade level and within the imposed time limitations. You are hereby authorized one (1) hour per day to spend on union representational duties and responsibilities. This hour will be spent in the NAGE union office on the second floor of Building 148, and will be the hour immediately prior to your lunch period. You will, therefore, be accountable to your supervisor for the performance of assigned government business on the basis of seven (7) hours per day, exclusive of leave or other officially assigned or accepted duties. All normal union business will be deferred to this one (1) hour that you will be located in the NAGE office. Telephone calls and visists from external union sources and emergency calls and visits from employees may be received at your normal work site; however, you must first seek permission from your supervisor prior to leaving your work to handle these situations. If you find that complications arise between trying to satisfy the balance between the government's business and your representational responsibilities, you must first seek approval from your supervisor to deviate from his direction. Ultimately, you must abide by this direction and bring the issue to my attention if you feel that it is necessary to do so. If you do not feel that this is a reasonable position, then your request to negotiate this issue is welcomed.

not abide by the one hour per day limit. It was pointed out that in the seven weeks from Sept. 12, 1977 to October 29, 1977 Mr. Lepore utilized a minimum of 33% and a maximum of 100% of his time on union representational activities. CPT. Trueblood went on to state:

> In as much as there has not been an improvement in the amount of time you have spent conducting government business as a result of my letter to you dated 5 August 1977 and 12 September 1977, you are hereby directed to use no more than one (1) per day performing representational duties. All visits, all calls, those situations that you have classified as "emergencies" during the past few months, and any other union representational responsibilities, must be deferred to a time between the hours of 1100 and 1200 daily, or during non-work hours. Non-work hours are those hours before and after work and during your lunch period, and anytime for which your Supervisor has approved your request for leave. Deviations from this requirement which will become effective the beginning of the first workday following your receipt of this letter, will not be allowed.

The union also alleges that it was improperly denied a document referred to as a "retention register". The activity's position is that a "sanitized" version of the retention register would be provided if the union agreed to pay for it. Further, in the event of a Reduction in Force (RIF), a register would be provided to the union free of charge.

The evidence concerning the "retention register" is as follows.

By letter dated Feb. 14, 1977, Mr. Stewart Fisher, the activity's labor relations specialist stated to Mr. Lepore:

> Sometime ago you requested to be provided with a copy of the NUSC Retention Register on a monthly basis. I initially informed you that because of the Privacy Act we could only provide you with a sanitized version of this register. This sanitized

> version would include position title, series and grade, name and specialty title (when they became effective). All registers are set up by competitive area and competetive level. The cost of a copy of the initial register would be $15.00 plus five cents per page with approximately 20 pages. Subsequent monthly copies of this register would cost 2.00 plus five cents per page, with the same approximate number of pages. If you desire copies of this register, please notify me and arrangements will be made for your receipt of same.

Almost six months later on August 3, 1977, Lepore replied as follows:

> FUSE exercises its rights to request a copy of the retention register based on the facts of the announcement of a RIF (large or small) in the near future, to meet ceiling requirements.

On January 26, 1978 Lepore, on behalf of FUSE, wrote to Fisher contending that the Union requested a copy of the retention register on October 6, 1976 as well as on several other occasions and stated that it was negotiated that the Union was to get a monthly copy of the sanitized register. In this letter FUSE accused the Activity of dilatory tactics in supplying the register. After some further correspondence, the register was provided to the union on April 4, 1978, the union paid the $10.35 charge on May 27, 1978. In August, 1978 the union was given a second retention register free of charge that management used in connection with (RIF), although this RIF did not affect members of Lepore's union.

ISSUES

1. Did the use of up to forty hours per week from May 21, 1976 to August 5, 1977 for union representational functions by the union President constitute an established past practice?

2. Did the Activity violate Section 19(a) (1) and (6) of the Order by unilaterally restricting to one hour per day the amount of time the union president could devote the representational functions?

3. Did the Activity violate section 19(a) (1) and (6) of the Order by requiring payment from the union in order for the union to receive a monthly retention register for periods other than when a Reductuion in Force was to be effectuated.

DISCUSSION

I. Use of Official Time

Complainant contends, in essence, that it was an established practice for the union president to spend up to 40 hours per week for union-related business; that this practice continued for over one year, and when the Activity unilaterally imposed a limitation on the amount of time Mr. Lepore could spend on union business, it violated Section 19(a)(1) and (6) of the Order.

It has been held by the Assistant Secretary that the use of official time for the conduct of union business in not an inherent right under the Order. Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base California, A/SLMR No. 485 (1975); Department of the Army, Picatinny Arsenal Dover, New Jersey A/SLMR No. 512 (1975).

When the bargaining unit was formed in May 1976, and Mr. Lepore became President, he apparently persuaded his first line Supervisor, Mr. Bisci, that the large amount of time being spent on union business was required to put together a bargaining "package" for negotiations. Bisci testified that management in the initial days of the union existence, wanted to be cooperative in assisting the union is establishing itself. Based on Lepore's representations, Bisci was under the impression that Lepore's time on alleged union business would not continue over a prolonged period.

Once, however, it became apparent that Lepore could not or would not meaningfully perform activity tasks because of his alleged representational duties, this became the subject of discussions between Mr. Bisci and the activity's personnel and labor management specialists. However, the Officer-in-Charge of the activity, CPT. Trueblood, was not aware of the problem until about one month before he issued his August 5, 1977 letter restricting Lepore's time to one hour per day.

Since, the parties did not have a negotiated agreement that covered the use of official time for representational purposes, the Officer-in-Charge based his decision upon the FPM guidelines imposing what he determined to be a reasonable amount of time for union business.

Of course, what is reasonable has to be determined in the context of a given set of facts and circumstances.

After observing Mr. Lepore's demeanor, and listening to his testimony in his effort to account for the time he alledgedly spent on union business, I find that his entire testimony is totally unbelievable and I accord it no weight whatsoever. He was evasive, unresponsive and unpersuasive. His documentation, which generally consisted of a few pieces of paper with cryptic notes documenting his "help and advise" to union members, was totally unreliable as a gauge of time spent on union business. I find and conclude that Lepore could not possibly have legitimately spent anywhere near the hundreds of hours on "union business" that he attempted to justify. More likely, he used his position as union president to avoid performing his activity tasks.

On the record in this case, I find and conclude that the decision of the activity to provide Mr. Lepore one hour per day for union business was, in the absence of any negotiated agreement or credible evidence that this was an unreasonable restriction, a reasonable interpretation of the Federal Personnel Manual concerning the use of official time for union business, and consistent with management's prerogatives under Section 12(b) of the Order.

There is no credible evidence that management refused to consult, confer or negotiate with the complainant on the issue of representational time and I find and conclude that the direction to Mr. Lepore, to limit his time spent on union business to one hour per day, which in any event he effectively ignored, was not a violation of Section 19(a)(1) and (6) of the Order.

The Monthly Retention Register

"Retention Registers" are documents used by management for job reassignments or separations in the event of a reduction in force (RIF). The activity maintains a "monthly retention

group report," which could not be used in the event of a RIF, until it was updated because it does not reflect personnel changes that occur on a daily basis.

In July 1976, Mr. Lepore requested a "retention register" from Mr. Fisher. Fisher told Lepore he could get a "sanitized" version (deleting information covered by the Privacy Act) if the union paid for it, because it would have to be specially prepared for the union as it was not kept in the ordinary course of business. Fisher testified that, by regulation, the union is only entitled to a free copy of the actual retention register after a RIF is announced. During October the issue of obtaining a register was brought up in discussions between the parties, but there is no credible evidence that establishes whether at this time, management requested payment in advance or whether the union agreed to pay after it was sent.

The most credible evidence on the issue of the retention register begins with the February 14, 1977 letter from the Activity which advised Lepore that he could have a copy of the register and the approximate cost. Lepore, on behalf of the union, did not respond until October 3, 1977 requesting a copy of the register on the assumption that a RIF was coming in the near future. Certainly, by waiting almost eight months to reply it appears that the union was in no hurry to obtain the register prior to receiving some information that a RIF might occur.

Lepore renewed his request on January 26, 1978 contending that the parties had "negotiated" on October 7, 1976 that the union would be provided with a "sanitized" version of the register. Subsequently, Lepore advised Fisher that the union would pay, and on April 4, 1978 a validated retention register was furnished to Lepore. The cost was $10.35 and was paid on May 27, 1978. In August, 1978 a RIF occurred and the union was given, without charge, a second retention register that was used in the RIF.

I find and conclude that there is no credeble evidence of any agreement between the parties to either provide or pay for a retention register in October, 1976. The first definitive piece of evidence that I credit on this issue is the February 14, 1977 letter which consisted an offer to sell a copy of the register, which was ultimately accepted and payment tendered. The union offered no credible evidence that

it needed such a document, absent a bona fide RIF, in order to exercise its rights and responsibilities under section 10(e) of the Order.

For the foregoing reasons I find that there is no evidence that Section 19(a)(1) and (6) of the Order was violated by the alleged failure to provide a retention register.

I further find and concluded that based upon the entire record in this case the Complainant has failed to prove by a preponderance of the evidence that the Activity committed any violation of Section 19(a)(1) and (6) of the Order.

RECOMMENDATION

It is recommended that the complaint be dismissed in its entirety.

ROBERT G. MAHONY
Administrative Law Judge

Dated: July 26, 1979
Washington, D.C.

RFM:pac

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION MEDICAL
CENTER, SHREVEPORT, LOUISIANA

Respondent

and

Assistant Secretary
Case Nos. 64-4243(CA)
64-4265(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2000

Complainant

DECISION AND ORDER

The Administrative Law Judge in the above-entitled proceeding issued his Recommended Decision and Order finding that the Respondent had not engaged in the unfair labor practices alleged in the complaints and recommending that the complaints be dismissed in their entirety. Thereafter, the Complainant filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendations. In adopting the Administrative Law Judge's findings, conclusions and recommendation in Case No. 64-4265(CA), the Authority notes particularly that the Administrative Law Judge, in dismissing the 19(a)(1) complaint with respect to Respondent's statement concerning the

documentation of an employee's complaints, found that the statement in question "had nothing to do with the documentation of any of [the employee's] work problems." */

ORDER

IT IS HEREBY ORDERED that the complaints in Assistant Secretary Case Nos. 64-4243(CA) and 64-4265(CA) be and are hereby dismissed.

Issued, Washington, D.C., June 16, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

*/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
VETERANS ADMINISTRATION MEDICAL CENTER, SHREVEPORT, LOUISIANA Respondent	
and	Case Nos. 64-4243(CA) 64-4265(CA)
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2000 Complainant	

LYNDA BECK FENWICK, Attorney
Office of District Counsel
VARO
1400 North Valley Mills Drive
Waco, Texas

and

MR. JOHN MALONE, Chief Personnel Officer
Veterans Hospital Medical Center
Shreveport, Louisiana

For the Respondent

MR. CARL HOLT, National Representative
American Federation of Government Employees
3108 Avon Drive
Arlington, Texas 76015

and

GEORGIE PARKER LUCAS, Chief Steward
Veterans Hospital Medical Center
Shreveport, Louisiana

For the Complainant

Before: ELI NASH, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

These consolidated cases are before the Federal Labor Relations Authority based on amended complaints, filed by the American Federation of Government Employees Local 2000, AFL-CIO hereinafter called "the Complainant" alleging that the Veterans Administration Medical Center, hereinafter called "Respondent" violated Section 19(a)(1) of Executive Order 11491, as amended based on certain actions and statements made by Earl Kephart, Chief of Nursing Services. The Decision and Order herein is issued for the Federal Labor Relations Authority in accordance with the Transition Rules and Regulations published in the Federal Register, Vol. 44, No. 1, January 2, 1979, pp. 5-8.

A hearing was held in Shreveport, Louisiana on August 2, 1979. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved herein. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, the arguments of the parties and the brief submitted by Respondent, I make the following findings of fact and conclusions of law.

Findings of Fact

The Complainant Union, is, and at all times material herein has been, the exclusive representative of all regular employees of the Respondent Medical Center. At all times material herein Respondent and the Union were parties to a collective bargaining agreement which contains a grievance procedure.

Although there is a substantial amount of background evidence in the record showing the labor relations climate between the parties, the specific issues in this matter involve only two specific events which are set out below:

Case No. 64-4265(CA) - The February 24 Meeting

At the request of Chief Steward, Georgia Lucas, a meeting was held on February 24, 1978, at which Complainant was represented by Mrs. Lucas and Carl Holt, Complainant's National Representative. Respondent was represented by Mr. Kephart and assistant personnel officer Gustavo Guerra. The parties agreed that the purpose of the meeting was to discuss disagreement over interpretation relating only to handling of grievances. However, during the course of this meeting certain statements were allegedly made regarding the documenting of complaints of employee Fannie Harper.

Mr. Guerra did not recall any specific reference to Ms. Harper's

grievance although stating there may have been some conversation along that line.

According to Mr. Kephart, Mr. Holt mentioned to him that he understood Ms. Harper was a problem employee. Kephart's response was "you might say that." He then allegedly mentioned that Ms. Harper did stop at either the personnel office or on several occasions at the director's office in the morning when she came off duty. Holt then asked if these occurrences had been documented and Kephart replied that they had not been documented since they were not visits with him. Holt asked, "Don't you think they should have been documented." Kephart replied, "perhaps so." On further examination, Mr. Kephart testified that the reference to documenting complaints was to those complaints Ms. Harper was herself making and not to documenting of mistakes she had made on the job. He further testified that complaints of other employees made at the director's office were not documented.

There is record evidence that Ms. Harper sometimes deviated from the agreed upon contract procedure and in contacting the proper parties in order to present her grievances.

Mr. Holt testified that Kephart mentioned that they had had trouble with Ms. Harper. Mr. Holt responded that, "I would suggest to you as I do all management officials, when having a problem with an employee, let us know and we will see what we can do to help." Finally, Mr. Holt testified that he felt a threat to document an employee's actions after filing a grievance is a definite threat.

Mrs. Lucas stated that at the February 24 meeting she was told by Mr. Kephart, "that certain things had gone on and had not been documented in Ms. Harper's job performance, but that they would in the future be documented, and the only way that she interpreted the statement as a threat. Mrs. Lucas further testified that Mr. Kephart indicated that Ms. Harper would be documented very closely.

Case No. 64-6243(CA) - The March 17 Meeting

On March 17, 1978, Mr. Kephart met in his office with Mrs. Lucas and grievant Fannie Harper. According to all of the parties the purpose of this meeting was to receive an answer to the second step of a grievance presented under the contract. Also present during this meeting was, Mr. Kephart's secretary, LaVenia Allend.

Mrs. Lucas testified that when she saw Mrs. Allend in the meeting that she pointed out to Mr. Kephart that her presence was not proper but Mr. Kephart would not ask Mrs. Allend to leave.

The record established that Mrs. Allend is the secretary to the Chief of Nursing Service, but is a member of the bargaining unit. She

typed the reply to Ms. Harper's grievance and was present at the meeting, at the request of Mr. Kephart. Also, she was aware that the purpose of the meeting was to give the written reply to Ms. Harper. Finally, she testified that she normally sat in on the type of meeting that was held that day.

Mr. Kephart recalls that Mrs. Allen's presence was requested at this meeting simply to have a representative with him in the office.

The purpose of this meeting, as previously stated was to present to the grievant, Ms. Harper the Agency's response to the second step of the grievance under the contract. 1/ Mrs. Lucas contended that, it is customary that any questions grievant has regarding the reply is discussed before proceeding to the next step. Clearly, Mr. Kephart refused to discuss the matter during this meeting and the meeting was apparently very heated.

Discussion and Conclusions

In Case No. 64-4243(CA) Complainant contends that, in allowing Mr. Kephart's secretary to be present when he discussed a grievance with the grievant Ms. Harper, Respondent violated Section 19(a)(1) of the Order. The gravamen of the Complaint is that of the secretary, who was a bargaining unit member, destroyed the confidentiality of the meeting. The Complainant contends, in essence, that the presence of management officials and others at grievance meetings is not conducive to holding a constructive meeting. 2/

In my view, the purpose of this meeting was merely to present the agency's response to the grievant's second step grievance. Despite Complainant's contentions to the contrary, there is no provision in the contract under Article VII for discussion at this level nor does the record establish a past practice of such discussions. Therefore, it is found that no discussion was underway with which the presence

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1/ Article VII, Step 2 provides, in pertinent part that: "The service chief shall answer, in writing, within five (5) workdays. [Emphasis added.]

2/ Although the issue of whether or not management is entitled to have representatives of its own choosing at grievance meetings was not directly raised, the Complainant appears to be raising a question of contractual interpretation by its repeated reference to managements having additional representatives at this and other meetings. If indeed, there is a breach or misunderstanding arising out of the parties disagreement, it would not appear violative of Section 19(a) of the Order. General Services Administration, Region 5, Public Buildings Service, Chicago Field Office, A/SLMR No. 528.

of Mrs. Allend could have interfered. Moreover, the record reveals no other reason why the presence of Mrs. Allend, either as an observer or representative, would interfere with or restrain employee rights. Having considered the entire record before me, I find no basis to support a finding that the presence of Mrs. Allend at the March 17, 1978 meeting constituted a violation of the Order.

With respect to the issue in Case No. 64-4265(CA) that Mr. Kephart threatened Ms. Harper by telling her that he had let certain problems go undocumented; but since she had filed a grievance, he was going to document everything involving Ms. Harper and would take appropriate action, I find that Complainant has not established by a preponderance of the evidence that such statement, if made, was violative of the Order.

A determination of whether a statement violates Section 19(a)(1) must take into consideration the entire circumstances surrounding the making of the statement. Cf. Internal Revenue Service, Mid Atlantic Center, 4/ASLMR 516, A/SLMR No. 421 (1974).

Interestingly, Ms. Harper against whom the threat was allegedly made was not present during the meeting. Further, there was no refusal to process a grievance of Harper's or any other employee at this meeting, but there was considerable discussion as to how grievances would be handled. Within the context of the discussions which occurred during the meeting it is entirely possible that Mr. Kephart made reference to documentation and appropriate action and that these remarks could have been directed at Ms. Harper's situation. However, it must be demonstrated that such statement or action was made because Harper exercised rights protected by the Order. Cf. Veterans Administration, North Chicago Veterans Hospital, North Chicago, Illinois, A/SLMR No. 1024. On the basis of the record, I am convinced that Ms. Harper's prior actions, in not following the established procedure may have prompted such a statement by Respondent, that all her complaints would be documented under the agreement, and had nothing to do with the documentation of any of her work problems. Accordingly, I conclude that no violation was present in Respondent's statement regarding documentation of Ms. Harper's complaints.

Recommendation

It having been found that Respondent did not engage in any conduct violative of Section 19(a)(1) of the Order, it is recommended that the complaints be dismissed in their entirety.

ELI NASH, JR.
Administrative Law Judge

Dated: October 29, 1979
Washington, D.C.

CORRECTED COPY

3 FLRA No. 66

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS
LOCAL F-61

(Union-Petitioner)

and

Case No. O-NG-6

PHILADELPHIA NAVAL SHIPYARD

(Activity)

DECISION ON NEGOTIABILTIY ISSUES

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 et seq.).

Union Proposal I

ARTICLE XX

TRAINING

Section 1 - The Employer and the Union agree that any given training session or drill will not exceed one (1) hour duration. It is further agreed that only one (1) training session or drill, of one (1) hour duration or less, will be assigned to any given workday. Training sessions or drills must be concluded by 1500 hours on weekdays. No training sessions will be held on Saturdays, Sundays or holidays.

Section 2 - The Employer and the Union agree that no outdoor training sessions or drills will be held on days when the outside temperature exceeds 80 degrees fahrenheit, or drops below 45 degrees fahrenheit. It is further agreed that high humidity, high winds and precipitation shall be considered reason for cancellation of outdoor training sessions or drills. The Employer and the Union further concur that all on-duty personnel will participate in training sessions or drills with the exception of men on overtime status, completing ship inspection or extinguisher detail, whenever possible.

Question Here Before the Authority

The question is whether the union's proposal violates section 7106(a)(2)(B) of the Statute[1/] as alleged by the agency.

Conclusion: The provision violates management's right under section 7106(a)(2)(B) of the Statute to assign work. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 45 F.R. 3513, the agency's allegation that the proposal is not within the duty to bargain is sustained.

Reasons: The workweek of the fire fighters involved in this case can include, in any given week, a Saturday, a Sunday or a holiday. Further, as is apparent from the positions of the parties before the Authority, fire fighters are assigned a certain amount of training as a regular part of their fire fighting duties. An agency retains the right under section 7106(a)(2)(B) to assign work. Such right clearly encompasses the training involved in this case, i.e., training assigned during the duty hours of fire fighters. Section 1 of the union's proposal, however, would place absolute limits on the ability of the agency to assign such training at all after specified hours or on certain days of a fire fighter's workweek. To that extent the proposal violates management's right to assign work.

In addition, while it must be emphasized that health and safety considerations such as inclement weather or high winds are legitimate factors to consider in conducting outdoor training, section 2 of this proposal clearly goes beyond consideration of such factors in implementing a decision to assign training. Instead, this proposal would establish arbitrary absolute limits on the assignment of outdoor training, which limits are not based on health and safety considerations. Thus, the union's proposal, by placing absolute limits on the agency's ability to assign training to unit personnel during duty hours violates the agency's right to assign work under section 7106(a)(2)(B) of the Statute.

1/ Section 7106(a) of the Statute provides, in pertinent part, as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws --

. . . . . .

(B) to assign work . . . .

Union Proposal II

ARTICLE XXIV

HOLIDAYS

The following days are recognized as holidays under this Agreement:

New Years Day
Lincoln's Birthday
Washington's Birthday
Memorial Day
Fourth of July
Labor Day
Columbus Day
Veterans Day
Thanksgiving Day
Christmas Eve Day
Christmas Day

1) Working conditions on the above days will be minimal based on the reduced workload in the Shipyard on the above days.

2) In-station duties shall only consist of those details whose completion is necessary for normal station maintenance and safe living conditions.

3) Any day declared a Federal Holiday by any Federal Agency, the above provisions will be observed.

4) Saturday afternoon and Sundays shall apply to the above provisions.

Question Here Before the Authority

The question is whether the union's proposal violates section 7106(a)(2)(B) of the Statute[2/] since it concerns the assignment of work and, in addition, whether that portion of the proposal listing holidays violates 5 U.S.C. § 6103.[3/]

2/ Section 7106(a)(2)(B) which is set out in full in note 2 supra, provides as here relevant that "nothing . . . shall affect the authority of any management official . . . to assign work."

3/ 5 U.S.C. § 6103 provides, as here relevant, as follows:

§ 6103. Holidays

(a) The following are legal public holidays:

New Year's Day, January 1.
Washington's Birthday, the third Monday in February.

(Continued)

Opinion

Conclusion: The proposal violates management's right under section 7106(a)(2)(B) of the Statute to assign work and, in addition, that portion of the proposal listing holidays violates 5 U.S.C. § 6103. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 45 F.R. 3513, the agency's allegation that the proposal is not within the duty to bargain is sustained.

Reasons: By its express provisions, the proposal seeks to limit the particular duties which may be assigned to unit employees on Saturday afternoons, Sundays and holidays. Notwithstanding the fact that the basic workweek of fire fighters includes Saturdays, Sundays and holidays, there is nothing in the Federal Service Labor-Management Relations Statute or its legislative history which indicates that the right to assign work is limited to normal duty days. Thus, the union's proposal by proscribing the duties fire fighters may be assigned on certain days violates management's right under section 7106(a)(2)(B) to assign work. In addition, by including in a list of holidays days which are not recognized as holidays in Federal law, the proposal, to that extent, also violates 5 U.S.C. § 6103.

Proposal No. III

Article XV

Section 5 - Merit promotion evaluation procedures will be so conducted as to determine the most highly qualified candidates from a list of eligibles. All evaluation methods will be administered so as to determine skill levels on a cumulative basis up to the vacancy announcement date. Evaluation data must be determined by supervisors evaluation, performance evaluation, oral interview, and academic achievement. Each of the methods outlined in sub-paragraphs 5A, 5B, 5C, will count 30% toward the final score. Academic achievement outlined in sub-paragraph 1D, will count the additional 10% needed to total 100%.

A. Supervisor's Evaluation

1. Supervisory evaluation will be limited to two supervisors.

a. No evaluation will cover any period of performance in excess of 2 1/2 years past.

(Continued)

Memorial Day, the last Monday in May.
Independence Day, July 4.
Labor Day, the first Monday in September.
Columbus Day, the second Monday in October.
Veterans Day, November 11.
Thanksgiving Day, the fourth Thursday in November.
Christmas Day, December 25. . . .

2. The evaluator must have been employee's supervisor for a period of three months except in cases where employee's prior supervisor is unable to tender an evaluation due to sickness or death.

3. No evaluation is to be submitted by any supervisor below rank of GS-6 (Except in cases of temporary promotions to GS-6, and then only during the time the promotion is in effect, and the supervisor is himself not competing for the same position.)

4. Evaluations will be discussed with applicant by rater prior to submission of evaluation form to the Civilian Personnel Officer if requested by the applicant. (Any evaluation based on potential will not be discussed with applicant).

5. Supervisors evaluations will carry the following relative weight:

   a. Current Supervisor = 100%

   b. Any other Supervisor = 80%

   c. Supervisors evaluations will be computed as follows:

      1. Subtract low score from high score.

      2. Take 80% of the difference.

      3. Divide the difference by 2.

      4. Add the result to the current supervisor's score if it is lower than the "other" supervisor's score, or subtract the result from the current supervisor's score if it is higher than the "other" supervisor's score. An example follows:

         Current Supervisor's rate = 92.0

         Other Supervisor = 76.0

         Difference in scores = 16.0

         80% of 16 = 12.8

         1/2 of 12.8 = 6.4

         92.0 - 6.4 Final Evaluation Score of 85.6

6. No employee will be rated by a former supervisor who has left the employ of the Fire Department of Philadelphia Naval Shipyard.

7. Every effort will be made to secure two evaluations. In cases where this is not possible, due to an employee only having one supervisor, death of a supervisor, or under the conditions outlined in No. 6 above, a second evaluation will be obtained from the employee's platoon Assistant Chief. The Assistant Chief may not then be designated as the selecting official if the employee rated by him is in the area of consideration.

B. Performance Evaluation

1. The type of evaluation will be determined by Fire Department Chief Officers. The Union President will be consulted regarding the type of evaluation. (If Union President is to be evaluated, the consultation will be with the next in line Union Officer not to be evaluated.)

2. The evaluation will be observed by a non-participating Union Representative unless an individual objects, objections to be submitted in writing.

3. Grades will be determined by panel of at least two fire department designated GS-5's and/or GS-6's who will use a numerical scoring system and award each applicant an average of his total points. In the event the applicant's driving ability is to be evaluated, the services of a third party such as the Motor Vehicle Operator Licensing Examiner or a Motor Vehicle Operator Foreman, will be acquired for that purpose. (Example: #1 evaluator scores 90, #2 - 85 Score, #3-84 Score = 86.3)

C. Oral Interview

1. Interview will be conducted by at least three but not more than five Fire Department Chief Officers.

2. All interviewers will ask same amount of job related questions. The applicant's score will then be totaled and averaged to determine each applicant's oral interview rating.

3. Appropriate measures will be taken to insure that there will be no related verbal exchanges between those applicants already interviewed and those not yet interviewed.

4. Interview will be observed by a non-participating Union Representative unless an individual objects; such objection to be submitted in writing.

D. Credit for academic achievement will be given as follows:

1. 60 units of college credit will count 100% of the 10% designated for academic achievement.

2. Fire Science and job related courses count full value.

3. Other courses included in the Fire Science A.A. degree curriculum (with the exception of Physical Education, and credits given without classroom attendance) will receive one-half value.

4. Credits earned by course challenges will get their proper value as long as they meet the requirements of 2 and 3 above.

Section 6 - It shall be the responsibility of Management, with cooperation of the Union, to make every effort to insure that all Fire Department personnel be given a complete briefing on all respects of this evaluation procedure.

Section 7 - Promotion registers to GS-5 and GS-6 will stand for no longer than nine (9) months.

Question Here Before the Authority

The question is whether the union's proposal is outside the obligation to bargain under section 7117 of the Statute,[4/] because it concerns matters that are not conditions of employment of unit employees.

Opinion

Conclusion: To the extent that the proposal concerns promotion procedures for bargaining unit positions it is within the obligation to bargain under section 7117 of the Statute. However, to the extent that the proposal would apply promotion procedures to nonbargaining unit supervisory positions it is

4/ Section 7117(a)(1) of the Statute provides as follows:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

The term "matters" as used in section 7117(a)(1) is explained by reference to the definition of "collective bargaining" in section 7103(a)(12) and "conditions of employment" in section 7103(a)(14) of the Statute:

§ 7103. Definitions; application

. . . . . .

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees . . . . [Emphasis added.]

. . . . . .

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . .

negotiable only at the election of the agency. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 45 F.R. 3513, since the agency has elected not to negotiate promotion procedures for non-bargaining unit supervisory positions, the agency's allegation that the proposal is not within the duty to bargain becuase it extends to such nonbargaining unit supervisory positions is to that extent sustained.

Reasons: The duty to bargain under the Statute extends only to the conditions of employment of bargaining unit employees.5/ In this regard, supervisors are specifically excluded from inclusion in collective bargaining units.6/ As relevant in the circumstances of this case, the agency claims and the union tacitly admits, that the GS-6 positions identified in the proposed promotion procedures are classified as supervisory and, thus, are outside of the bargaining unit.7/

While an agency is not prohibited from bargaining on and, therefore, may, at its election, bargain on the promotion procedures for such nonbargaining unit supervisory positions, it is not obligated to do so. Consequently, since the agency in this case has elected not to bargain on the promotion procedures for supervisory personnel, the agency's allegation that the proposal is not within the duty to bargain, is to that extent, sustained.

5/ Id.

6/ Section 7112(b) of the Statute provides, in pertinent part, as follows:

> § 7112. Determination of appropriate units for labor organization representation
>
> . . . . . .
>
> (b) . . . nor shall a unit be determined to be appropriate if it includes--
> (1) . . . any . . . supervisor . . . .

7/ No determination is made in this case as to whether GS-6 "fire captain" positions would be considered supervisory under section 7103(a)(10) of the Statute. Such a determination would properly be the subject of a petition for clarification of an existing unit filed under Part 2422 of the Authority's rules and regulations, 45 F.R. 3498.

Union Proposal IV

ARTICLE X

OVERTIME

Section 4 - The Employer agrees that for the purpose of applying Section 7(k) of the Fair Labor Standards Act,[8/] the work period shall consist of a 7 day period. [Footnote added.]

Question Here Before the Authority

The question is whether the union's proposal is outside the duty to bargain either because it concerns a matter specifically provided for by Federal statute and is, thus, excluded from the definition of conditions of employment under section 7103(a)(14) of the Federal Service Labor-Management Relations Statute,[9/] or because it violates management's right under section 7106(a)(1) of the Statute[10/] to determine the agency's budget, organization and number of employees.

8/ Section 7k of the Fair Labor Standards Act (FLSA) (29 U.S.C. § 207(k)) provides, in pertinent part, as follows:

> (k) No public agency shall be deemed to have violated [the requirement to pay overtime for hours worked in excess of 40 hours] with respect to the employment of any employee in fire protection activities . . . if--
>
> . . . . . .
>
> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period . . . as 216 hours bears to 28 days . . . compensation at a rate not less than one and one-half times the regular rate at which he is employed.

9/ Section 7103(a)(14) of the Statute provides, in pertinent part, as follows:

> (14) "conditions of employment" . . . does not include policies, practices, and matters--
>
> . . . . . .
>
> (C) to the extent such matters are specifically provided for by Federal statute.

10/ Section 7106(a)(1) of the Statute provides, in pertinent part as follows:

> § 7106. Management rights

(Continued)

Conclusion: The union's proposal does not concern a matter which is specifically provided for by Federal statute and, further, does not violate section 7106(a)(1) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 45 F.R. 3513, the agency's allegation that the proposal is not within the duty to bargain is set aside.11/

Opinion

Reasons: As previously indicated, (note 8, supra) section 7(k) of the FSLA provides, as relevant in this case, that fire fighters will receive overtime under the FLSA for all hours worked in excess of 216 hours in a 28 day period or proportionally fewer hours for a proportionally shorter work period, e.g., 108 hours for a 14 day work period (as is currently utilized by the agency) or 54 hours for a seven day work period (as proposed by the union).12/

This utilization of a seven day work period results in some circumstances in a different overtime entitlement than if a fourteen day work period is selected. For example, the fire fighters in this case are scheduled to work three 24 hour days each week for a total of 144 hours for the two week period. Thus, under the agency's practice these fire fighters will be entitled to 36 hours (144 minus 108) of overtime.

Under the union's proposal on the other hand, which contemplates a seven day period for the calculation of overtime, fire fighters would be entitled to overtime compensation for all hours worked in excess of 54 a week. Assuming the fire fighters work the same 72 hours (three 24 hour days) each week they would be entitled to 18 hours of overtime each week (72 minus 54) or 36 hours for two weeks. In this situation then, the union's proposal will result in the same overtime entitlement as under the current agency procedure.

In two other situations however, the union's proposal would result in more overtime being payable than under the agency's current practice. The first of those two situations would occur when a fire fighter is on leave for one day during the two week period. Under the FLSA, time not worked is subtracted from the scheduled time to determine the fire fighters potential overtime entitlement as follows:

(Continued)

> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--
>
> (1) to determine the . . . budget, organization, number of employees . . . of the agency . . . .

11/ In so deciding that the subject proposal is within the duty to bargain, no judgment is made as to the merits of the proposal.

12/ In addition to FLSA overtime, fire fighters receive under 5 U.S.C. § 5545(c) a fixed percentage of their basic pay (up to 25%) as compensation for standby time, Sunday work and holiday work.

1. Under the agency's current procedure (Overtime for hours worked in excess of 108 in a 14 day period)

scheduled work (3-24 hour periods per week)	144 hours for two weeks
less time not worked (one day leave)	-24
hours worked	120
overtime calculation	-108
overtime entitlement for the 14 day period	12 hours

2. Under the union's proposal (overtime for hours worked in excess of 54 in a seven day period)

	Week 1	Week 2
scheduled work (3-24 hour periods)	72	72
less time not worked (one day leave)	-24	--
hours worked	48	72
overtime calculation	-54	-54
overtime entitlement	0	18

Thus, under the union's proposal the fire fighter would be entitled to six more hours overtime than under the agency's current practice (18 hours instead of 12 hours).

In the second situation, where a fire fighter is off one day the first week and then works an additional shift the second week, the fire fighter would be entitled to more overtime under the union's proposal than under the agency's current practice as follows:

1. Under the agency's current practice

scheduled work (3-24 hour periods per week)	144 hours for two weeks
less time not worked (one day leave)	-24
plus additional unscheduled shift	+24
total hours worked	144
overtime calculation	-108
overtime entitlement	36

2. Under the union's proposal

	Week 1	Week 2
scheduled work (3-24 hour periods per week)	72	72
less time not worked (one day leave)	-24	--
plus additional unscheduled shift	--	+24
total time worked	48	96
overtime calculation	-54	-54
overtime entitlement	0	42

Thus, in this situation the fire fighter would be entitled to 42 hours of overtime instead of 36 hours under the agency's current practice.

The agency first claims that under section 7(k) of the FLSA the agency head has sole discretion to determine the length of the work period referred to in section 7(k). Thus, the agency argues, since the determination of work periods is specifically provided for by Federal statute, such determination is excluded from the obligation to bargain by section 7103(a)(14) of the Federal Service Labor-Management Relations Statute. In support the agency principally relies on the legislative history of section 7(k) of the FLSA, two unsuccessful legislative attempts to achieve a reduction in the work week and a Federal court decision sustaining the use of the 14 day work period in calculating FLSA overtime.

The agency's claim cannot be sustained. It is clear from the legislative history of section 7103(a)(14) of the Statute that only those matters specifically provided for by other Federal statutes are excepted from the obligation to negotiate.13/ In this regard, the agency has failed to demonstrate that the determination of the length of the work period used to calculate FLSA overtime cannot under section 7(k) of the FLSA be arrived at through negotiations as long as the constraints specified in section 7(k) are met, i.e., that the length of the work period be at least seven and not more than 28 days. In addition, there is no indication in the implementing regulations contained in the Federal Personnel Manual14/ that the discretion delegated to agency heads to determine the length of the work period also could not be exercised through negotiations.

13/ See statement of Congressman Clay concerning that portion of the bill passed by the House (the "Udall substitute") which excluded matters specifically provided for by other Federal statutes from the obligation to bargain which portion was enacted as 7103(a)(14)(C):

> Mr. CLAY.
>
> . . . . . .
>
> Section 7103(a)(14)(D), removing from subjects of bargaining those matters specifically provided for by Federal statute, was adopted by the committee and retained in the Udall substitute with the clear understanding that only matters "specifically" provided for by statute would be excluded under this subsection. Thus, where a statute merely vests authority over a particular subject with an agency official with the official given discretion in exercising that authority, the particular subject is not excluded by this subsection from the duty to bargain over conditions of employment.

124 CONG. REC. H 9638 (daily ed. Sept. 13, 1978).

See also the statement of Congressman Ford of Michigan 124 CONG. REC. H9638 (daily ed. Sept. 13, 1978).

14/ See Federal Personnel Manual (FPM) letter No. 551-5, Jan. 15, 1975.

As to the agency's reliance on two unsuccessful legislative attempts to change the work week of fire fighters as support for the claim that the section 7(k) determination is within the agency's sole discretion, such reliance is misplaced. Both H.R. 4634 introduced in the 94th Congress and H.R. 3161 introduced in the 95th Congress would have caused a reduction in the actual hours fire fighters work from 72 to an average of 54 (H.R. 4634) or an average of 56 (H.R. 3161) with no reduction in title 5 overtime (note 12, supra). The union's proposal here involved however, concerns only the calculation of FLSA overtime and would not require any reduction in the 72 hour workweek of fire fighters.

Finally, the agency's reliance on a Federal court decision sustaining the use of a 14 day work period is also misplaced. In that case,[15/] the court rejected a union contention that an agency was mandated by title 5 to utilize a seven day work period. The Court indicated that the FLSA-sanctioned work periods which ranged from seven to 28 days and that "Congress intended to vest discretion with the . . . Civil Service Commission in establishing the applicable work periods . . . ." As noted above, such discretion was in turn delegated to agency heads.

Therefore, since nothing in section 7(k) of the FLSA specifically provides for the length of the work period used to calculate FLSA overtime or precludes the negotiation of such period, the matter is not excluded from the duty to bargain by section 7103(a)(14) of the Federal Service Labor-Management Relations Statute.

Turning now to the agency's allegations that the union's proposal would violate management's 7106(a)(1) rights to determine the budget, organization and numbers of employees, such allegations will be dealt with in turn.

There is no question but that Congress intended that any proposal which would directly infringe on the exercise of management rights under section 7106 of the Statute would be barred from negotiation.[16/] The right to determine the

---

15/ International Association of Fire Fighters v. United States, 23 WH Cases 471 (D.D.C. July 15, 1977).

16/ See, for example, the statement of Congressman Clay, one of the proponents of the "Udall substitute," concerning the management rights clause of the "Udall substitute:"

> Mr. Clay.
>
> . . . . . .
>
> The Udall substitute contains a management rights clause substantially enlarged beyond that in the committee print. An important element in our agreeing to entrust such an expanded management rights clause to the hands of the new Authority is the example of the protection afforded the collective bargaining process by conscientious scrutiny of management claims of infringements on management rights, especially as found in the

(Continued)

"budget" was interpreted and applied in the Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio case.17/ That decision stated in pertinent part:

> . . . the agency's authority to determine its budget extends to the determinations of the programs and operations which will be included in the estimate of proposed expenditures and the determination of the amounts required to fund them. Under the Statute, therefore, an agency cannot be required to negotiate those particular budgetary determinations. That is, a union proposal attempting to prescribe the particular programs or operations the agency would include in its budget or to prescribe the amount to be allocated in the budget for them would infringe upon the agency's right to determine its budget under section 7106(a)(1) of the Statute.
>
> [However], where a proposal which does not by its terms prescribe the particular programs or amounts to be included in an agency's budget, nevertheless is alleged to violate the agency's right to determine its budget because of increased cost, consideration must be given to all the factors involved. That is, rather than basing a determination as to the negotiability of the proposal on increased cost alone, that one factor must be weighed against such factors as the potential for improved employee performance, increased productivity, reduced turnover, fewer grievances, and the like. Only where an agency makes a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits can an otherwise negotiable proposal be found to violate the agency's right to determine its budget under section 7106(a) of the Statute.

The proposal here in dispute does not by its express terms prescribe the particular amount to be included in the agency's budget. The agency argues that adoption of the proposal would result in an increased cost in excess of $3.1 million per year "with no countervailing benefits to the Government."

(Continued)

> two 1978 decisions above. If the new Authority is faithful to these interpretative guidelines, the ultimate exercise of the specified managerial responsibility, the only subject exempted from the bargaining obligation, will be protected and the general obligation to bargain over conditions of employment will be unimpaired. However, it is essential that only those proposals that directly and integrally go to the specified management rights be barred from the negotiations. [Emphasis supplied.]

124 CONG. REC. H9638 (daily ed. Sept. 13, 1978).

See also the statement of Congressman Ford of Michigan, 124 CONG. REC. H9649 (daily ed. Sept. 13, 1978).

17/ American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, Case No. O-NG-40, 2 FLRA 77 (Jan. 31, 1980), Report No. 31 at 5 of decision.

This claimed increase in cost is not based solely on adoption of the proposal in the bargaining unit here involved which contains less than 50 fire fighters.18/ Rather, it is the product of computations involving all the more than 10,000 fire fighters in the Department of Defense and assumes that they all arrange for work and leave schedules which would entitle them to the maximum amount of overtime to which one could be entitled under the disputed proposal. Moreover, the agency has made no substantial demonstration that the increased costs, which it hypothesizes, are unavoidable and will not be offset by increased employee performance, reduced turnover, fewer grievances and the like. Consequently, proposal IV does not violate the right of the agency to determine its budget under section 7106(a)(1) of the Statute.

As to the agency's arguments that the union's proposal would require the agency to alter its organization and number of employees assigned, such arguments cannot be sustained. There is nothing in the proposal which would require or result in a change of either the number of fire fighters assigned or a change in the 72 hour per week work schedule. The union's proposal only would establish a different work period for the calculation of FLSA overtime, and in this regard, the agency has cited no law or regulation indicating that this work period must coincide with an already established pay period or an already established work schedule. Therefore, since the union's proposal is not directly related to the "organization" of the agency or to "the number of employees assigned," it is not excluded from the duty to bargain by section 7106(a)(1) of the Statute.

In summary, the agency has discretion under section 7(k) of the FLSA and implementing regulations to establish the work period to be used to calculate overtime as at least seven and not more than 28 days. There is no indication that such discretion was intended to be sole and exclusive and could not be exercised through negotiation with the union. Furthermore, negotiation of the work period within the statutory limits does not violate the rights reserved to management under the Federal Service Labor-Management Relations Statute.

18/ See Office of Labor Management Relations, U.S. Civil Service Commission, Union Recognition in the Federal Government, 252 (1978).

Accordingly, since union proposal IV concerns a matter within the agency's duty to bargain under the Statute, the agency's allegation to the contrary is set aside.

Issued, Washington, D.C., June 24, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D. C.

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 862

(Union)

and

Case No. O-NG-44

TOOELE ARMY DEPOT, TOOELE, UTAH

(Activity)

DECISION ON NEGOTIABILITY APPEAL

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

During contract negotiations, the union submitted the following proposal which would authorize hazard pay differential to certain categories of General Schedule employees:

Union Proposal

Section 2: Hazardous Duty Pay

a. It is expressly recognized that while the criteria established by law for hazard pay determination (FPM and CPR) is not a proper subject for negotiation, the application of that criteria to specific factual situations is a matter of mutual concern. It is, therefore, agreed and understood that environmental differential pay is authorized for and limited to the below listed occupational tasks when performance is appropriately certified by supervisory personnel:

POSITION	LOCATION	CIRCUMSTANCES
GS-4 Security Guard	South Area	Any time a GS-4 Security Guard is assigned to duties normally performed by a GS-5 Security Guard.
GS-4 or GS-5 Firefighter	South Area	The 10 hours of the tour of duty considered as working time (See Article IX, Hours of Work and Basic Work Week, Section 3a).
GS-5 Security Guard	Restricted Access Area	When actually engaged in the performance of security duties during a CAIC/SOI calling for the individual to remain in areas of contamination. When required to enter on the "hot" side of line or toxic areas.
	Agent Escort	Escort of nonstandard test munitions before the safety evaluation test has been accomplished. Escort of Chemical agents and/or explosives either on or off depot.
	Impact Area	Pursuit of intruders into or through an impact area.
	Storage Area	When on the first workday following the weekend or holiday during which a surveillance inspection for leakers has not been performed and a leaker is found, environmental differential will be paid for duty performed during the weekend or holiday.

The agency declared the proposal nonnegotiable on the basis that it would conflict with 5 U.S.C. 5545(d), 1/ which authorizes the Office of Personnel Management (OPM) to establish a schedule of pay differentials for certain categories of employees performing hazardous duties on an irregular or intermittent basis. In this regard, the agency took the position that the hazardous duties specified in the union's proposal were regular and recurring and had already been factored into the evaluation and grade determination of the guard and firefighter positions in question. The agency also argued that negotiations over the proposal would thwart the position classification process which is specifically excluded from "conditions of employment" as defined in section 7103(a)(14)(B) of the Statute 2/ over which there is an obligation to

1/ 5 U.S.C. 5545(d) provides, in relevant part, that:

> The [Office of Personnel Management] shall establish a schedule or schedules of pay differentials for irregular or intermittent duty involving unusual physical hardship or hazard. Under such regulations as the [Office of Personnel Management] may prescribe, . . . an employee . . . is entitled to be paid the appropriate differential for any period in which he is subjected to physical hardship or hazard not usually involved in carrying out the duties of his position. However, the pay differential --
>
> > (1) does not apply to an employee in a position the classification of which takes into account the degree of physical hardship or hazard involved in the performance of the duties thereof;
> >
> > . . . . . .

2/ Section 7103(a)(14)(B) of the Statute provides as follows:

§ 7103. Definitions; application

(a) For the purpose of this chapter --

. . . . . .

(Continued)

bargain collectively. 3/ The union, on the other hand, asserted that the hazardous duties were irregular or intermittent and had not been taken into account in the classification process.

The Authority thereafter requested an advisory opinion from the Office of Personnel Management pursuant to 5 U.S.C. 7105(i) (section 7105(i) of the

(Continued)

> (14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters --
>
> . . . . .
>
> (B) relating to the classification of any position; . . .

3/ Section 7117(a)(1) of the Statute provides:

> § 7117. Duty to bargain in good faith; compelling need; duty to consult
>
> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

The term "matters" as used in section 7117(a)(1) is explained by reference to the definition of "collective bargaining" in section 7103(a)(12) of the Statute as set forth below and "conditions of employment" in section 7103(a)(14), supra note 2:

> § 7103. Definitions; application
>
> (a) For the purpose of this chapter --
>
> . . . . . .
>
> (12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees. . . .

Statute) 4/ concerning the proper interpretation of rules, regulations, or policy directives issued by the OPM, more specifically whether the union's proposal in the instant case would conflict with laws, rules or regulations over which OPM has responsibility.

On March 11, 1980, the OPM issued its advisory opinion to which the parties were given an opportunity to comment pursuant to section 2429.15(b) of the Authority's rules and regulations. 5/ The agency and the union filed submissions, which submissions have been duly considered by the Authority.

In its advisory opinion, the OPM cited 5 U.S.C. 5545(d)(1)(see note 1, supra) and the following sections of OPM's implementing regulations contained in Subpart I of Part 550 in the Code of Federal Regulations:

§ 550.902 Definitions.

In this subpart:

(d) "Hazardous duty" means a duty performed under circumstances in which an accident could result in serious injury or death. . . .

(e) "Hazard pay differential" means additional pay for the performance of irregular or intermittent hazardous duty. . . . [Emphasis added by OPM]

§ 550.904. Authorization of hazard pay differential.

(a) An agency shall pay the hazard pay differential listed in Appendix A to an employee who is assigned to and performs any irregular or intermittent duty specified in the appendix when that duty is not usually involved in carrying out the duties of his position. Hazard pay differential may not be paid an employee when the hazardous duty has been taken into account in the classification of his position. [Emphasis added by OPM]

(b) For the purpose of this section:

(continued)

4/ 5 U.S.C. 7105(i) provides:

In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

5/ 45 F.R. 3518 (1980).

(1) "Not usually involved in carrying out the duties of his position" means that even though the hazardous duty may be embraced within the employee's position description it is not performed with sufficient regularity to constitute an element in fixing the grade of the position.

(2) "Has been taken into account in the classification of his position" means that the duty constitutes an element used in establishing the grade of the position.

Applying these regulations in the context of the instant dispute, the OPM thereafter concluded:

> In our view, the dispute essentially concerns position classification; i.e., whether certain duties are typical to the job series, or otherwise considered in the classification of positions and/or given sufficient weight. These matters may be raised as individual or group classification appeals.
>
> If the use of this procedure should result in a finding that the duties referred to in the union proposal are not properly considered in the classification process, there would be no bar in law or regulation to negotiation on the application of OPM's schedule of pay differentials to such duties.

Section 7103(a)(14) of the Statute (note 2, supra), provides that matters relating to the classification of any position are expressly excluded from the definition of "conditions of employment." Hence, such matters are not within the scope of the duty to bargain under section 7117 of the Statute which is limited to "conditions of employment" by section 7103(a)(12) (note 3, supra). Therefore, based upon the entire record in the instant case, including OPM's advisory opinion, it is concluded that the subject dispute involves issues which would be appropriate for resolution through the classification appeals process rather than under the procedures set forth in section 7117 of the Statute and Part 2424 of the Authority's rules and regulations. That is, as noted above (supra p. 3-4), the parties herein are essentially in disagreement as to whether specific hazardous duties associated with certain guard and firefighter positions are performed on an "irregular or intermittent" basis and whether such hazardous duties have been taken into account in the classification of these positions. Until the foregoing questions are resolved through the classification appeals process, the Authority has insufficient information to decide the instant negotiability appeal. Accordingly, the Authority finds that the union's appeal has been prematurely filed and therefore must be denied, without prejudice to the renewal of its contention that the matters in dispute are negotiable under the Statute in a petition duly filed with the Authority after it is resolved, under applicable procedures,

that the hazardous duties at issue are irregular or intermittent and have not been taken into account in classifying the positions specified in the union's proposal.

Issued, Washington, D.C., June 25, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

MARINE CORPS LOGISTICS SUPPORT
BASE, PACIFIC, BARSTOW,
CALIFORNIA

Activity

and

Case No. 0-AR-23

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 1482

Union

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator Sara Adler filed by the union under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)).

From the record before the Authority, it appears that the union filed a grievance over a particular work assignment made by the activity. The grievance was ultimately submitted to arbitration. The arbitrator stated that the parties were not in agreement on the framing of a specific issue. The union's proposed issue, as stated by the arbitrator, was:

> Did management violate Article 33, Section 3 of the negotiated Agreement by misassigning a supervisor to perform journeyman duties?
>
> Did management violate Article 7, Section 1 of the negotiated Agreement?

The activity's proposed issue, as stated by the arbitrator, was:

> Is the work assignment which gave rise to the grievance . . . a grievable matter. If so, did management violate Article 7, Section 1 of the Agreement . . . ?

The parties agreed to allow the arbitrator to first resolve the issue of arbitrability of whether "the work assignment which gave rise to the grievance . . . [was] a grievable matter." The arbitrator's award was as follows:

> The work assignment which gave rise to the grievance . . . is not arbitrable and the Arbitrator must decline to proceed.

In reaching this award, the arbitrator determined that under section 7106 of the Statute,[1] management has the right

> to assign personnel, including supervisors, as it sees fit and that right is nonnegotiable except as the agency chooses under the Civil Service Reform Act of 1978 and the Employer has not here chosen.

On this basis the arbitrator concluded that "the assignment of personnel is not subject to grievance and arbitration."

The union filed a petition for review of the arbitrator's award pursuant to the rules of procedure set forth in 5 C.F.R. part 2411 (1978), which, to the extent consistent with the provisions of section 7122(a) of the Statute (5 U.S.C. § 7122(a)) and as amended by section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority, 44 F.R. 44741, remain operative with respect to this case. Pursuant to section 7122(a) of the Statute and section 2411.32 of the amended rules of procedure, the Authority accepted the union's petition for review on the issue of whether the award violates section 7106 of the Statute. Both parties filed post-acceptance briefs.

As previously noted, the arbitrator's award was confined to the issue of whether the grievance was arbitrable. Finding that the grievance was not subject to arbitration, she declined to proceed and therefore did not rule on the merits of the grievance. The arbitrator based her award on section 7106 of the Statute. She found that the grievance was not arbitrable because section 7106 reserves to management the right to assign work. The question presented to the Authority is whether this award, finding on the basis of section 7106 that this grievance was not arbitrable and consequently that there was no authority to proceed to resolve the grievance on the merits, is deficient under the Statute.

For the reasons that follow, the Authority finds that the arbitrator's award is deficient. The Authority notes that the arbitrability question

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1/ Section 7106 pertinently provides:

> §7106. Management rights
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
>
> . . . . . .
>
> (2) in accordance with applicable laws—
>
> . . . . . .
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted[.]

submitted to the arbitrator concerned whether the dispute in this case, which involved a work assignment and allegations by the union that such assignment was made in violation of specific provisions of the parties' negotiated agreement, could be properly subject to arbitration. Section 7106 of the Statute, on which the arbitrator relied in finding the dispute nonarbitrable, specifies and enumerates rights which are reserved to management. However, nothing in section 7106 precludes an arbitrator from reaching the merits of a grievance in cases where, as in this case, the union has alleged a violation of certain specified provisions of a collective bargaining agreement. Thus, while an arbitrator may find, on the merits of the grievance, that there has been no violation of the specified provisions of the agreement because the actions taken by management which gave rise to the grievance were within the ambit of the rights reserved under section 7106, or that, while there has been a violation, the scope and nature of possible remedies available to the arbitrator is limited by section 7106, nothing in section 7106 in and of itself prevents an arbitrator from deciding if there has been a violation of a particular contract provision.

Accordingly, pursuant to section 7122(a) of the Statute and section 2411.37(a) of the amended rules, the arbitrator's award finding the grievance nonarbitrable is set aside.2/

Issued, Washington, D.C., June 11, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In arriving at this decision, the Authority in no manner addresses the impact or application of section 7106 to the merits of this grievance. That question would be properly for the arbitrator to decide should the parties choose to resubmit the grievance to arbitration subject to any subsequent appeal that might be exercised pursuant to 5 U.S.C. § 7122(a).

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL BORDER PATROL COUNCIL
AND NATIONAL IMMIGRATION AND
NATURALIZATION SERVICE COUNCIL

Union

and

Case No. 0-AR-12

UNITED STATES DEPARTMENT OF
JUSTICE, IMMIGRATION AND
NATURALIZATION SERVICE

Activity

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator James M. Harkless filed by the union*/ under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)).

According to the arbitrator, the Immigration and Naturalization Service (the activity) sent copies of proposed revisions to Operating Instruction 287.10, which deals with the Agency Professional Integrity Program, to the union. After the union was given the opportunity to comment on the proposed revisions, the activity notified the union that the Operating Instruction was being implemented with some of the union's suggestions being incorporated into it, but with other suggestions being rejected "after deliberation on the merits of each."

The union protested that implementation of the revised Operating Instruction, without negotiations over the differences remaining between the parties, violated the activity's bargaining obligation under their negotiated agreement. The matter ultimately was submitted to arbitration.

The arbitrator stated that the two issues before him were:

1. whether the Agency was under a contractual duty to bargain with the [union] over the O.I. before implementing it; [and]

2. if so, whether the Agency lived up to that duty in this case.

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*/ The union parties to this matter before the arbitrator were the National Border Patrol Council and the National Immigration and Naturalization Service Council. The American Federation of Government Employees, on behalf of its two member Councils, filed the instant petition before the Authority. For discussion purposes, the two Councils before the arbitrator and the petitioner will all be referred to herein as "the union."

The arbitrator denied the grievances, holding that the activity was not required to bargain with the union about the inclusions which the union wished to make in Operating Instruction 287.10 and that therefore the activity did not violate the parties' agreement in unilaterally putting the Operating Instruction into effect.

In his reasoning, the arbitrator stated that when the matter was submitted to arbitration, only two provisions of the Operating Instruction remained in dispute: (1) a proposal concerning the potential effect on "whistle-blowers" and (2) a proposal concerning allegations by employees against aliens who are about to depart. The arbitrator set forth Article 3, Section G of the parties' collective bargaining agreement, as follows:

> The parties recognize that from time to time during the life of the agreement, the need will arise requiring the change of existing Agency regulations covering personnel policies, practices and/or working conditions not covered by this agreement. The Agency shall present the changes it wishes to make to existing rules, regulations and existing practices to the Union in writing. The Union will present its views (which must be responsive to either the proposed change or the impact of the proposed change) to the Agency within 30 calendar days of receipt of the proposed change. Reasonable extensions to this time limit may be granted on request. Changes in national policy shall be referred to the President of each national council if such changes impact on either of the National Councils.
>
> If disagreement exists, either the Agency or the Union may serve notice on the other of its interest to enter into formal negotiations on the subject matter. Such negotiations must begin within 30 calendar days of the date the Agency receives notice from the Union that it does not agree with proposed changes.

Citing this article, the arbitrator stated:

> There is little dispute that the provision for mid-term negotiations set out in Article 3, Section G of the Agreement only obligates the [activity] to bargain over matters which are mandatory subjects for negotiation under the Executive Order. . . . The O.I. involved here deals with the internal investigations program of the [activity] to insure the professional integrity of the employees who are engaged in important law enforcement functions. As such, it is a Management document delineating certain internal security procedures. It is primarily directed at better organization and defining responsibilities under this program. The revisions do not appear to change existing rights of employees under the Agreement or applicable Civil Service Regulations. Consequently, the Arbitrator is persuaded that it falls outside the scope of mandatory bargaining under the provisions of Sections 11(b) and 12(b)(5) of the Executive Order.
>
> . . . [T]he [activity] correctly points out that the language incorporated in the opening policy statement of the O.I. is neither more nor less than is contained in the standards of conduct binding on all federal employees under federal law. Since this amounts to no change in existing policy, the [activity] was not required to bargain about it in mid-term of the

> Agreement even if the O.I. were within the scope of mandatory bargaining. Also, aside from considerations of Sections 11(b) and 12(b)(5), the proposal [concerning allegations by employees against aliens who are about to depart] . . . does not purport to regulate employee conduct and need not be bargained over as a precondition to imposing a program designed to regulate employees. [Arbitrator's award at 6-7.]

The union filed a petition for review of the arbitrator's award pursuant to the rules of procedure set forth in 5 C.F.R. part 2411 (1978), which, to the extent consistent with the provisions of section 7122(a) of the Federal Service Labor Management Relations Statute (5 U.S.C. §7122(a)) and as amended by section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority, 44 F.R. 44741, remain operative with respect to this case. The union seeks Authority acceptance of its petition on the basis of the exceptions discussed below. The agency did not file an opposition.

Pursuant to section 2411.32 of the amended rules and section 7122(a) of the Statute, the Authority will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award is deficient because it is contrary to law or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its first exception, the union contends that the award violates Executive Order No. 11491, as amended, and title VII of the Civil Service Reform Act of 1978. In support of this exception, the union contends that the arbitrator failed to correctly interpret the Executive Order with respect to the negotiability of the union's proposals, that the two union proposals at issue were negotiable, and that the arbitrator erred in his interpretation of the parties' agreement by finding that the activity was not required to bargain over the inclusion of the proposals into Operating Instruction 287.10.

The Authority will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates law. In this case, however, the union's petition does not contain a description of facts and circumstances to support its exception. In this regard, the union does not show in what manner the arbitrator's award, in which he determined that the activity did not violate the parties' collective bargaining agreement when it put the Operating Instruction into effect, violates either the Executive Order or the Federal Service Labor-Management Relations Statute. The union states only that the proposals are negotiable and cites certain National Labor Relations Board cases to support its position. The cases cited are inapposite to the question of whether a particular matter is negotiable or nonnegotiable under the Executive Order or the Statute. Thus the union provides no support for its general assertion that "[t]he arbitrator failed to correctly interpret the Executive Order . . . ." Further, as to the union's assertion in support of this exception that "[t]he arbitrator committed a gross misinterpretation of the contract," such an assertion does not provide a basis for review of an arbitration award. United States Army Missile Materiel Readiness Command (USAMIRCOM) and American Federation of Government Employees, Local 1858, AFL-CIO, Case No. 0-AR-7, 2 FLRA No. 60 (Jan. 17, 1980). Therefore, the union's first exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules.

In its second exception, the union contends that the arbitrator failed to conduct a fair hearing. In support of this exception, the union contends that the arbitrator allowed an issue to be heard that was never raised during the grievance process. In this regard, the union refers to admission by the arbitrator of evidence going to the activity's defense that the matters over which the union sought to bargain were nonnegotiable.

The Authority will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents a ground similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations cases. In the private sector, Federal courts have sustained challenges to arbitration awards when it has been alleged that the petitioner was not accorded a fair hearing primarily in cases where it appears that the arbitrator's challenged rulings precluded consideration of all the pertinent and material evidence. See Harvey Aluminum v. United Steelworkers of America, AFL-CIO, 236 F.Supp. 488, 493-95 (C.D. Calif. 1967). See generally Shopping Cart, Inc. v. Amalgamated Food Employees Local 196, 350 F.Supp. 1221 (E.D. Pa. 1972) and Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 261 F. Supp. 832 (D.N.J. 1966), aff'd, 397 F.2d 594 (3d Cir.), cert. denied 393 U.S. 954 (1968). Therefore, the Federal Labor Relations Authority will grant a petition for review of an arbitration award on the ground that the arbitrator failed to conduct a fair hearing by refusing to consider pertinent and material evidence.

In this case, however, the union's argument is not that the arbitrator refused to hear pertinent and material evidence, but instead that the arbitrator heard too much evidence, specifically evidence going to the activity's defense that the matter was nonnegotiable. Thus the union argues that it was denied a fair hearing by the failure of the arbitrator to exclude certain profferred evidence. In the private sector, while refusal to hear pertinent and material evidence may constitute a denial of a fair hearing, courts have long recognized that liberal admission of testimony and evidence is the usual practice in arbitration. For example, in Harvey Aluminum, supra, the court quoted favorably from Arbitrator Benjamin Aaron as follows:

> Despite the generally accepted principle that arbitration procedures are necessarily more informal than those in a court of law, objections to evidence on such grounds that it is hearsay, not the best evidence, or contrary to the parol evidence rule, are still frequently raised in ad hoc arbitration. To the extent that these and similar objections are intended to exclude proferred evidence, they generally fail. The arbitrator is interested in gathering all the relevant facts he can, his principal objective is to render a viable decision, and any information that adds to his knowledge of the total situation will almost always be admitted. [Emphasis by court.] 263 F.Supp. at 491, quoting from Aaron, Some Procedural Problems in Arbitration, 10 Vand. L. Rev. 739, 743-44 (1957).

Thus, the union's contentions that the arbitrator should not have admitted certain evidence provide no basis for granting its petition for review. The union states in its petition that it objected at the arbitration hearing to the admission of the evidence and thus the arbitrator had the union's objections before him when determining what weight to give to the disputed evidence in

arriving at his award. Therefore, the union's second exception provides no basis for granting its petition under section 2411.32 of the amended rules.

In its third exception, the union contends that the arbitrator exceeded his authority. In support of this exception, the union states that the plain wording of the contract calls for "formal negotiations" and that the award has the effect of interpreting the agreement as providing for a waiver of the union's right to bargain during the mid-term of an agreement when the agency declares the union's proposals nonnegotiable.

On their face, the union's assertions in support of its exception are directed towards the arbitrator's interpretation of the collective bargaining agreement and constitute disagreement with that interpretation. As pointed out in connection with the first exception, disagreement with the arbitrator's interpretation and application of the provision of the agreement before him does not constitute a basis for reviewing arbitration awards. Therefore, the union's third exception provides no basis for granting its petition under section 2411.32 of the amended rules.

Accordingly, the union's petition is denied because it fails to meet the requirements of section 2411.32 of the amended rules for acceptance of a petition for review of an arbitrator's award.

Issued, Washington, D.C., June 11 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NAVAL ORDNANCE STATION,
LOUISVILLE, KENTUCKY

Activity

and

Case No. 0-AR-11

LOCAL LODGE NO. 830,
INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS

Union

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator John Dunsford filed by the agency under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7122(a)).

According to the arbitrator's award, the dispute in this matter arose when, due to extreme weather conditions, the activity was closed by order of its Commanding Officer on January 13, 17, 18, 20, 26 and 27, 1978. Only guards and building maintenance crews remained on duty. Except for January 26 when administrative leave was granted, employees who did not work on these days were required to use annual leave or take leave without pay. The union filed a grievance alleging, relevantly, that the activity violated Article 8, Section 6(c)[1/] of the parties' collective bargaining agreement (1) because it did not grant administrative leave to the employees who did not work on January 17, 18, 20, and 27 whereas a majority of Federal activities in the Louisville area did grant administrative leave to their employees on these days, and (2) by not authorizing mass excusals for parts of other days, January 16 and 19, although some Federal activities did release their employees early. The matter ultimately went to arbitration.

1/ According to the arbitrator, Article 8, Section 6(c) provides:

Section 6. Emergency Conditions

. . . . . .

c. When mass excusals are authorized, employees must be either actually at their place of duty, or scheduled to report for duty, in order to be excused. Mass excusals shall be on the same basis as other Federal activities of the Louisville area when the same conditions exist.

At the hearing before the arbitrator, the activity challenged the arbitrability of the dispute on the ground that the subject matter of Article 8, Section 6(c) is a reserved management right under section 12(b)(3)[2/] of Executive Order 11491 and, therefore, is nonnegotiable.

According to the arbitrator, the issues before him were as follows:

1. Is the present grievance arbitrable in view of the fact that under Section 12(b)(3) of Executive Order 11491 Station management retains the right "to relieve employees from duties because of lack of work or for other legitimate reasons"?

2. If the grievance is arbitrable, did the Station violate Article 8, Section 6(c) of the negotiated agreement between the parties on January 16-20, 1978 and January 26-27, 1978?

With respect to the arbitrability question, the arbitrator first determined that decisions as to whether or not to authorize mass excusals from work and close the station is a retained management right under section 12(b)(3) of the Order, and therefore that part of the grievance concerning the activity's failure to grant mass excusals for parts of January 16 and 19 was not arbitrable. The arbitrator further determined, however, that the type of leave policy to apply once management has independently made a decision as to whether or not to close a facility is not an infringement on management's reserved rights under section 12(b)(3), but merely concerns the implementing procedures or impact of that decision on adversely affected employees. The arbitrator concluded, therefore, that the part of the grievance concerning the type of leave the activity should have granted its employees once it decided to close was arbitrable.

With respect to the merits of the grievance, the arbitrator found that since the majority of the Federal activities in the Louisville area had granted administrative leave to their employees on January 17, 18, 20, and 27, the activity had violated Article 8, Section 6(c) of the agreement by not granting administrative leave to its employees on those dates after it decided to close. Accordingly, the arbitrator awarded as follows:

> To the extent that the grievance claims that the Station was contractually bound to excuse employees from work because of emergency weather conditions on January 16 and 19, 1978, it is dismissed as nonarbitrable.

2/ Section 12(b)(3) provides:

> Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements—
> (b) management officials of the agency retain the right, in accordance with applicable laws and regulations—
>
> . . . . . .
>
> (3) to relieve employees from duties because of lack of work or for other legitimate reasons[.]

Decisions if and when mass excusals are to be authorized are retained rights of management under Section 12(b)(3) of Executive Order 11491 and are nonnegotiable subject matter.

In other respects the grievance is arbitrable.

The Station violated Article 8, Section 6(c) of the Basic Agreement when, having made the decision to excuse most employees from work due to emergency weather conditions on January 17, 18, 20, and 27, 1978, it required them to take annual leave or leave without pay on those days rather than granting administrative leave. But for the violation of the Basic Agreement by the Station, these employees would have received administrative leave on January 17, 18, 20 and 27, 1978.

The Station shall take whatever measures are necessary to correct these violations by crediting the affected employees with the administrative leave to which they were entitled under the contract. By agreement of the parties, the arbitrator shall retain jurisdiction in this case only for purposes of resolving any disputes regarding the precise form the remedy should take.

The agency filed a petition for review of the arbitrator's award pursuant to the rules of procedure set forth in 5 C.F.R. part 2411 (1978), which, to the extent consistent with the provisions of section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7122(a)) and as amended by section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority, 44 F.R. 44741, remain operative with respect to the present case. The agency seeks Authority acceptance of its petition on the basis of the exception discussed below. The union filed an opposition.

Under section 2411.32 of the amended rules and section 7122(a) of the Statute, the Authority will grant a petition for review where it appears, based upon the facts and circumstances described in the petition, that the award is deficient because it is contrary to law, regulation, or the Order, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its exception to the arbitrator's award, the agency contends that the award violates section 12(b)(3) of the Order.[3/] In this regard, the agency contends that a decision as to whether to require employees to use annual leave or administrative leave is a retained management right under section 12(b)(3) and is therefore nonnegotiable since: (1) the right to require an employee to use annual leave or administrative leave is indistinguishable from the right to relieve employees from duty; (2) prior Assistant Secretary decisions have indicated that management has a nonnegotiable right under section 12(b)(3) to determine the leave status of employees who are relieved from duties, as well

3/ The agency also makes a general assertion that the award violates section 7106(a)(2)(A) of the Statute (5 U.S.C. § 7106(a)(2)A)), but directs its contentions in support of its exception only to the alleged violation of the Order.

as the nonnegotiable right not to relieve employees from duties; and (3) the right to relieve employees from duties reflects the authority already vested in management by law[4/] and regulation[5/] to require annual leave of an employee. The agency thus concludes that the award violates the Order because it enforces a nonnegotiable collective bargaining agreement provision which requires the activity to "abdicate its retained right to relieve employees from duty when and as it wishes."

The Authority will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates the Order.[6/] However, in this case the agency's petition does not contain a description of facts and circumstances to support its exception. Thus, the agency fails to demonstrate in what way the arbitrator's award, in which he determined that the activity had violated the parties' agreement by not granting administrative leave to its employees after making a decision to close the activity on certain days, violates management's section 12(b)(3) right to relieve employees from duties because of lack of work or for other legitimate reasons. The Assistant Secretary's decisions upon which the agency relies are inapposite. A careful reading of those decisions indicate that they are directed only to the right of management under section 12(b)(3) to make the ultimate decision on whether or not to excuse employees from duty at all, a right clearly recognized by the arbitrator, and not to the type of leave to be granted after management has made the decision to excuse the employees.

Further, nothing in those decisions, or in the language of section 12(b)(3), supports the agency's assertion that the right to require an employee to use annual leave or administrative leave is indistinguishable from the right to relieve employees from duty. It may be that an agency decision to relieve employees from duty may at the same time, in most circumstances, necessitate a

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4/ The agency cites, in this regard, 5 U.S.C. § 6302(d) (1976), which provides:

> (d) The annual leave provided by this subchapter, including annual leave that will accrue to an employee during the year, may be granted at any time during the year as the head of the agency concerned may prescribe.

5/ The agency cites, in this regard, Federal Personnel Manual chapter 630, subchapter 3-4(b), which provides:

> Annual leave provided by law is a benefit and accrues automatically. However, supervisors have the responsibility to decide when the leave may be taken. This decision will generally be made in the light of the needs of the service rather than solely on the desires of the employees. Supervisors should insure that annual leave is scheduled for use so as to prevent any unintended loss at the end of the leave year.

6/ Thus, where, as in the circumstances of case, the grievance was decided by the arbitrator based on his interpretation of the Order, the disposition of the case is governed by the provisions of the Order.

decision as to the type of leave that employees will be required to use. However, nothing in section 12(b)(3) prevents an agency from agreeing to a negotiated agreement provision such as the one the agency agreed to in this case, that is, that after management has made the determination on whether or not to excuse employees from duty under certain circumstances then "excusals shall be on the same basis as other Federal activities of the Louisville area when the same conditions exist." Such a provision could then be enforced through the arbitral process.

Furthermore, as to the agency's assertion that management's retained right under section 12(b)(3) to relieve employees from duties reflects the authority already vested in management by law and regulations to require annual leave of an employee, such assertions do not support an exception that an award violates section 12(b)(3), nor does the agency in any manner show that such laws and regulations would prevent the negotiation of the provision involved herein, or arbitral enforcement of that provision. Therefore, the agency's exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules.

Accordingly, the agency's petition for review of the arbitrator's award is denied because it fails to meet the requirements for review set forth in section 2411.32 of the amended rules of procedure.

Issued, Washington, D.C., June 11. 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

3 FLRA No. 68

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

MARE ISLAND NAVAL SHIPYARD

(Activity)

and

Case No. 0-AR-105

FEDERAL EMPLOYEES METAL TRADES
COUNCIL OF VALLEJO, AFL-CIO

(Union)

ORDER DISMISSING EXCEPTIONS

On May 28, 1980, Federal Employees Metal Trades Council, AFL-CIO (the union), filed exceptions to the award of Arbitrator Morris L. Myers in the instant case with the Authority, pursuant to section 2425.1 of the Authority's regulations (5 C.F.R. § 2425.1 (1980)). For the reasons indicated below, it has been determined that the subject exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the Authority's regulations (5 C.F.R. § 2425.1(b) (1980)) provides:

> The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in the union's submission, is dated April 24, 1980. Therefore, under section 2425.1(b) of the Authority's regulations, the union's exceptions were due in the office of the Authority no later than May 23, 1980. However, as stated above, the subject exceptions were not filed with the Authority until May 28, 1980. In this regard, the Authority is not empowered to extend or waive the time limit for filing exceptions to arbitrators' awards.

Accordingly, as the union's exceptions were untimely filed, and apart from other considerations, the union's appeal is hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 25, 1980

Samuel A. Chaitovitz, Executive Director

3 FLRA No. 70

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

OFFICE OF HEARINGS AND APPEALS,
SOCIAL SECURITY ADMINISTRATION, HEW

(Activity)

and

Case No. 0-AR-94

LOCAL 3615, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES

(Union)

ORDER DISMISSING EXCEPTIONS

On May 9, 1980, Local 3615, American Federation of Government Employees, AFL-CIO (the union), filed exceptions to the award of Arbitrator Abraham Weiss in the instant case with the Authority, pursuant to section 2425.1 of the Authority's regulations (5 C.F.R. § 2425.1 (1980)). For the reasons indicated below, it has been determined that the subject exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the Authority's regulations (5 C.F.R. § 2425.1(b) (1980)) provides:

> The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in the union's submission, is dated April 9, 1980. Therefore, under section 2425.1(b) of the Authority's regulations, the union's exceptions were due in the office of the Authority no later than May 8, 1980. However, as stated above, the subject exceptions were not filed with the Authority until May 9, 1980. In this regard, the Authority is not empowered to extend or waive the time limit for filing exceptions to arbitrators' awards.

Accordingly, as the union's exceptions were untimely filed, and apart from other considerations, the union's appeal is hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 25, 1980

Samuel A. Chaitovitz, Executive Director

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NAVAL AIR DEVELOPMENT CENTER

(Activity)

and

Case No. 0-AR-103

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL #1928

(Union)

ORDER DISMISSING EXCEPTIONS

On May 21, 1980, American Federation of Government Employees, AFL-CIO (the union), filed exceptions to the award of Arbitrator Edward J. Mullaly in the instant case with the Authority, pursuant to section 2425.1 of the Authority's regulations (5 C.F.R. § 2425.1 (1980)). For the reasons indicated below, it has been determined that the subject exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the Authority's regulations (5 C.F.R. § 2425.1(b) (1980)) provides:

> The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in the union's submission, is dated April 21, 1980. Therefore, under section 2425.1(b) of the Authority's regulations, the union's exceptions were due in the office of the Authority no later than May 20, 1980. However, as stated above, the subject exceptions were not filed with the Authority until May 21, 1980. In this regard, the Authority is not empowered to extend or waive the time limit for filing exceptions to arbitrators' awards.

Accordingly, as the union's exceptions were untimely filed, and apart from other considerations, the union's appeal is hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 25, 1980

Samuel A. Chaitovitz, Executive Director

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. O-PS-18

DECISION ON REQUEST FOR GENERAL STATEMENT
OF POLICY OR GUIDANCE

The Authority received a request from the National Association of Government Employees on behalf of its affiliate the Federal Aviation Science and Technological Association (union) that the Authority issue a general statement of policy or guidance on the following question:

> Whether or not a bargained-for privilege in a collective bargaining agreement covering certain, ascertainable, definite employees can be extended by the Comptroller General to include employees not included in the unit covered by the agreement.

According to the request, the union negotiated the privilege of a bargaining unit employee operating a privately owned vehicle during training at the Federal Aviation Administration's Oklahoma City Training Academy under certain circumstances. Subsequently, the Comptroller General ruled that an employee not covered by the privilege negotiated by the union should also be allowed to use a privately owned vehicle during training at the academy under the same circumstances. The union contends "[t]he decision stands for the principle that a bargained for privilege of an exclusive representative applies to similarly situated employees not subject to the provisions of the bargaining agreement upon the proper and timely filing for the same privilege."

The Authority has carefully considered this request and has determined that it does not satisfy the standards governing the issuance of general statements of policy and guidance set forth in section 2427.5 of the rules of the Federal Labor Relations Authority, 45 Fed. Reg. 3516, which provides in pertinent part:

> § 2427.5 Standards governing issuance of general statements of policy and guidance.
>
> In deciding whether to issue a general statement of policy or guidance, the Authority shall consider:
>
> (a) Whether the question presented can more appropriately be resolved by other means;
>
> (b) Where other means are available, whether an Authority statement would prevent the proliferation of cases involving the same or similar question[.]

The question presented in this request for a general statement of policy or guidance can be more appropriately resolved by other means. For example,

procedures set forth in the Statute and appropriate regulations for the resolution of unfair labor practices provide a more flexible mechanism for the adjudication of issues of fact with respect to the alleged consequences resulting from the Comptroller General's ruling.

Moreover, Authority action on this request is not warranted since it would not prevent the proliferation of cases involving the same or similar question. In this regard, your contentions essentially relate to the unique circumstances of the situation described. Therefore, the statement of policy requested would not necessarily be dispositive of possible cases growing out of other circumstances.

Accordingly, the request for a general statement of policy or guidance is denied.

Issued, Washington, D.C., June 25, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 44 REPORT OF CASE DECISIONS July 30, 1980

REPRESENTATION CASE

3 FLRA No. 79 (June 27, 1980)

National Marine Fisheries Service, Southeast Fisheries Center, Miami, Florida, Case No. 4-RO-16. The union (AFGE Local 2875) filed a representation petition with the Authority seeking to add approximately 40 employees of the activity to its existing unit of employees working at the same location. The Authority concluded that the unit sought was not appropriate for the purpose of exclusive recognition under section 7112(a) of the Statute. Accordingly, the Authority dismissed the union's petition. (Decision and Order attached.)

UNFAIR LABOR PRACTICE CASES

3 FLRA No. 75 (June 26, 1980)

Internal Revenue Service, Chicago, Illinois, Case No. 5-CA-77. The complaint alleged that the activity violated section 19(a)(1) and (6) of E.O. 11491, as well as section 7116(a)(1) and (5) of the Statute, by failing to furnish, upon request by two unit employees and the union (NTEU Chapter 10), necessary and relevant information relating to the proposed suspension of the employees. The ALJ found that both section 19(d) of the Order and section 7116(d) of the Statute precluded raising the activity's refusal to furnish the information sought in this unfair labor practice proceeding, since the same issue had been raised in a grievance proceeding, pursuant to the parties' negotiated grievance procedure, prior to filing of the ULP charge in this case. The Authority adopted the ALJ's findings, conclusions, and recommendation and, accordingly, dismissed the complaint. (Decision and Order attached.)

3 FLRA No. 82 (June 27, 1980)

Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma, Case No. 6-CA-62. The amended complaint alleged, in substance, that the activity violated section 7116(a)(1) and (5) of the Statute by unilaterally announcing a change in existing

conditions of employment concerning flexitime and, thereafter, by unilaterally implementing a flexitime program without affording the union (AFGE Local 916) an opportunity to bargain on such changes or on the impact and implementation of the changes. The ALJ concluded that the activity had not engaged in conduct prohibited by section 7116(a)(1) and (5) of the Statute, and recommended that the complaint be dismissed. The General Counsel filed exceptions with the Authority. The Authority adopted the findings, conclusions and recommendation of the ALJ. More specifically as to one issue, the Authority agreed with the ALJ's conclusion that a finding of a violation of section 7116(a)(1) of the Statute cannot be predicated on the alleged bypass of the union by the activity. This issue was first raised by the General Counsel in a post-hearing brief, and it did not appear that the activity was adequately apprised of the issue, or that it was fully litigated at the hearing. Under those circumstances, the Authority found that it was precluded from finding that the activity violated section 7116(a)(1) of the Statute in the bypass of the union as claimed by the General Counsel. The Authority thereupon dismissed the complaint. (Decision and Order attached.)

NEGOTIABILITY CASES

3 FLRA No. 76 (June 26, 1980)

International Association of Fire Fighters, Local F-48, AFL-CIO and Naval Support Activity, Mare Island Station, California, Case No. 0-NG-139. The dispute involved two union proposals concerning (1) work on Saturdays, Sundays and holidays; and (2) seasonal scheduling of training. As to (1), the Authority found that the proposal was not materially different from a union proposal on the same subject in IAFF Local F-61 and Philadelphia Naval Shipyard, Case No. 0-NG-6, 3 FLRA No. 66 (Report No. 43). Therefore, for the reasons fully set forth in its decision on the similar proposal in that case, the Authority held that the union's proposal in this case conflicted with section 7106(a)(2)(B) of the Statute; and sustained the agency's allegation that the proposal was not within the duty to bargain. As to (2), however, the Authority found that the wording of the union's proposal concerning training in this case was sufficiently different to distinguish it from a union training proposal found nonnegotiable in the Philadelphia Naval Shipyard case. The Authority held that this proposal did not violate section 7106(a)(2)(B) of the Statute and, accordingly, set aside the activity's allegation that the proposal was outside the duty to bargain. (Decision attached.)

3 FLRA No. 80 (June 27, 1980)

American Federation of Government Employees, National Council of EEOC Locals No. 216, AFL-CIO and Equal Employment Opportunity Commission, Washington, D.C., Case No. 0-NG-197. The dispute involved a union proposal that employees have the opportunity to assess in writing the performance of their supervisors, and that no employee was to be disciplined by a supervisor who had not received training as required by the FPM and OPM regulations. The Authority, in agreement with the agency's contention, held that the proposal was outside the scope of bargaining under section 7117 of the Statute, as it pertained to assessment of supervisory performance and to the training of supervisors as a precondition of management's right to discipline, and therefore did not involve conditions of employment of bargaining unit employees. Accordingly, the Authority sustained the agency's allegation that the proposal was not within the duty to bargain. (Decision attached.)

3 FLRA No. 81 (June 27, 1980)

National Labor Relations Board Union and National Labor Relations Board, Washington, D.C., Case No. 0-NG-147. The dispute involved a union proposal that, consistent with operating needs, employees detailed to temporary duty stations away from their permanent duty stations would not be obliged to incur or suffer dual lodging expenses which would cause their total travel expenses for any particular day to exceed the maximum $50 per diem rate. The Authority held that the proposal did not violate section 7106 of the Statute. Accordingly, the Authority set aside the agency's allegation that the proposal was not within the duty to bargain. (Decision attached.)

3 FLRA No. 85 (June 27, 1980)

American Federation of Government Employees, AFL-CIO, Council of Federal Grain Inspection Locals and United States Department of Agriculture, Federal Grain Inspection Service, Washington, D.C., Case No. 0-NG-126. The dispute involved a union proposal that all work in excess of 40 hours per week performed on a Sunday shall be paid at twice the basic rate of pay. The Authority found that the union's proposal was outside the duty to bargain under the Statute, since it pertained to matters specifically provided for by Federal statute (5 U.S.C. § 5542(a)) and thus expressly excluded from the definition of "conditions of employment" in section 7103(a)(14)(C) of the Statute. Further in that regard, the Authority rejected the union's contention that 5 U.S.C. § 5542(a), which provides that overtime shall be paid at "one and one-half times the [employee's] hourly rate,"

was inconsistent with section 7(a)(1) of the Fair Labor Standards Act, which requires overtime compensation at not less than one and one-half times the hourly rate. Accordingly, the Authority sustained the activity's allegation that the proposal was outside the duty to bargain. (Decision attached.)

ARBITRATION CASES

3 FLRA No. 72 (June 25, 1980)

Department of the Navy, Consolidated Civilian Personnel Office, Naval Base Police, Pearl Harbor and Local R-12-195, International Brotherhood of Police Officers/National Association of Government Employees (Brown, Arbitrator), Case No. 0-AR-90. The Authority dismissed the union's exceptions to the arbitrator's award as untimely filed under section 2425.1 of the Authority's regulations. (Order Dismissing Exceptions attached.)

3 FLRA No. 73 (June 26, 1980)

Headquarters, 323rd Flying Training Wing, Mather Air Force Base, California and Local 1692, American Federation of Government Employees (Peck, Arbitrator), Case No. 0-AR-102. The Authority dismissed the union's exceptions to the arbitrator's award as untimely filed under section 2425.1 of the Authority's regulations. (Order Dismissing Exceptions attached.)

3 FLRA No. 74 (June 26, 1980)

Ogden Air Logistics Center, Hill Air Force Base, Utah and American Federation of Government Employees, Local 1592 (Lovell, Arbitrator), Case No. 0-AR-99. The Authority dismissed the union's exceptions to the arbitrator's award as untimely filed under section 2425.1 of the Authority's regulations. (Order Dismissing Exceptions attached.)

3 FLRA No. 77 (June 27, 1980)

Local 2221, American Federation of Government Employees, AFL-CIO and Newark Air Force Station (Coyne, Arbitrator), Case No. 0-AR-80. The Authority dismissed the union's exceptions to the arbitrator's award as untimely filed under section 2425.1 of the Authority's regulations. (Order Dismissing Exceptions attached.)

3 FLRA No. 83 (June 27, 1980)

Department of the Air Force and American Federation of Government Employees, Local No. 2840 (Moore, Arbitrator), Case No. 0-AR-98. The Authority dismissed the activity's exceptions to and request for a stay of the arbitrator's award as untimely filed under section 2425.1 of the Authority's regulations. The Authority also denied a request from OPM to file a brief as an amicus curiae in the case. (Order Dismissing Exceptions attached.)

3 FLRA No. 84 (June 27, 1980)

Community Services Administration and National Council of CSA Locals, American Federation of Government Employees, AFL-CIO (Strongin, Arbitrator), Case No. 0-AR-106. The Authority dismissed the agency's exceptions to the arbitrator's award as untimely filed under section 2425.1 of the Authority's regulations. (Order Dismissing Exceptions attached.)

GENERAL STATEMENT OF POLICY OR GUIDANCE

3 FLRA No. 78 (June 27, 1980)

National Treasury Employees Union, Case No. 0-PS-16. NTEU requested that the Authority issue a general statement of policy concerning the question of "[w]hether employees who are on official time under [section 7131(d) of the Statute] while representing an exclusive representative, or in connection with other matters covered by [the Statute], are entitled to payments from agencies for their travel and per diem expenses." The Authority found that the request did not satisfy the standards governing issuance of general statements and therefore denied the union's request. (Decision attached.)

Attachments (14)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL MARINE FISHERIES SERVICE
SOUTHEAST FISHERIES CENTER
MIAMI, FLORIDA

Activity

and

Case No. 4-RO-16

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES (AFGE), AFL-CIO,
LOCAL UNION 2875

Petitioner

DECISION AND ORDER

Upon a petition duly filed with the Federal Labor Relations Authority under § 7111(b)(1) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135, a hearing was held before a hearing officer of the Authority. The Authority has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case, including the brief filed by the Activity, the Authority finds:

The Petitioner currently exclusively represents a unit of professional and nonprofessional employees who are employed at the National Marine Fisheries Service, Southeast Fisheries Center, Miami, Florida Laboratory. In this proceeding the Petitioner seeks to add on to its existing unit of about 30 employees, the approximately 40 employees of the National Marine Fisheries Service's Southeast Fisheries Center who are physically employed in Miami.

The National Maritime Fisheries Service (NMFS) is a component of the National Oceanic and Atmospheric Administration (NOAA). NMFS maintains a headquarters in metropolitan Washington, D.C., and an administrative structure of five Regions and four Centers. The Regions are Northeast, Southeast, Southwest, Northwest and Alaska. The Centers are Northeast, Southeast, Southwest and Northwest, which includes Alaska. The Regions and Centers appear to be identical in geographic scope, except that Alaska is a separate Region but part of the Northwest Center. They are adminstratively independent of one another. The instant case involves only the Southeast Fisheries Center (Center) and does not concern the Southeast Region or any other subdivision of NMFS.

The Center maintains a headquarters in Miami, Florida, which is subdivided among the: Office of the Director (Director); Office of Program Planning, Evaluation and Administrative Support (Support); Office of Assistant Director for Research (Research); and Office of the Assistant Director for Fishery Management (Management). In addition to its headquarters staff, the Center consists of

seven laboratories and the Technical and Information Management Services (TIMS). The laboratories are located in Beaufort, North Carolina, Charleston, South Carolina, Miami, Florida, Panama City, Florida, Pascagoula, Mississippi, Bay St. Louis, Mississippi, and Galveston, Texas. TIMS whose function is essentially data processing and compilation of statistical data, has field offices, in Miami, Florida, Beaufort, North Carolina, Galveston, Texas and New Orleans, Louisiana.

As noted above, the Petitioner currently represents the employees in the Miami Laboratory. It now seeks to add to that unit all of the Southeast Fisheries Center employees who work at the same location. Specifically, it seeks all eligible employees in the four subdivisions of headquarters except for one Fishery Biologist who is physically located at the Charleston, South Carolina Laboratory. The Petitioner also seeks to represent two employees who are administratively part of the Charleston Laboratory but who are physically located in Miami. In addition, the Petitioner seeks to represent the approximately 10 employees assigned to TIMS who are located in Miami, but not the approximately 30 similar employees at the other three field offices. The Petitioner does not desire to represent any employees of Southeast Fisheries Center located outside the Miami facility.

The Activity contends that only an Activity-wide (Center-wide) unit would be appropriate.

The record reveals that terms and conditions of employment such as pay procedures, health benefits, training, promotions, discipline, grievances, hours of work, and awards are either established by NMFS or, where appropriate, by delegation to the Director of Southeast Fisheries Center. Routine personnel matters have in turn been delegated to the Regional Personnel Office which operates for the Center as a whole. Only the Director of Southeast Fisheries Center is enpowered to negotiate a labor agreement within the Center, and expertise in labor-management matters resides solely in NOAA headquarters at Washington. Similar job classifications prevail in the Center headquarters and the seven laboratories. TIMS employees work in different job classifications than those found elsewhere in the Center, but, again, the same classifications prevail throughout TIMS, whether the employees are located in Miami, Beaufort, New Orleans, or Galveston.

The record further reveals that there is a high degree of functional integration among the various components of the Center. Each component is assigned one or more "Focal Points" or areas of primary responsibility, and they are supported by other components or by individuals or groups of employees in other components, as assigned. For example, the Miami Laboratory has one Focal Point, Oceanic Pelagics Management. It is supported by Management, TIMS, and the Panama City, Pascagoula, Bay St. Louis and Galveston Laboratories. Research has two Focal Points and is assigned support from Management, TIMS, and five Laboratories. Individual employees or groups of employees thus assigned as support are given specific projects by the component charged with a Focal Point. They are directed in their work by those at the component in charge of the Focal Point, and their output is evaluated by that component. Thus, it appears that employees at each of the components of the Center work in close contact with those in other components either because of the functional integration of their work or because of actual employee interchange.

During the period from October 1976 to July 1979 there were about 45 permanent transfers of employees among the various components of the Southeast Fisheries Center. The Miami headquarters components permanently acquired 13 employees and lost two. TIMS acquired 17 and lost none, although it is not established when those acquisitions occurred. The Laboratories, other then Miami, acquired 13 and lost 23. The Miami Laboratory alone acquired two employees but permanently lost 20. In the same time frame there were 20 instances of temporary transfers. There were eight temporary assignments into Center headquarters and one out. Seven employees were temporarily assigned to TIMS and none were assigned out. The laboratories, other than Miami, temporarily acquired the services of four employees and lost 11, and the Miami Laboratory temporarily gained one employee and lost eight. The record does not reveal the extent, if any, of the interchange between the Miami Laboratory currently represented by the Petitioner and the Miami employees sought herein.

There are approximately 290 permanent fulltime employees in the Southeast Fisheries Center, and the Miami Laboratory constitutes the sole unit of exclusive recognition. Elsewhere in NMFS, there is a headquarters-wide unit in Washington, D.C., and a Region-wide unit in the Northwest Region. In the Northeast Fisheries Center there is a unit of two out of eight Laboratories, and in the Southwest Fisheries Center there is a unit consisting of one of four Laboratories.

Although the employees currently represented by the Petitioner and those sought herein work in the same building and share such facilities as a common parking lot and lunchroom, the record is devoid of evidence that they share any particular terms or conditions of employment, and thus any unique community of interest, separate and apart from other Center employees except for those that might be implied from a common location.

Under all the circumstances, the Authority concludes that the unit which the Petitioner seeks to represent is not appropriate for the purpose of exclusive recognition under § 7112(a) of the Statute as it does not encompass employees who share a clear and identifiable community of interest separate and distinct from other employees of the Activity, and it will not promote effective dealings and efficiency of the operations of the agency. Thus, employees who would be included in, and employees who would be excluded from, the unit sought perform the same functions, possess essentially the same job classifications, skills and qualifications, are engaged in common and integrated work projects, and enjoy common supervision and working conditions. Hence, there is no clear and identifiable community of interest among the employees in the proposed unit, separate and distinct from those employees who would be excluded. Further, it is clear that the unit sought is not coextensive with any administrative component or subdivision of the Activity. Rather, the unit sought would fragment the Activity, and several of its components as well. In this regard, the record discloses that two employees from the Charleston Laboratory would be included in the sought unit, but one employee in Center Headquarters would be excluded; and, that three out of four TIMS employees would be excluded on the basis of geographic location alone. Moreover, both the Activity's personnel and labor relations policy are established and implemented on an Activity-wide basis. Under these circumstances, the Authority finds that the unit sought would not promote effective dealings and efficiency of the operations of the agency.

Accordingly, as the unit sought herein does not satisfy the criteria set forth in § 7112(a) of the Statute, the petition will be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 4-RO-16 be, and it hereby is, dismissed.

Issued, Washington, D.C., June 27, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNAL REVENUE SERVICE
CHICAGO, ILLINOIS

Respondent

and

Case No. 5-CA-77

NATIONAL TREASURY EMPLOYEES
UNION, NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 10

Complainant

DECISION AND ORDER

The Administrative Law Judge issued his Recommended Decision and Order in the above-entitled proceeding recommending that the complaint, which alleged unfair labor practices under Executive Order 11491, as amended, and the Federal Service Labor-Management Relations Statute (92 Stat. 1215), be dismissed. The Complainant filed exceptions to the Administrative Law Judge's Recommended Decision and Order and the Respondent filed a reply to the Complainant's exceptions.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (45 F.R. 3482, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Statute.

Therefore, pursuant to sections 2400.2 and 2423.29 of the Authority's rules and regulations and sections 7118 and 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the Complainant's exceptions and the Respondent's reply, the Authority hereby adopts the Administrative Law Judge's findings, conclusions, and recommendation. In this regard, the Authority notes with approval the Administrative Law Judge's conclusion that this case does not involve an unfair labor practice allegation that an Agency has refused to provide an exclusive bargaining representative necessary information to carry out its bargaining responsibility and an individual has raised the same issue in a grievance.

ORDER

IT IS HEREBY ORDERED that the complaint in Authority Case No. 5-CA-77 be, and it hereby is, dismissed.

Issued, Washington, D.C., June 26, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
U.S. INTERNAL REVENUE SERVICE CHICAGO, ILLINOIS Respondent	
and	Case No. 5-CA-77
NATIONAL TREASURY EMPLOYEES UNION, NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 10 Charging Party	

Sheila A. Reilly, Esquire
Attorney
Brenda M. Robinson, Esquire
Regional Attorney
Federal Labor Relations Authority
219 S. Dearborn Street, Room 1638
Chicago, Illinois 60604
For the General Counsel

Sharyn Danch, Esquire
Assistant Counsel
National Treasury Employees Union
1730 K Street, N.W., Suite 1101
Washington, D.C. 20006
For the Charging Party

David L. Murphy, Esquire
Office of the Regional Counsel
Internal Revenue Service
219 South Dearborn Street
22nd Floor South
Chicago, Illinois 60604
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION AND ORDER

Statement of the case

This is a proceeding under the Statute, 5 U.S.C. Section 7101, et seq. The original charge was filed by the Charging Party on April 19, 1979 (G.C. Exh. 1a) and an amended charge was filed on August 22, 1979 (G.C. Exh. 1c). Complaint and Notice of Hearing issued on August 28, 1979; the hearing was set for October 2, 1979; and pursuant thereto, a hearing was duly held before the undersigned on October 2, 1979, in Chicago, Illinois.

At the commencement of the hearing, the parties submitted a Stipulation which was made a part of the record as Joint Stipulation, together with Exhibits 1 through 27 attached thereto and a part thereof. Exhibit 21 to the Stipulation is a copy of the grievance filed by Sylvia L. Harris under the negotiated grievance procedure on April 5, 1979, and Exhibit 22 to the Stipulation is a copy of the grievance filed by Robert S. Greenspan under the negotiated grievance procedure on April 10, 1979.

The graveman of the Complaint, as set forth in paragraph IV(b), was that, on various dates in 1978 and 1979,

> ". . . the Union and employees Robert Greenspan and Sylvia Harris have requested and are requesting the Respondent to furnish to the Union necessary and relevant information relating to the proposed suspension of bargaining unit employees Robert Greenspan and Sylvia Harris for the purpose of representing these employees regarding said proposed action . . . . " (G.C. Exh. 1e)

As the grievance of each employee (Exhibits 21 and 22 to Joint Stipulation) stated,

> "I take exception to the fact the I have not been provided with all the information that has been requested."

it was apparent that the provisions of Sections 19(d) 7116(d) and 7121(d) and (e) might preclude further proceedings herein, inasmuch as the grievances appeared to raise the same issue, namely failure to furnish information requested, and, after extensive oral argument, the undersigned stated, on the record, that he had concluded that the grievances had, in fact, raised the same issue, i.e., failure to furnish requested information to employees Harris and Greenspan, as raised by the Complaint; that from the Amended Charge (G.C. Exh. 1b) and the Complaint (G.C. Exh. 1e) it was clear that the Union had requested the information only in connection with the representation of employees Harris and Greenspan in their grievances

of their disciplinary actions 1/; and, accordingly, the undersigned stated that it was his intention, subject to such further and additional written submissions the parties cared to submit, to grant Respondent's Motion to Dismiss. The hearing was closed and October 9, 1979, was fixed as the date for mailing briefs. Respondent's brief, dated October 12, 1979, was received on October 17, 1979, and General Counsel's brief, dated October 11, 1979, was received on October 19, 1979. Counsel for the Charging Party, by letter dated October 22, 1979, received by this office on October 30, 1979, concurred with the arguments and positions stated by the General Counsel. Each brief has been carefully considered.

Discussion

The Complaint alleged violations of Sections 19(a)(1) and (6) of Executive Order 11491, as amended (hereinafter also referred to as the "Order"), as well as violations of Section 7116(a)(1) and (5) of the Statute, 5 U.S.C. Section 7116(a)(1) and (5). Section 19(d) of the Order provides, in part, that:

> "(d) . . . Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures. . . . "

The purpose and effect of this provision is ". . . to prevent relitigation (of the same issues) after a free choice of remedies. . . " has been made by the aggrieved party. Veterans Administration, North Chicago Veterans Hospital, North Chicago, Illinois, A/SLMR 1024 (at p. 42 of the Recommended Decision)(1978); See, also, Equal Employment Opportunity Commission, 6 A/SLMR 484, at 6 Supplement A/SLMR 187 (1976).

In this case, Ms. Harris and Mr. Greenspan raised the same issue of the non-production of requested information in their grievances as is at issue in the Complaint. Careful consideration has been given to General Counsel's contentions, advanced at the hearing and renewed in his brief, that, in substance, because the non-production of requested information issue appears in the section of each grievance entitled "Argument", grievants had not effectively raised the issue in the grievances and/or that grievants did not intend to raise the issue in the grievances, but such contentions have not been found persuasive inasmuch as the documents

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1/ Specifically, this case does not involve a request by a union for information qua the union and nothing herein is intended, nor shall it be so construed, as dispositive of a union's independent right to request information necessary or appropriate for the discharge of the union's overall bargaining responsibility and/or jurisdiction under the unfair labor provisions of the statute where the union, qua the union has requested information and an individual grievance has raised the same refused to furnish information. Such issue is not involved in this case and resolution of said issue is expressly deferred for future determination.

in question are to the contrary. 2/ Not only did grievants Harris and Greenspan raise this issue in their grievances, but they also did so

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2/ Each grievance begins with the statement,

> "Pursuant to Article 33, §6 I hereby grieve my Disciplinary Action." (Exhs. 21 and 22 to Joint Stipulation)

Then follows the appointment of representative, Mr. Michael L. Peacher; the request that copies of all correspondence be sent to Mr. Peacher; and the statement,

> "I wish to meet as soon as possible." (Exhs. 21 and 22, supra)

Other than that, "I hereby grieve my Disciplinary Action", this portion of each grievance contains no indication of the nature, i.e., basis, of the grievance whatever. The nature, or basis, of each grievance is fully stated thereafter, although denominated "Argument". Thus each grievance states:

> "Argument
> "In addition to the arguments set for in my reply, I deny the charges, I assert that I did not receive the necessary instructions and training, and I protest that the Disciplinary Action in question failes (sic) to promote the efficiency of the Service.
>
> "I take exception to the fact that I have not been provided with all the information that has been requested." (Exhs. 21 and 22 to Joint Stipulation).

Not only did grievants raise the issue of the non-production of information requested as a specific and independent basis; but by incorporation of ". . . the arguments set forth in my reply", each grievant further raised the issue of the non-production of information requested. For example, on November 24, 1978, Mr. Greenspan (Exh. 4 to Joint Stipulation) and Ms. Harris (Exh. 5 to Joint Stipulation) each responded to their proposed suspension, inter alia, by requesting a variety of data and each appointed Mr. Peacher as representative. On January 8, 1979, Mr. Peacher, as the representative of Ms. Harris and Mr. Greenspan, in part "under the provisions of the Multi-District Agreement", requested data and stated that he wished "to determine if either . . . were subjected to disparate treatment." (Exh. 11 to Joint Stipulation); on January 11, 1979, Mr. Peacher, on behalf of Mr. Greenspan

(Footnote continued on page 5.)

with the apparent inprimature of the Charging Party as is evidenced by their use of the Union's official stationary for their grievances. In any event, election by grievants to raise the non-production of information in their timely grievances precludes the union raising the same issue under the unfair labor practice procedures. Cf. Federal Aviation Administration, Muskegon Air Traffic Control Tower, A/SLMR No. 543, 5 A/SLMR, 457 (1975); Department of Defense Dependants Schools, Europe, London Central High School, High Wycombe, England, 1 FLRA 15 (1979). Grievants Harris and Greenspan were the "aggreived" parties, within the meaning of Section 19(d) of the Order, as to the disciplinary action against them; the information was requested by them, or on their behalf, in connection with the disciplinary action; and failure to furnish the requested information was specifically raised in their timely grievances. As the Complaint specifically alleges, the information was needed ". . . for the purpose of representing these employees . . .", the union may not independentally pursue an unfair labor practice after the aggrieved parties have exercised their option to raise the issue under the grievance procedure. Department of the Army, U.S. Army Transportation Center at Fort Eustis, Virginia, A/SLMR No. 681, 6 A/SLMR 384, 6 Supplement A/SLMR 147, 148 N.4 (1976); Equal Employment Opportunity Commission, A/SLMR No. 707, 6 A/SLMR 484, 6 Supplement A/SLMR 187 (1976); Department of Defense Dependants School, Europe, supra.

Section 7116(d), of the Statute, 5 U.S.C. Section 7116(d), provides in pertinent part, as follows:

> ". . . issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures."

2/ (Footnote 2 continued.) responded that Mr. Greenspan had been subjected to disparate treatment (Exh. 13 to Joint Stipulation), and on behalf of Ms. Harris first asserted that the additional information requested on January 8, 1979, had not been received and then asserted that Ms. Harris had been subjected to disparate treatment (Exh. 14 to Joint Stipulation). On March 9, 1979, Mr. Peacher, on behalf of Ms. Harris and Mr. Greenspan, took "strong exception to your denial of records" (Exh. 17 to Joint Stipulation). Letters of reprimand, rather than suspension, issued as to Mr. Greenspan (Exh. 19 of Joint Stipulation) and as to Ms. Harris (Exh. 20 to Joint Stipulations) on March 26, 1979, and the grievances were filed thereafter, by Ms. Harris on April 5, 1979, and by Mr. Greenspan on April 10, 1979.

From the foregoing, it is obvious that the "exception to the fact that I have not been provided with all the information that has been requested" of each grievance was neither an inadvertence nor was it an isolated statement of the issue. To the contrary, as the various replies, which each grievance incorporated by reference, show, grievants had raised the issue of the non-production of requested information in their replies and, in addition to incorporation of "the arguments set forth in my reply", also raised the issue as a separate and independent basis, or ground, in each grievance.

Section 7121(e)(1) of the Statute, 5 U.S.C., Section 7121(e)(1), provides, in part, as follows:

> ". . . An employee shall be deemed to have excercised his option . . . under the negotiated grievance procedure at such time as the employee . . . timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure. . . . "

Obviously, Section 7116(d) was taken substantially without change from Section 19(d) of the Order. Indeed, the Report of the Committee on Governmental Affairs of the United States Senate, to accompany S.2640, which bill ultimately became the Civil Service Reform Act, emphasized that this section is ". . . similar to a provision contained in section 19(d) of Executive Order 11491 . . . ." (S. Rep. No. 95-969 at p. 107 (July 10, 1978)). The Report futher stated:

> ". . . Accordingly, the issues involved may be raised under either the negotiated grievance procedure or, where appropriate, in an unfair labor practice proceeding . . . The use of either option (referring both to grievance procedures and statutory appeals procedures) will preclude the use of the unfair labor practice procedure . . . . (S. Rep. No. 95-569, at p. 107)

The clear intent of Section 7116(d) is that it is to operate in the same manner as Section 19(d) had operated. This is plainly shown by the language of the statute as well as by its legislative history.

Accordingly, as both Section 19(d) of the Order and Section 7116(d) of the Statute preclude the raising in an unfair labor practice proceeding of the refusal of Respondent to furnish information requested in disciplinary proceedings where the same issue, namely, the same refusal to furnish information, had been raised in the grievance of the employees subject to the disciplinary proceedings prior to the filing of the original charge herein, the complaint must be dismissed for lack of jurisdiction.

ORDER

For the reasons set forth hereinabove, the aggrieved parties, grievants Harris and Greenspan, raised the issue of Respondent's refusal to furnish requested information in their grievances, filed on April 5, and 10, 1979, respectively, and proceedings on the union's charge, originally filed on April 19, 1979, which raises the same issue of Respondent's refusal to furnish requested information in the disciplinary proceedings of employees Harris and Greenspan, is precluded by the

prior election of the aggrieved parties to raise the issue under the negotiated grievance procedures by Section 19(d) of Executive Order 11491, as amended and, by Section 7116(d) of the Statute. Accordingly, it is:

ORDERED, that the complaint herein be, and the same is hereby, dismissed.

William B Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: November 14, 1979
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

OKLAHOMA CITY AIR LOGISTICS CENTER,
TINKER AIR FORCE BASE, OKLAHOMA

Respondent

and

Case No. 6-CA-62

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 916

Complainant

DECISION AND ORDER

The Administrative Law Judge issued his Recommended Decision and Order in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

Pursuant to § 2423.29 of the Authority's rules and regulations [5 C.F.R. Part XIV (1980)] and § 7118 of the Federal Service Labor-Management Relations Statute (5 U.S.C. §§ 7101-7135), the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, including the General Counsel's exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation.

In agreement with the Administrative Law Judge, the Authority concludes that a finding of a violation of § 7116(a)(1) of the Statute cannot be predicated upon the alleged bypass of the union by the agency. As noted in the recommended decision of the Administrative Law Judge, this issue was first raised by the General Counsel in his post-hearing brief, and it does not appear that the agency was adequately apprised of the issue, or that the matter was fully litigated, at the hearing. Under these circumstances, the Authority is precluded from finding that the agency violated § 7116(a)(1) of the Statute by the bypass of the union claimed by the General Counsel.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 6-CA-62 be, and it hereby is, dismissed.

Issued, Washington, D.C., June 27, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
OKLAHOMA CITY AIR LOGISTICS CENTER, TINKER AIR FORCE BASE, OKLAHOMA, Respondent	
and	Case No. 6-CA-62
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 916, Charging Party	

Steven M. Angel, Esquire
Office of the General Counsel
Federal Labor Relations Authority
Region VI, P.O. Box 2640
Dallas, Texas 75231

For the General Counsel

Major Michael J. Petherick, Esquire
Labor Relations Counsel
Office of the Staff Judge Advocate
Oklahoma City Air Logistics Center
Tinker Air Force Base, Oklahoma 73145

For the Respondent

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This case arose pursuant to the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. Section 7101 et seq., as a result of an unfair labor practice complaint dated August 31, 1979, and an amended complaint dated November 6, 1979, filed by the Regional Director, Region 6, Federal Labor Relations Authority, Dallas, Texas against the Oklahoma City Air Logistics Center (AFLC), Tinker Air Force

Base, Oklahoma -(Respondent).

The amended complaint alleged, in substance, that Respondent violated 5 U.S.C. Section 7116(a)(1) and (5) by unilaterally announcing a change in existing conditions of employment concerning flexitime on or about April 16, 1979 and, thereafter, by unilaterally implementing a flexitime program on or about May 28, 1979 without furnishing the American Federation of Government Employees, AFL-CIO, Local 916 (Charging Party or Union) an opportunity to bargain on such changes or on the impact and implementation of such changes.

Respondent's answer denied the allegations and asserted that the obligation to bargain was modified by a memorandum of understanding between Respondent and the Union signed on August 19, 1977.

A hearing was held in this matter before the undersigned at Oklahoma City, Oklahoma. The General Counsel, FLRA and the Respondent were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs.

Based on the entire record herein, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, and the briefs, I make the following findings of facts, conclusions of law, and recommendations.

Findings of Fact

1. On July 22, 1976 Respondent and the Union executed a collective bargaining agreement effective until July 21, 1979. (Joint Ex. 1).

2. The agreement provided, in part, as follows:

Article XIX

Work Schedules

Section A: Definitions:

. . .

(2) Tour of Duty: The days of the administrative workweek that an employee is regularly scheduled to work.

(4) Hours of Work: The hours of each workday in the administrative workweek that an employee is regularly scheduled to work.

(5) Shifts: Day shift, swing shift and graveyard shift.

. . .

Section C:

... Before any changes in shifts or tours of duty are put into effect, the Employer will notify and afford the Union an opportunity to meet and confer on such changes ....

. . .

Article XLI

Negotiations During The Term Of This Agreement

Section A. The Employer and the Union, through appropriate representatives, shall meet and confer in good faith with respect to personnel policies and practices, and matters affecting working conditions that are not covered by this agreement .... The Parties may negotiate an agreement, or any question arising thereunder ... and execute a written agreement or memorandum of understanding.

Section B. All written agreements or memorandums of understanding reached under the provisions of this Article shall be enforceable under the provisions of the negotiated grievance procedure.

. . .

Section E. For the period of its duration, this Agreement will have the full force and effect of regulations within the unit. During this period, the agreement will be modified only by the passage of legislation, the issuance of Civil Service Commission or other controlling regulations, the issuance of Air Force regulations required by law or other appropriate authorities, or by mutual agreement of the parties.

Section F. Any proposed change in existing agency regulations resulting in changes in personnel policies, practices, or matters affecting working conditions not specifically covered in this agreement will not be implemented without prior notification to the Union ... The Union may request a meeting to meet and confer with the Employer ....

(3) Only the designated Union Representative shall have the authority to bind the Union on such accords that may be reached at these meetings. These accords may not conflict with existing provisions of this agreement. (Joint Ex. 1).

. . .

3. In August 1977 Respondent and the Union met to negotiate the implementation of flexitime at the Oklahoma City Air Logistics Center. (Tr. 54; 118; 142). Mr. Paul Ketcherside, president of the local, represented the Union. Respondent was represented by Joseph G. Lynch, principal spokesman, Charles L. Whitley, chief negotiator, Dale Williams, labor relations officer, and Arthur Sanderson. (Tr. 54-55; 122; 142). The parties carefully went over a Pacer Schedule plan which had been prepared by management to introduce the concept of flexitime. (Tr. 55; 122). I.B.1.b. and c. of the proposed plan read as follows:

b. The determination based on Decision Analysis to implement or modify Flexitime at any organizational level is reserved to the employer, in order to meet the peculiar operational requirements of an organization. In such cases, the union will be consulted on the decision to implement or modify Flexitime. Where Flexitime is cancelled in an organization, management will notify the union in accordance with Article XLI of the 1976 Labor-Management Agreement and provide the union with an opportunity to negotiate.

c. The employer must retain the right to modify the application of flexitime to a particular position or to eliminate a position or positions from coverage under an organization's Flexitime program in order in efficiently and effectively meet the organization's operational requirements. Such action will be based upon operational requirements and will not be arbitrary or capricious. (Joint Ex. 11).

4. An oral clarification of some of the language contained in the plan was provided by Respondent. (Tr. 55; 122; 143-144). The obligation to "consult" was defined as giving notice to the Union, soliciting their views, comments, and inputs, giving their views, comments, and inputs consideration, and then having given that consideration, management was free to implement the decision, which either accommodated the Union's views, or which did not for whatever reasons management had. "Negotiation", on the other hand, was defined as the exchange of proposals in the effort to reach agreement, and failing agreement, waiting to implement any changes until such time as either the Union elected not to go to the Impasses Panel, or until the Impasses Panel issued its recommendations. (Tr. 122-123).

5. I.B.1.c. of the proposed plan gave the Union the most concern. (Tr. 55-56; 124; 146). The Union was concerned that since the employer, under the proposal, would "retain the right to modify the application of flexitime to a particular position or to eliminate a position or positions from coverage," some arbitrary or capricious manager could one by one eliminate or cancel flexitime for individuals within a given unit or organization until it was effectively cancelled for the entire organizational element without the obligations agreed to in paragraph I.B.1.b. (Tr. 58; 124-125; 146-147). It was agreed that paragraph I.B.1.b. would remained unchanged, but paragraph I.B.1.c.

would be changed as follows:

> c. When necessary to meet operational requirements of the organization, the employer may exclude individual positions from the operation of this plan or modify the application of the plan to individual positions. However, when all of the positions of an organization (sub-unit or larger) are affected, the employer will comply with paragraph (b) above. Actions taken under this paragraph will be based upon operational requirements and will not be arbitrary or capricious. (Joint Ex. 4B, 11).

6. On August 19, 1977, the parties, by Paul Ketcherside for the Union and Charles Whitley for Respondent, executed a memorandum of understanding as follows:

> This Memorandum of Understanding is executed by AFGE Local 916 and the Oklahoma City Air Logistics Center to indicate agreement on a flexitime plan titled Pacer Schedule, OC-ALC 77-25.
>
> It is understood by the Parties that those portions of the Plan which consist of personnel policies and practices affecting working conditions of employees in the bargaining unit are enforceable under the 1976 Labor-Management Agreement between the Parties. (Joint Ex. 4A).

7. Paragraph 2 of the memorandum of understanding was inserted at the request of the Union to ensure that disputes under the flexitime procedure would be subject to the grievance and arbitration provisions of the 1976 agreement. (Tr. 125-126; 147). 1/

1/ Paul Ketcherside, president of the Union, testified that "consult" under I.B.1.b. of the plan means "notify", and that it was understood during negotiations that, under this provision, the Union would be notified of even minor modifications in flexitime, at which time the Union could make a determination of whether or not to exercise its right to negotiate under Article 41 of the 1976 agreement. Mr. Ketcherside testified that the parties understood that Article 3, 19, and 41 of the 1976 agreement would supersede anything to which they agreed, and that under Article 4, section F(3) of the 1976 agreement he had no authority to bind the Union to a accord in conflict with the 1976 agreement. (Tr. 58-60).

(Continued)

8. On April 13, 1979, Respondent sent the Union a letter notifying the Union of the Respondent's intent to modify the flexitime plan at the Center-wide level and providing the Union "an opportunity to consult on this modification if you desire." The proposed modification consisted of changing the core hours, flexible time periods, and flexible lunch period. It was noted that the Union could provide comments and suggestions prior to implementation, and that the modifications would be effective April 30, 1979. (Joint Ex. 5).

9. During the period March 19 to April 13, 1979, Respondent took some surveys of employee attitudes about the flexitime program and the proposals. Some supervisors asked their employees how they liked flexitime, whether it was suiting their needs, and whether they had any ideas about improving the program. (Tr. 32-33; 90; Joint Ex. 10). Personnel responding generally indicated a desire to have the flexitime program remain unchanged and indicated an expected arrival time of 7:30 a.m. with a 30-minute lunch period should the proposed modifications be made to the flexitime program. (Joint Ex. 8). The Union was not given an opportunity to be present at these meetings. (Tr. 33).

10. Following the April 13, 1979 letter, some supervisors held meetings with their employees, showed them copies of the letter, advised them of the proposals, that a change in flexitime might be made, and that the employees might want to make appropriate arrangements. (Tr. 31-32; 62; 90). The Union was not notified of such meetings. (Tr. 32).

11. On April 20, 1979 an article concerning flexitime appeared in the base newspaper. The article, initiated by Respondent, publicized the fact that Respondent was considering modifying flexitime and that the Union had been furnished the appropriate paper work concerning the proposed change. (Tr. 91, 105).

12. On April 16, 1979 Paul Ketcherside, president of the Union, and John R. Kelley, Respondent's labor relations officer, met to discuss the reasons for the change and what the Respondent intended in its April 13, 1979 letter concerning "an opportunity to consult." The Union emphasized its desire to negotiate the modification at this time and in a letter to Respondent dated April 16, 1979. (Tr. 46-47; 61-62).

(Continued)

1/ In making the above findings, I have rejected this testimony. I have credited the testimony of Mr. Lynch, principal spokesman, and Charles L. Whitley, chief negotiator for Respondent. The testimony of Mr. Lynch and Mr. Whitley concerning the negotiations was more specific, thorough, convincing, and consistent with the plain language of the memorandum, the 1976 agreement, and the record as a whole.

13. On April 23, 1979 Respondent and the Union met. Respondent outlined its reasons for the modification and indicated it was at the meeting to fulfill its obligation of consultation. Mr. Ketcherside of the Union indicated it was there to negotiate, but, in any event, he needed some information in order to make proper judgments. He outlined at the meeting eleven categories of information desired and reiterated the request in a letter dated the same day. He requested that Respondent postpone making any changes for at least 30 days to enable Respondent to consider its position. (Tr. 92; Joint Ex. 7).

14. On April 23, 1979, Respondent advised the Union that it was in the process of obtaining the information requested by the Union and that the proposed implementation date was rescheduled for May 13, 1979. (Tr. 92-93).

15. On April 26, 1979 Respondent furnished the Union the information it had requested in eight categories, but stated that information concerning the amounts of scheduled and unscheduled annual leave used prior to and during flexitime and the number of abuses of flexitime and related disciplinary actions was not reasonably available. (Tr. 93; Joint Ex. 8).

16. On April 30, 1979 the Union reiterated its request for the information not supplied. (Joint Ex. 9).

17. The parties met on May 7, 1979. Mr. Kelley of Respondent explained to Mr. Ketcherside of the Union that Respondent had no records distinguishing between scheduled and unscheduled annual leave or leave used prior to and during flexitime. He stated that obtaining information concerning alleged abuses of flexitime and disciplinary action taken as a result would require a massive review of personnel files with no assurance that the data would relate specifically to abuses of flexitime. Mr. Ketcherside acknowledged the problem in obtaining the information, and stated that he was concerned whether or not the Respondent was changing flexitime because of abuses by employees. Mr. Kelley replied that if Mr. Ketcherside was changing the request to ask for that information, an answer could be provided.

18. On May 9, 1979 Respondent advised the Union that the employer had no statistical evidence that would indicate that abuse encountered under flexitime was significally different from abuse prior to flexitime. (Tr. 94-97; Joint Ex. 10).

19. During discussions between Respondent and the Union concerning the proposed modification of flexitime, the Union asserted that the changes were not justified by Respondent's reasons; that they would cause hardships on employees; and that a joint labor-management committee should be established to study the situation and come up with recommendations. No specific counter-proposals on the flexitime

plan were offered by the Union.

20. Respondent considered the Union's requests, rejected them, and implemented the modification proposals on May 27, 1979.

Discussion, Conclusions, and Order

The General Counsel alleged that Respondent violated Section 7116 (a)(1) and (5) of the Statute "on or about April 16, 1979, [when] Respondent unilaterally announced a change in existing conditions of employment concerning flexitime and, thereafter, on or about May 28, 1979, unilaterally implemented a flexitime program without furnishing the Union an opportunity to bargain on such changes or on the impact and implementation of such changes." (General Counsel's Ex. 1(x).)

In denying that it has committed any unfair labor practice herein, Respondent asserts that the obligation to bargain was modified by a memorandum of understanding, signed on August 19, 1977, between Respondent and the Union, (General Counsel's Ex. 1(z).), and that it complied with its contractual obligation.

Both parties rely on the negotiated agreement, the memorandum of understanding, and the negotiations leading to the memorandum of understanding in asserting their respective positions concerning Respondent's obligation to bargain. Therefore, the issues essentially involve arguable interpretations of the negotiated agreements and are not properly the subject of unfair labor practice proceedings.

It is well recognized that a party to a negotiated agreement acts at its peril in interpreting and applying such agreement. Thus, if the Respondent's interpretation of the negotiated agreement and memorandum of understanding was such that it resulted in a clear and patent breach of the terms of the agreement, then such interpretation could rise to the level of an unfair labor practice. On the other hand, if Respondent's interpretation was arguably within the terms of the negotiated agreement, and the memorandum of understanding, then such interpretation would merely be a matter of contract interpretation to be resolved through the parties' grievance and arbitration machinery. Cf. Department of the Navy, Naval Air Rework Facility, A/SLMR No. 1089, 8 A/SLMR 815, 816 (1978) and cases cited therein; American Federation of Government Employees, AFL-CIO, Local 1931 and Department of the Navy, Naval Weapons Station, Concord, California, Case No. O-NG-55, 2 FLRA 19 (1979).

It is arguable that the Respondent's April 13, 1979 notice to the Union of its intent to modify flexitime at the Center, its subsequent "consultation" with the Union on its proposal, and its implementation

of the proposal, constituted reasonable interpretations of the parties' agreements. Therefore, I conclude that such actions, standing alone, did not rise to the level of an unfair labor practice under the Statute and such contractual dispute should be resolved through the parties' grievance and arbitration procedure.

Assuming, however, that the case is properly the subject of unfair labor practice proceedings on the theory that it involves an alleged violation of Respondent's obligation to bargain under the Statute and an alleged waiver of such obligation, Cf. Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 1158, 8 A/SLMR 1288, 1293 (1978), the record will be considered further on that basis.

Under the Statute "consultation" means something different from "bargaining" in two areas: national consultation rights under Section 7113 and Government-wide consultation rights under Section 7117(d)(1) and (2), areas not involved here. However, Section 7103(a)(12), in defining collective bargaining" uses the words "consult" and "bargain" interchangeably in speaking of the "mutual obligation ... to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment ...." Thus, if the word "consult" is contained in an agreement, it may be construed to mean "bargain" or "negotiate" unless "consult" is otherwise defined, or there has been a clear and unmistakable waiver of the right to bargain, or unless it clearly refers to national or Government-wide consultation rights.

Section 7135(a)(1) of the Statute provides that nothing contained in the chapter shall preclude the continuation of a lawful agreement entered into before the effective date.

Paragraph I.B.1.b. of the flexitime plan, agreed to by the parties, directly and specifically reserves to Respondent the "determination ... to ... modify Flexitime at any organizational level ... in order to meet the peculiar operational requirements of an organization." Where flexitime is modified, the plan states that the Union will be "consulted". Where flexitime is cancelled, the plan states that the Union will be provided an opportunity to "negotiate". The plain language of the plan and the bargaining history leading to the agreement, as found above, demonstrates that the parties intended a clear and unmistakable distinction between the two situations and of their rights in connection with each. Compare Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 1101, 8 A/SLMR 893, 899, FLRC 78A-136 (1978). The General Counsel's argument that the change amounted to a cancellation of flexitime is rejected. It is concluded, therefore, that a clear and unmistakable waiver by the

Union of its right to negotiate a modification of flexitime is evident from the language of the agreement and the negotiations leading to the agreement. Cf. Federal Aviation Administration, A/SLMR 992, 8 A/SLMR 227 (1978); U.S. Army School Training Center, Fort Gordon, Georgia, A/SLMR No. 148, 2 A/SLMR 201 (1972). Compare United States Customs Service, Region VI, Houston, Texas, A/SLMR No. 1161, 8 A/SLMR 1305 (1978); Department of the Treasury, Internal Revenue Service, Chicago District Office, A/SLMR No. 962, 8 A/SLMR 40 (1978); Department of the Treasury, Internal Revenue Service, Southwest Region, Dallas, Texas, A/SLMR No. 858, 7 A/SLMR 523 (1977); Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, A/SLMR No. 656, 6 A/SLMR 238, affirmed FLRC No. 76A-85, 5 FLRC 357 (1977).

The record reflects that the Respondent issued a newspaper release, held meetings with some employees to advise them of the proposed modification, and conducted some surveys of employee attitudes about the flexitime program and Respondent's proposed modification without the knowledge and consent of the Union. (Findings 9-11, supra). It has previously been held that similar employee surveys of this nature is an unfair labor practice since such surveys amount to a by-pass of the union which undermines and impairs the status of the union as the exclusive representative of employees in the unit. Cf. Department of Health, Education and Welfare, Social Security Administration, Bureau of Retirement and Survivors Insurance, Northeastern Program Service Center and American Federation of Government Employees, Local Union 1760, AFL-CIO, 1 FLRA 59 (1979). Joint Exhibits in the record reflects that information about the alleged surveys was made available to the Union by Respondent on April 26 and May 9, 1979. (Joint Ex. 8, 10). Yet, neither the charge nor amended complaint specifically raise this issue or allege facts specifically relating to the issue. As noted, the complaint contains a factual allegation that Respondent refused to bargain in good faith with the Union in that "on or about April 16, 1979, Respondent unilaterally announced a change in existing conditions of employment concerning flexitime and, thereafter, on or about May 28, 1979, unilaterally implemented a flexitime program without furnishing the Union an opportunity to bargain on such changes or on the impact and implementation of such changes." The General Counsel's opening statement did not refer to the by-pass issue. Although parts of the examination and cross-examination of two witnesses inquired into these events, the oral motion of the General Counsel, made at the close of the hearing, to amend the complaint to conform with the evidence covered only "changes as to dates and [names] ... It would not go to substantive elements of the complaint." (Tr. 148-149). The issue is raised squarely for the first time in the General Counsel's post-hearing brief.

I conclude that it would be inappropriate to determine the by-pass issue since it is not clear that Respondent was properly on notice of this issue and, as a result, that the matter was fully

litigated at the hearing.

It is concluded that a preponderance of the evidence does not support a violation by Respondent of Sections 7116(a)(1) and (5) of the Statute, as alleged.

Recommendation

Having found that Respondent has not engaged in conduct prohibited by Sections 7116(a)(1) and (5) of the Statute, it is recommended that the complaint herein be dismissed in its entirety.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: January 18, 1980
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL F-48, AFL-CIO

(Union)

and

Case No. 0-NG-139

NAVAL SUPPORT ACTIVITY
MARE ISLAND STATION, CALIFORNIA

(Activity)

DECISION ON NEGOTIABILITY ISSUES

This case comes before the Federal Labor Relations Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. secs. 7101 et seq.)

Union Proposal I

Article 22.5 Saturday and Sunday Work. Work on Saturday will be arranged to insure employees commence stand-by status at 1100 hours. Emergencies excepted. Work on Sunday will not be scheduled, given to the fact that Sunday is a religious day of rest for many employees. The only work to be performed on Sunday will be morning equipment inspection and light station clean-up, and that of an emergency as described in Section 3 of this Article.

Article 22.6 Work on Holidays. No work except that of an emergency, as described in Section 3 of this Article. The only work to be performed on National Holidays are that of morning equipment inspection and light station clean-up.

Union's hand written proposal (in relevant part) "...(w)ork and training assignments shall not exceed 3 hrs. on national holidays, Saturdays and Sundays."

Question Here Before the Authority

The question is whether the union's proposal falls within the duty to bargain under the Federal Service Labor-Management Relations Statute, or whether, as alleged by the agency, the proposal violates section 7106(a) of the Statute.

Opinion

Conclusion: Union Proposal I conflicts with section 7106(a)(2)(B) of the Statute. 1/ Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)), the agency's allegation that the disputed proposal is not within the duty to bargain is sustained.

Reason: The union's proposal bears no material difference from a proposal concerning work on holidays, Saturdays and Sundays in International Association of Fire Fighters, Local F-61 and Philadelphia Naval Shipyard, 3 FLRA No. 66 (O-NG-6), wherein the Authority found that such a proposal would restrict management's right "to assign work within the meaning of Section 7106(a)(2)(B)." Therefore, for the reasons fully set forth in that decision, the Authority finds that the instant proposal conflicts with management's right to assign work. Accordingly, the agency's allegation that the proposal is not within the duty to bargain must be sustained.

Union Proposal II

> Article 29.1 In view of seasonal changes in weather conditions, management will endeavor to schedule training so wintertime training will consist of those items that require class room sessions, i.e., hydraulics, first aid, rope and forcible entry practices, fire extinguisher practices, salvage, and pre-fire planning, etc. Summertime training requiring outdoor performance of skills such as hose lays, ladder practices, pump operation training, driver training, etc. (Emphasis added.)

Question Here Before the Authority

The question is whether the union's proposal falls within the duty to bargain under the Statute, or whether, as alleged by the agency, the proposal would violate section 7106(a) of the Statute.

Opinion

Conclusion: Union Proposal II does not conflict with section 7106(a) of the Statute but is within the duty to bargain under the Statute. Thus, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3482 et seq. (1980)),

---

1/ Section 7106(a)(2)(B):

> Section 7106. Management rights
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--
>
> . . . . . .
>
> (2) in accordance with applicable laws--
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

the agency's allegation that the provision is not within the duty to bargain is set aside. 2/

Reason: Although the instant proposal appears to be similar to a proposal concerning the training of fire fighters mentioned above and discussed in Philadelphia Naval Shipyard, supra, its wording is sufficiently different to distinguish the provision. Thus, unlike the provision in Philadelphia Naval Shipyard which limited management's right to assign work and thus was found non-negotiable, the language "will endeavor" contained herein does not restrict management's prerogative to assign training (or work) and, hence, this proposal does not conflict with management's rights under section 7106(a)(2)(B) of the Statute. Accordingly, the agency's allegation to the contrary is set aside.

Issued, Washington, D.C., June 26, 1980.

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In so deciding that the proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, NATIONAL COUNCIL OF
EEOC LOCALS NO. 216, AFL-CIO

(Union)

and

Case No. 0-NG-197

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, WASHINGTON, D.C.

(Agency)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

Union Proposal

Article 5

Section d.

At least annually, employees shall have the opportunity to assess in writing the performance of supervisors. Assessment forms shall be developed jointly by the EMPLOYER and the UNION.

Section h.

No employee shall be disciplined by a supervisor who has not received training as required by the FPM and OPM regulations.

Question Here Before the Authority

The question is whether the union's proposal is outside the duty to bargain under section 7117 of the Statute, */ as alleged by the agency.

Opinion

Conclusion: The proposal is outside the scope of bargaining under section 7117 of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 45 Fed. Reg. 3513 (1980), the agency's allegation that the disputed proposal is not within the duty to bargain is sustained.

*/ Section 7117(a)(1) of the Statute provides:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

The term "matters" as used in section 7117(a)(1) is explained by reference to the definition of "collective bargaining" in section 7103(a)(12) and "conditions of employment" in section 7103(a)(14) of the Statute:

§ 7103. Definitions; application

(a) For the purpose of this chapter --

. . . . . .

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees . . . .

. . . . .

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . .

Reasons: The agency contends, among other things, that both sections of the proposal are outside the duty to bargain because the assessment of supervisory performance and the training of supervisors as a precondition to the exercise of management's right to discipline do not involve the conditions of employment of bargaining unit employees. We agree with the agency's contention.

In a recent decision, National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO and U.S. Department of Labor, Washington, D.C., Case No. 0-NG-79, 3 FLRA No. 44 (May 29, 1980), the Authority found nonnegotiable a proposal which pertained to the filling of supervisory and management positions with bargaining unit employees. In its decision, the Authority stated that:

> An exclusive representative's obligation and correlative rights . . . extend only to employees in the unit, under section 7114(a)(1). Furthermore, the definition of "collective bargaining" found in section 7103(a)(12) . . . restricts the scope of the obligation to bargain in good faith to matters affecting the conditions of employment of employees in an appropriate unit. Consequently, the agency has no obligation to bargain over matters relating to the non-bargaining unit positions referred to in the proposal. Thus, as the proposal goes beyond the representation rights of the exclusive representative and does not directly relate to conditions of employment of unit employees, it is outside the duty to bargain under the Statute. [Footnotes omitted.]

The proposal in the instant case similarly does not directly relate to conditions of employment of unit employees. Rather, it relates to the assessment and training of supervisors. Consequently, for the reasons stated in more detail in the Department of Labor case cited above, the union's proposal is outside the duty to bargain under the Statute. Accordingly, the agency's allegation that the disputed proposal is not within the duty to bargain must be sustained.

Issued, Washington, D.C., June 27, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL LABOR RELATIONS BOARD UNION

(Labor Organization)

and

Case No. O-NG-147

NATIONAL LABOR RELATIONS BOARD,
WASHINGTON, D.C.

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

Preliminary Matter

The labor organization in the above-captioned matter filed a petition for review by the Authority of two proposals which had been alleged by the activity to be outside the duty to bargain under the Federal Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7101 et seq. Subsequently, on May 27, 1980, the labor organization filed an amendment to the petition for review requesting that it be permitted to withdraw its request that the Authority issue a decision on the negotiability of its "Broadest Possible Group" proposal. The labor organization states that it has modified its position with respect to that proposal and that agreement has been reached with the activity on the modified proposal. The union continues to request an Authority decision concerning the negotiability of its "No Dual Lodging Expense" proposal.

In view of the foregoing agreement between the parties concerning the subject of the "Broadest Possible Group" proposal, the request by the labor organization to amend its petition for review is granted.

Union Proposal

"No Dual Lodging Expense" Proposal

Consistent with operating needs, employees detailed (to temporary duty stations away from their permanent duty stations) pursuant to the terms of this supplemental agreement, will not be obliged to incur or suffer dual lodging expenses which would cause their total travel expenses for any particular day to exceed the maximum $50 per diem rate.

Question Here Before the Authority

The question presented is whether the union's proposal is a matter within the agency's duty to bargain under the Statute or, as alleged by the agency, is excluded from the obligation to bargain by reason of section 7106(a)(2)(A) and (B) of the Statute.1/

Opinion

Conclusion: The proposal does not violate section 7106 of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 45 Fed. Reg. 3513 (1980), the agency's allegation that the disputed proposal is not within the duty to bargain is set aside.2/

Reasons: The agency contends that the proposal is excluded from the duty to bargain by section 7106(a)(2)(A), which retains to the agency the right to assign employees, and by section 7106(a)(2)(B), which similarly retains the right to assign work. In that regard, the agency argues that the phrase "consistent with operating needs" does not provide sufficient discretion to assign employees or work. Specifically, the agency contends that it would not be able to reassign a detailed employee to a duty station away from the site of the detail when such reassignment would involve dual lodging expenses if another employee permanently assigned to the detail site is available to do the work. The union, however, contends that the proposal falls within the duty to bargain under section 7106(b)(2) since it constitutes the procedure within which management will assign persons on details, and under section 7106(b)(3) as an appropriate arrangement for persons adversely affected by the exercise of the agency's authority to assign employees. In this regard, the union concedes that management retains the ultimate discretion to reassign employees who are currently on detail even though such employees may incur dual lodging expenses.

Section 7106(a) of the Statute specifies various rights reserved to agency management. Subsection (b), however, provides that management's exercise of any rights contained in subsection (a) does not preclude negotiations on the

---

1/ Section 7106(a)(2) of the Statute provides in pertinent part:

> § 7106. Management rights
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--
>
> (2) in accordance with applicable laws--
>
> (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay or take other disciplinary action against such employees;
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted . . . .

2/ In deciding that the proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

procedures which management officials will observe in exercising those rights.3/

The proposal here would require that the agency not make assignments which would oblige an employee to incur or suffer dual lodging expenses in excess of $50 per day unless there is an operating need to do so. In general, however, the union concedes that agency management retains the authority to make final decisions concerning assignment of employees. Specifically, the union concedes that management is not required to counsel employees concerning its "operating needs," that the proposal does not permit an employee to refuse an assignment, and that the agency can, in fact, assign employees in circumstances which would oblige an employee to incur dual lodging expenses. Further, the proposal here leaves to management's discretion the determination of its operating needs.

Accordingly, this proposal merely establishes a general requirement that when management assigns detailees in circumstances which would result in dual lodging situations, the assignment must be consistent with operating needs. Thus, since the agency retains the discretion to determine its operating needs and, subsequently, to assign employees, the proposal here constitutes a procedure which is within the duty to bargain under section 7106(b)(2), and does not violate management's rights under section 7106(a).

Issued, Washington, D.C., June 27, 1980

Ronald W. Haughton, Chairman

Henry B. Frazer III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ In this regard, section 7106(b)(2) provides:

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

(2) procedures which management officials of the agency will observe in exercising any authority under this section.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, COUNCIL OF FEDERAL GRAIN INSPECTION LOCALS

(Union)

and

Case No. 0-NG-126

UNITED STATES DEPARTMENT OF AGRICULTURE, FEDERAL GRAIN INSPECTION SERVICE, WASHINGTON, D.C.

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

Union Proposal

All work in excess of 40 hours per week performed on a Sunday shall be paid at twice the basic rate of pay.

Question Here Before the Authority

The question is whether the union's proposal is outside the agency's duty to bargain under section 7117 of the Statute because it concerns a matter that is excluded from "conditions of employment" as defined in section 7103(a)(14) of the Statute. 1/

1/ Section 7117(a)(1) of the Statute provides as follows:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

Opinion

Conclusion: The union's proposal is outside the duty to bargain under the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, 45 Fed. Reg. 3513 (1980), the agency's allegation that the disputed proposal is not within the duty to bargain is sustained.

Reasons: The duty to bargain under the Statute extends to the conditions of employment of bargaining unit employees. Matters "specifically provided for by Federal statute" however, are expressly excluded from the definition of

(Continued)

> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

The term "matters" as used in section 7117(a)(1) is explained by reference to the definition of "collective bargaining" in section 7103(a)(12) and "conditions of employment" in section 7103(a)(14) of the Statute:

> § 7103. Definitions; application
>
> . . . . . .
>
> (12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees . . . .
>
> . . . . . .
>
> (14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices and matters--
>
> . . . . . .
>
> (C) to the extent such matters are specifically provided for by Federal statute.

"conditions of employment" in section 7103(a)(14)(C) (note 1, supra) and, hence, are not within the scope of the duty to bargain. The union's proposal in the instant case concerns the rate of pay for bargaining unit employees who perform overtime work on a Sunday. The basic pay provisions applicable to Federal employees, including provisions regarding overtime pay for hours worked in excess of 40 per week or 8 in one day, are set forth in 5 U.S.C. 5542(a) which provides, in pertinent part, as follows:

> § 5542. Overtime rates; computation
>
> (a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:
>
> (1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.
>
> (2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS-10, and all that amount is premium pay.

While there are statutory provisions which specifically permit the negotiation of premium pay for certain categories of Federal employees, no such specific statutory authorization for the bargaining unit employees of the Federal Grain Inspection Service involved herein has been cited by the union or found by the Authority. Accordingly, in the instant case, as stated in the House Committee Report accompanying H.R. 11280 from which section 7103(a)(14)(C) of the Statute derived without change, "[r]ates of overtime pay are not bargainable, because they are specifically provided for by statute." 2/

2/ H.R. REP. No. 95-1403, 95th Cong., 2d Sess. 44 (1978)

The union contends, however, that 5 U.S.C. 5542(a), which provides that overtime shall be paid at "one and one-half times the [employee's] hourly rate," is inconsistent with section 7(a)(1) of the Fair Labor Standards Act (FLSA) which requires overtime compensation at "not less than" one and one-half times the regular rate. Section 7(a)(1) of the Fair Labor Standards Act (29 U.S.C. 207(a)(1)) provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

The union takes the position that Congress, in extending coverage of the FLSA to Federal employees in 1974, 3/ expressly indicated that the latter provision should govern where the two statutes on premium pay are inconsistent; 4/ and hence that the disputed proposal which seeks to establish overtime pay greater than one and one-half times the regular hourly rate is within the duty to bargain. In support of its assertion that the two premium pay provisions are "inconsistent," the union refers to certain language in the Conference Committee Report concerning section 704 of the Civil Service Reform Act of 1978 (92 Stat. 1218) 5/ in which Congress expressly overruled a number of the Comptroller General's decisions interpreting "not less than" in 5 U.S.C. 5544 pertaining to overtime pay for prevailing rate employees as no authorization for agencies to establish overtime pay rates greater than one and one-half times the basic hourly pay rate for such prevailing rate employees.6/

The agency did not file a timely statement of position herein pursuant to section 7117(c)(3) of the Statute, but requested permission, in effect, to file a submission in response to the union's arguments set forth above. The union objected to that request. Consistent with the Authority's policy not to consider submissions in negotiability cases other than those prescribed in the

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3/ Pub. L. No. 93-259, 88 Stat. 55 (April 8, 1974).

4/ The union cites H.R. REP. No. 93-913, 93rd Cong., 27-28 (1974), and FPM Letter 551-1, Attachment 5.

5/ See S. REP. No. 95-1272, 95th Cong. 2d Sess. 159 (1978).

6/ The Comptroller General decisions expressly overruled were B-189782, 57 Comp. Gen. 259 (1978) and B-191520 (June 6, 1978).

Statute and the Authority's rules, unless additional information is deemed necessary, (see American Federation of Government Employees, AFL-CIO, Local 695 and Department of the Treasury, U.S. Mint, Denver, Colorado, Case No. 0-NG-114, 3 FLRA No. 7 (April 14, 1980)), the agency's request is hereby denied, and nothing submitted with that request has been considered by the Authority in reaching its decision herein. However, the Office of Personnel Management (OPM), in its brief amicus curiae, filed pursuant to permission granted by the Authority under section 2429.9 of the Authority's Rules and Regulations, 45 Fed. Reg. 3518, specifically responded to the union's argument by quoting all of the Conference Committee language concerning section 704 (see note 5, supra) upon which the union relies. Such legislative history indicates that Congress, in overruling the aforementioned decisions of the Comptroller General by virtue of section 704, intended to authorize only those prevailing rate employees who are expressly empowered to negotiate their wages in accordance with prevailing rates in the private sector under section 9(b) of P.L. 92-392 (1972) to negotiate their overtime pay without regard to 5 U.S.C. 5544, but was not dealing generally with rates of overtime pay for all Federal employees. 7/ Accordingly, the union's contention that section 7(a)(1) of the Fair Labor Standards Act is inconsistent with 5 U.S.C. 5542(a) must be rejected, and the agency's allegation that the disputed proposal is outside the duty to bargain under the Statute is sustained.

Issued, Washington, D.C., June 27, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

7/ See the Comptroller General's decision in B-189782, 58 Comp. Gen. 198 (1979).

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE NAVY,
CONSOLIDATED CIVILIAN PERSONNEL
OFFICE, NAVAL BASE POLICE,
PEARL HARBOR

(Activity)

and

Case No. 0-AR-90

LOCAL R-12-195, INTERNATIONAL
BROTHERHOOD OF POLICE OFFICERS/
NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES

(Union)

ORDER DISMISSING EXCEPTIONS

On April 25, 1980, Local R-12-195, International Brotherhood of Police Officers/National Association of Government Employees (the union), filed exceptions to the award of Arbitrator Ronald C. Brown in the instant case with the Authority, pursuant to section 2425.1 of the Authority's regulations (5 C.F.R. § 2425.1 (1980)). For the reasons indicated below, it has been determined that the subject exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the Authority's regulations (5 C.F.R. § 2425.1(b) (1980)) provides:

> The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in the union's submission, is dated March 25, 1980. Therefore, under section 2425.1(b) of the Authority's regulations, the union's exceptions were due in the office of the Authority no later than April 23, 1980. However, as stated above, the subject exceptions were not filed with the Authority until April 25, 1980. In this regard, the Authority is not empowered to extend or waive the time limit for filing exceptions to arbitrators' awards.

Accordingly, as the union's exceptions were untimely filed, and apart from other considerations, the union's appeal is hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 25, 1980

Samuel A. Chaitovitz, Executive Director

3 FLRA No. 73

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HEADQUARTERS, 323RD FLYING
TRAINING WING, MATHER AIR
FORCE BASE, CALIFORNIA

(Activity)

and

Case No. 0-AR-102

LOCAL 1692, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES

(Union)

ORDER DISMISSING EXCEPTIONS

On May 27, 1980, Local 1692, American Federation of Government Employees, AFL-CIO (the union), filed exceptions to the award of Arbitrator Cornelius J. Peck in the instant case with the Authority, pursuant to section 2425.1 of the Authority's regulations (5 C.F.R. § 2425.1 (1980)). For the reasons indicated below, it has been determined that the subject exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the Authority's regulations (5 C.F.R. § 2425.1(b) (1980)) provides:

> The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in the union's submission, is dated April 22, 1980. Therefore, under section 2425.1(b) of the Authority's regulations, the union's exceptions were due in the office of the Authority no later than May 21, 1980. However, as stated above, the subject exceptions were not filed with the Authority until May 27, 1980. In this regard, the Authority is not empowered to extend or waive the time limit for filing exceptions to arbitrators' awards.

Accordingly, as the union's exceptions were untimely filed, and apart from other considerations, the union's appeal is hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 26, 1980

Samuel A. Chaitovitz, Executive Director

3 FLRA No. 74

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

OGDEN AIR LOGISTICS CENTER,
HILL AIR FORCE BASE, UTAH

(Activity)

and

Case No. 0-AR-99

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1592

(Union)

ORDER DISMISSING EXCEPTIONS

On May 15, 1980, Local 1592, American Federation of Government Employees, AFL-CIO (the union), filed exceptions to the award of Arbitrator Hugh G. Lovell in the instant case with the Authority, pursuant to section 2425.1 of the Authority's regulations (5 C.F.R. § 2425.1 (1980)). For the reasons indicated below, it has been determined that the subject exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the Authority's regulations (5 C.F.R. § 2425.1(b) (1980)) provides:

> The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in the union's submission, is dated April 15, 1980. Therefore, under section 2425.1(b) of the Authority's regulations, the union's exceptions were due in the office of the Authority no later than May 14, 1980. However, as stated above, the subject exceptions were not filed with the Authority until May 15, 1980. In this regard, the Authority is not empowered to extend or waive the time limit for filing exceptions to arbitrators' awards.

Accordingly, as the union's exceptions were untimely filed, and apart from other considerations, the union's appeal is hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 26, 1980

Samuel A. Chaitovitz, Executive Director

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
1900 E STREET NW. ● WASHINGTON, D.C. 20424

LOCAL 2221, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Union

and

Case No. 0-AR-80

NEWARK AIR FORCE STATION

Activity

ORDER DISMISSING EXCEPTIONS

On March 11, 1980, the American Federation of Government Employees, AFL-CIO (the union) filed with the Authority exceptions to the award of Arbitrator Thomas J. Coyne in the instant case, pursuant to section 2425.1 of the Authority's regulations (5 C.F.R. § 2425.1 (1980)). The Department of the Air Force filed an opposition to the union's exceptions. For the reasons indicated below, it has been determined that the subject exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the Authority's regulations (5 C.F.R. § 2425.1(b) (1980)) provides:

> The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in the union's exceptions, is dated February 10, 1980. Therefore, under section 2425.1(b) of the Authority's regulations, the union's exceptions were due in the office of the Authority no later than March 10, 1980.

However, as stated above, the subject exceptions were not filed with the Authority until March 11, 1980. In this regard, the union's allegations, filed with the Authority on May 16, 1980, relating to tolling the applicable time limit, including the union's allegation concerning a delay in receipt of a copy of the subject award by the union's national office, do not provide a basis for such tolling.

Accordingly, as the union's exceptions were untimely filed, and apart from other considerations, the union's appeal is hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 27, 1980

Samuel A. Chaitovitz, Executive Director

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE

(Activity)

and

Case No. 0-AR-98

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL NO. 2840

(Union)

ORDER DISMISSING EXCEPTIONS

On May 14, 1980, Department of the Air Force (the activity) filed exceptions to the award of Arbitrator Preston J. Moore in the instant case with the Authority, pursuant to section 2425.1 of the Authority's regulations (5 C.F.R. § 2425.1 (1980)). The activity also requested a stay of the award. Further, on June 6, 1980, the Office of Personnel Management (OPM) requested permission to file a brief as an amicus curiae herein; and on June 17, 1980, the union filed an opposition to the activity's exceptions. For the reasons indicated below, it has been determined that the subject exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the Authority's regulations (5 C.F.R. § 2425.1(b) (1980)) provides:

> The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in the activity's submission, is dated April 14, 1980. Therefore, under section 2425.1(b) of the Authority's regulations, the activity's exceptions were due in the office of the Authority no later than May 13, 1980. However, as stated above, the subject exceptions were not filed with the Authority until May 14, 1980. In this regard, the Authority is not empowered to extend or waive the time limit for filing exceptions to arbitrators' awards.

Accordingly, as the activity's exceptions were untimely filed, and apart from other considerations, the activity's appeal and request for a stay are hereby dismissed, and OPM's request to file a brief as an amicus curiae is denied.

For the Authority.

Issued, Washington, D.C., June 27, 1980

Samuel A. Chaitovitz

Samuel A. Chaitovitz, Executive Director

3 FLRA No. 84

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

COMMUNITY SERVICES ADMINISTRATION

(Agency)

and

Case No. 0-AR-106

NATIONAL COUNCIL OF CSA LOCALS,
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

(Union)

ORDER DISMISSING EXCEPTIONS

On May 29, 1980, Community Services Administration (the agency) filed exceptions to the award of Arbitrator Seymour Strongin in the instant case with the Authority, pursuant to section 2425.1 of the Authority's regulations (5 C.F.R. § 2425.1 (1980)). The agency also requested a stay of the award. For the reasons indicated below, it has been determined that the subject exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the Authority's regulations (5 C.F.R. § 2425.1(b) (1980)) provides:

> The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in the agency's submission, is dated April 29, 1980. Therefore, under section 2425.1(b) of the Authority's regulations, the agency's exceptions were due in the office of the Authority no later than May 28, 1980. However, as stated above, the subject exceptions were not filed with the Authority until May 29, 1980. In this regard, the Authority is not empowered to extend or waive the time limit for filing exceptions to arbitrators' awards.

Accordingly, as the agency's exceptions were untimely filed, and apart from other considerations, the agency's appeal and request for a stay are hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 27, 1980

Samuel A. Chaitovitz, Executive Director

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. O-PS-16

DECISION ON REQUEST FOR GENERAL STATEMENT
OF POLICY OR GUIDANCE

The Authority received a request from the National Treasury Employees Union that the Authority issue a general statement of policy concerning the interpretation of section 7131(d) of the Statute. 1/

According to the request, the specific matter at issue is the following:

> Whether employees who are on official time under 5 U.S.C. Section 7131(d) while representing an exclusive representative, or in connection with other matters covered by 5 U.S.C. Chapter 71, are entitled to payments from agencies for their travel and per diem expenses.

The Authority has carefully considered this request and determined that the request does not satisfy the standards governing the issuance of general statements of policy and guidance set forth in section 2427.5 of the Authority's rules and regulations, 45 Fed. Reg. 3516 (1980), which provide in pertinent part:

> Section 2427.5 Standards governing issuance of general statements of policy and guidance.
>
> In deciding whether to issue a general statement of policy or guidance, the Authority shall consider:
> (a) Whether the question presented can more appropriately be resolved by other means ....

1/ Section 7131(d) provides as follows:

> (d) Except as provided in the preceding subsections of this section--
>
> (1) any employee representing an exclusive representative, or
> (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative, shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

The matter raised in the request can be more appropriately resolved by other means.

More particularly, the authorization of official time for purposes described in section 7131(d) of the Statute is a matter subject to negotiation under the provisions of that section. The question presented relates to the matter of the entitlement of employees to payment for their travel and per diem expenses in connection with such official time, and derives from and is immediately related to this negotiable matter, and can more appropriately be resolved in procedures set forth in the Statute and pertinent regulations for review of negotiability disputes.

Accordingly, the request for a general statement of policy must be denied.

Issued, Washington, D.C., June 27, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 45 REPORT OF CASE DECISIONS August 5, 1980

REPRESENTATION AND UNFAIR LABOR PRACTICE CASES

3 FLRA No. 93 (July 3, 1980)

U.S. Department of the Navy, Naval Air Engineering Center, Lakehurst, New Jersey, Assistant Secretary Case Nos. 32-05035(RA) and 32-05681(CA). The union (IAM&AW Local 2581) filed a complaint under E.O. 11491, alleging that the activity had violated section 19(a)(1) and (5) of the Order when, following a reorganization, it refused to accord the union appropriate recognition, unilaterally terminated the parties' agreement, and refused to process grievances under the agreement. The union also alleged those same actions by the activity as the basis for an objection to the conduct of a runoff election in the subject RA case pursuant to a Decision and Direction of Election of the Assistant Secretary under the Order. The ALJ, noting the Assistant Secretary's conclusions in his Decision and Direction of Election with respect to the effect of the reorganization, determined that the activity did not violate section 19(a)(1) and (5) of the Order and recommended that the complaint be dismissed. The ALJ further found that the activity's conduct did not interfere with a fair election and recommended that the objection to the conduct of the runoff election be overruled and appropriate certification be issued. Contrary to the ALJ, the Authority, citing Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, 4 FLRC 484, FLRC No. 74A-52 (1976), concluded that the activity's conduct in the unfair labor practice case was violative of section 19(a)(1) and (5) of the Order. Further, while in agreement with the ALJ that the objection to the runoff election should be overruled, the Authority reached that conclusion for a different reason, that is, that the objection was untimely filed. Accordingly, the Authority issued a remedial order in the unfair labor practice case; overruled the union's objection in the representation case and returned that case to the Regional Director for final action consistent with its decision. (Decision and Order attached.)

NEGOTIABILITY CASE

3 FLRA No. 92 (June 30, 1980)

American Federation of Government Employees, AFL-CIO, Local 2578 and General Services Administration, National Archives and Records Service, Washington, D.C., Case No. 0-NG-164. The dispute involved a union proposal that the provisions in the parties' negotiated agreement that affect promotion, selection, and retention opportunities for women and minorities would constitute the activity's program implementing the Federal Equal Opportunity Recruitment Program (FEORP) as provided in 5 U.S.C. § 7201. The agency alleged that the proposal conflicted with the Statute and was inconsistent with regulations implementing the FEORP. The Authority found that because the proposal incorporated by reference other provisions, which were not in the record before the Authority, the proposal was not sufficiently specific and delimited in form and content at this time to permit the Authority to render a negotiability decision. Accordingly, the Authority dismissed the union's appeal. (Decision attached.)

ARBITRATION CASES

Case No. 0-AR-81 (June 27, 1980)

Immigration and Naturalization Service, Department of Justice and American Federation of Government Employees, Local No. 1656 (Marlett, Arbitrator). The union requested that the Authority reconsider its decision of April 9, 1980 (3 FLRA No. 5, Report No. 37) dismissing the union's exceptions to the arbitrator's award as untimely filed. Based upon documentation provided by the union in its request for reconsideration, the Authority determined that the union's exceptions should be considered timely under the Authority's regulations. Accordingly, the Authority granted the union's request for reconsideration, rescinded its decision of April 9, 1980, and reopened the case. (Order attached.)

3 FLRA No. 86 (June 30, 1980)

Local 2532, American Federation of Government Employees, AFL-CIO and United States Small Business Administration, Central Office (Lubic, Arbitrator), Case No. 0-AR-64. The dispute arose when an employee filed a grievance under the parties' negotiated grievance procedure alleging preselection in a promotion action in violation of the agreement. The activity, in denying the

grievance, failed to do so within the time limits prescribed in the agreement. Thereafter, the union filed a second grievance alleging that under the terms of the agreement, because of the activity's failure to make a timely response to the union's first grievance, the grievant should be promoted to the position involved. The arbitrator concluded that based upon examination of Chapter 335 of the FPM which requires promotions to be based on merit and contains no exception to that rule for an untimely reply to a grievance, that the relevant provision in the parties' grievance procedure cannot mandate the automatic promotion sought. Therefore, the arbitrator rendered an award in favor of the agency and the union filed exceptions. The Authority held that the union's exceptions provided no basis for finding the arbitrator's award deficient and, accordingly, sustained the award. (Decision attached.)

3 FLRA No. 87 (June 30, 1980)

American Federation of Government Employees, National Border Patrol Council and U.S. Immigration and Naturalization Service, Southern Region, Dallas, Texas (Leeper, Arbitrator), Case No. 0-AR-49. The arbitrator found that the activity had not violated the parties' negotiated agreement when it unilaterally terminated a consultation session with the union after two days of discussions. The union filed exceptions to the arbitrator's award, alleging that it was based on a nonfact and that it did not draw its essence from the parties' negotiated agreement. The Authority found that the union's exceptions provided no basis for finding the arbitrator's award deficient. Accordingly, the Authority sustained the award. (Decision attached.)

3 FLRA No. 88 (June 30, 1980)

Federal Aviation Science and Technological Association, Local No. 291, Fort Worth, Texas and Federal Aviation Administration, Fort Worth Air Route Traffic Control Center, Airway Facilities Sector, Southwest Region, Fort Worth, Texas (Sisk, Arbitrator), Case No. 0-AR-13. The issue before the arbitrator was whether employees who worked rotating shifts were entitled to a workweek consisting of 5 consecutive workdays followed by 2 consecutive days off under a particular provision in the parties' agreement. The arbitrator found, in view of another provision in the agreement which constituted an exception to the 5 days on and 2 off workweek, that the activity had not violated any portion of the agreement. The union filed a petition for review of the arbitrator's award, alleging that the arbitrator was biased and that the arbitrator exceeded his authority. The Authority held that the union's exceptions provided no basis for acceptance of the petition. Accordingly, the Authority denied the union's

petition because it failed to meet the requirements for review set forth in the applicable rules of procedure. (Decision attached.)

3 FLRA No. 89 (June 30, 1980)

American Federation of Government Employees, AFL-CIO, Local 987 and Warner Robins Air Logistics Center, Robins Air Force Base, Georgia (Knight, Arbitrator), Case No. 0-AR-22. The dispute involved the filling of vacancies; during the processing of the grievance the parties agreed to submit the dispute to the Civil Service Commission for resolution by interpretation of CSC Handbook X-118 pertaining to qualification standards. The submission to CSC resulted in an exchange of correspondence but did not resolve the dispute which was then submitted to arbitration. Referring to a letter from the CSC to the agency, the arbitrator determined that the method used by the activity to determine individual employee qualifications for the vacancies involved was not acceptable to the CSC. The arbitrator therefore granted the grievance and directed that new promotion certificates be issued under proper selection procedures. The agency filed a petition for review of the arbitrator's award with the Authority contending that the award was based on a nonfact. The Authority found that the agency's exception was not supported by the facts and circumstances described in the petition. Accordingly, the Authority denied the agency's petition because it failed to meet the requirements for review set forth in the applicable rules of procedure. (Decision attached.)

3 FLRA No. 90 (June 30, 1980)

Federal Employees Metal Trades Council and Mare Island Naval Shipyard (Eaton, Arbitrator), FLRC No. 78A-42. The arbitrator found that the activity's denial of the grievant's request for conversion from temporary to career appointment was violative of the parties' agreement, having concluded that the denial was based on discrimination because of the grievant's union activities. As a remedy, the arbitrator ordered that the grievant be converted to permanent status and paid for all work lost as a result of the activity's action. The agency filed a petition for review of the arbitrator's award with the Federal Labor Relations Council under E.O. 11491. The Council accepted the agency's petition for review on the exceptions alleging that the award violated law and E.O. 11491; and subsequently requested from the Civil Service Commission an interpretation

of applicable law and civil service regulations as they pertained to this award. The case was one of those still pending on December 31, 1978, to be decided by the Authority applying the Order. Based upon an interpretation rendered by the Office of Personnel Management (the successor agency to the CSC with respect to these matters) in response to the Council's request, the Authority found that the arbitrator's award violated applicable law and civil service regulations and instructions. Accordingly, the Authority set aside the arbitrator's award. (Decision attached.)

3 FLRA No. 91 (June 30, 1980)

Veterans Administration Medical Center and American Federation of Government Employees, Local 1985 (Mathews, Arbitrator), Case No. 0-AR-46. The arbitrator found that the agency had not violated the parties' negotiated agreement when its personnel service submitted only the name of one highly qualified candidate to a selecting official for consideration for a promotional opportunity. Further, the arbitrator found that there was no clear and consistent past practice over a sufficiently long period of time to establish an agreement by the parties and therefore also rejected the union's contention that the activity's action was contrary to established practice. The union filed exceptions to the arbitrator's award alleging that the award was arbitrary and capricious and that it did not take into account facts in evidence. The Authority found that the union was attempting to relitigate the merits of the case and that its exceptions constituted disagreement with the arbitrator's reasoning and conclusions. Accordingly, the Authority sustained the arbitrator's award. (Decision attached.)

Attachments (9)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF THE NAVY
NAVAL AIR ENGINEERING CENTER,
LAKEHURST, NEW JERSEY

Activity/Petitioner

and

Assistant Secretary
Case No. 32-05035(RA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 23/284,

Intervenor

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO, LOCAL 2581

Intervenor

U.S. DEPARTMENT OF THE NAVY
NAVAL AIR ENGINEERING CENTER,
LAKEHURST, NEW JERSEY

Respondent

and

Assistant Secretary
Case No. 32-05681(CA)

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO, LOCAL 2581

Complainant

DECISION AND ORDER

The Administrative Law Judge in the above entitled proceeding issued his Recommended Decision and Order finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. He also recommended that Complainant's Objection to the Runoff Election be overruled and that a Certification of Representative be issued by the Regional Director. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under § 304 of Reorganization Plan Number 2 of 1978 (43 Fed. Reg. 36040 (1980)), which transfer of function is implemented by § 2400.2 of the Authority's rules and regulations (45 Fed. Reg. 3482, (1980)). The Authority continues to be responsible for the performance of these functions as provided in § 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to § 2400.2 of the Authority's rules and regulations and § 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, the Authority hereby adopts the Administrative Law Judge's findings, conclusions, and recommendations as modified below.

The International Association of Machinists and Aerospace Workers, AFL-CIO, Local 2581 (IAM) filed the subject complaint alleging that the U.S. Department of the Navy, Naval Air Engineering Center, Lakehurst, New Jersey (Respondent) violated § 19(a)(1) and (5) of the Order by its refusal to accord appropriate recognition to the IAM, by its unilaterial termination of the parties' negotiated agreement, and by its refusal to process grievances under that negotiated agreement. The IAM also alleged these same actions of the Respondent as the basis for an objection to the conduct of the runoff election held in the subject RA case pursuant to the Decision and Direction of Election of the Assistant Secretary in Case No. 32-05035(RA) [See U.S. Department of the Navy, Naval Engineering Center, Lakehurst, New Jersey, 8 A/SLMR 912, A/SLMR No. 1104 (1978)]. The other objections to the conduct of the runoff election filed by the IAM were overruled by the Regional Director, and the IAM failed to file a timely Request for Review as to those objections.

The Administrative Law Judge found that the Respondent did not violate § 19(a)(1) and (5) of the Order as alleged, and recommended that the complaint be dismissed. In addition, he found that this conduct did not interfere with a fair election and recommended that the objection be overruled. In regard to the unfair labor practice allegations, the Administrative Law Judge noted that in the Decision and Direction of Election in Case No. 32-05035(RA) above, the Assistant Secretary concluded that the June 6, 1977 reorganization created a new organizational entity, and fundamentally altered the character and scope of several exclusive recognized units, including the unit represented by the IAM, and that, as a result, such units were no longer appropriate for the purpose of exclusive recognition under the Order. Under these circumstances, the Administrative Law Judge found that the agency had no obligation to continue to accord exclusive recognition to any of the labor organizations as exclusive representative. Accordingly, he concluded that Respondent did not violate § 19(a)(1) and (5) of the Order, when, in reliance on the Assistant Secretary's Decision, it withdrew its recognition from IAM. For essentially the same reasons, the Administrative Law Judge found that the objection to the runoff election was without merit, and recommended that it be overruled, and appropriate certification be issued.

Contrary to the Administrative Law Judge, the Authority concludes that Respondent violated § 19(a)(1) and (5) of the Order by its actions herein. Further, while in agreement with the Administrative Law Judge that the objection to the runoff election be overruled, the Authority reaches this conclusion for different reasons.

With regard to the alleged unfair labor practice, it is the Authority's view that the matter is controlled by the decision of the Federal Labor Relations Council in Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, 4 FLRC 484, FLRC No. 74A-52 (1976). In the Yuma case, above, the Council addressed the question of an agency's obligation under the Executive Order, to an exclusive bargaining representative following a reorganization and during the pendency of a representation petition. In that regard, the Council stated:

> Therefore, following a reorganization and during the pendency of a representation petition, the obligation of an agency under the Order, with respect to personnel policies and practices and matters affecting the working conditions of employees who are covered by the petition, is not to maintain the status quo absent evidence of an overriding exigency, as held in the present case by the Assistant Secretary, but instead to maintain recognition and to adhere to terms of the prior agreement to the maximum extent possible until the representation matter is resolved.
>
> With respect to the precise nature of the obligation to maintain recognition and to adhere to the terms of the prior agreement to the maximum extent possible until the representation issues raised by the reorganization are resolved, this means that consistent with the circumstances of the reorganization and with the necessary functioning of the agency, an agency must continue to recognized the status of an incumbent labor organization as the exclusive representative of the employees; adhere to the terms of existing agreements; and otherwise maintain existing personnel policies and practices and matters affecting working conditions to the extent consistent with the bargaining obligation under section 11(a) of the Order. (Emphasis supplied.)

Applying these principles to the instant case, while the Assistant Secretary had determined that the previously existing unit was no longer appropriate, the representational matter was still pending. That is, the representation case which would resolve the issue of representation for the effected employees was still being processed. As stated in Yuma, during this period the agency is mandated under Executive Order requirements, to maintain recognition and to adhere to terms of the prior agreement to the maximum extent possible. However, in the instant case, as found by the Administrative Law Judge, the agency withdrew recognition and terminated the agreement, including refusing to process grievances under the Agreement. Under these circumstances, the Authority concludes that Respondent herein violated § 19(a)(1) and (5) of the Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under § 304 of Reorganization Plan Number 2 of 1978 (43 Fed. Reg. 36040 (1980)), which transfer of function is implemented by § 2400.2 of the Authority's rules and regulations (45 Fed. Reg. 3482, (1980)). The Authority continues to be responsible for the performance of these functions as provided in § 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to § 2400.2 of the Authority's rules and regulations and § 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, the Authority hereby adopts the Administrative Law Judge's findings, conclusions, and recommendations as modified below.

The International Association of Machinists and Aerospace Workers, AFL-CIO, Local 2581 (IAM) filed the subject complaint alleging that the U.S. Department of the Navy, Naval Air Engineering Center, Lakehurst, New Jersey (Respondent) violated § 19(a)(1) and (5) of the Order by its refusal to accord appropriate recognition to the IAM, by its unilaterial termination of the parties' negotiated agreement, and by its refusal to process grievances under that negotiated agreement. The IAM also alleged these same actions of the Respondent as the basis for an objection to the conduct of the runoff election held in the subject RA case pursuant to the Decision and Direction of Election of the Assistant Secretary in Case No. 32-05035(RA) [See U.S. Department of the Navy, Naval Engineering Center, Lakehurst, New Jersey, 8 A/SLMR 912, A/SLMR No. 1104 (1978)]. The other objections to the conduct of the runoff election filed by the IAM were overruled by the Regional Director, and the IAM failed to file a timely Request for Review as to those objections.

The Administrative Law Judge found that the Respondent did not violate § 19(a)(1) and (5) of the Order as alleged, and recommended that the complaint be dismissed. In addition, he found that this conduct did not interfere with a fair election and recommended that the objection be overruled. In regard to the unfair labor practice allegations, the Administrative Law Judge noted that in the Decision and Direction of Election in Case No. 32-05035(RA) above, the Assistant Secretary concluded that the June 6, 1977 reorganization created a new organizational entity, and fundamentally altered the character and scope of several exclusive recognized units, including the unit represented by the IAM, and that, as a result, such units were no longer appropriate for the purpose of exclusive recognition under the Order. Under these circumstances, the Administrative Law Judge found that the agency had no obligation to continue to accord exclusive recognition to any of the labor organizations as exclusive representative. Accordingly, he concluded that Respondent did not violate § 19(a)(1) and (5) of the Order, when, in reliance on the Assistant Secretary's Decision, it withdrew its recognition from IAM. For essentially the same reasons, the Administrative Law Judge found that the objection to the runoff election was without merit, and recommended that it be overruled, and appropriate certification be issued.

Contrary to the Administrative Law Judge, the Authority concludes that Respondent violated § 19(a)(1) and (5) of the Order by its actions herein. Further, while in agreement with the Administrative Law Judge that the objection to the runoff election be overruled, the Authority reaches this conclusion for different reasons.

With regard to the alleged unfair labor practice, it is the Authority's view that the matter is controlled by the decision of the Federal Labor Relations Council in Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, 4 FLRC 484, FLRC No. 74A-52 (1976). In the Yuma case, above, the Council addressed the question of an agency's obligation under the Executive Order, to an exclusive bargaining representative following a reorganization and during the pendency of a representation petition. In that regard, the Council stated:

> Therefore, following a reorganization and during the pendency of a representation petition, the obligation of an agency under the Order, with respect to personnel policies and practices and matters affecting the working conditions of employees who are covered by the petition, is not to maintain the status quo absent evidence of an overriding exigency, as held in the present case by the Assistant Secretary, but instead to maintain recognition and to adhere to terms of the prior agreement to the maximum extent possible until the representation matter is resolved.
>
> With respect to the precise nature of the obligation to maintain recognition and to adhere to the terms of the prior agreement to the maximum extent possible until the representation issues raised by the reorganization are resolved, this means that consistent with the circumstances of the reorganization and with the necessary functioning of the agency, an agency must continue to recognized the status of an incumbent labor organization as the exclusive representative of the employees; adhere to the terms of existing agreements; and otherwise maintain existing personnel policies and practices and matters affecting working conditions to the extent consistent with the bargaining obligation under section 11(a) of the Order. (Emphasis supplied.)

Applying these principles to the instant case, while the Assistant Secretary had determined that the previously existing unit was no longer appropriate, the representational matter was still pending. That is, the representation case which would resolve the issue of representation for the effected employees was still being processed. As stated in Yuma, during this period the agency is mandated under Executive Order requirements, to maintain recognition and to adhere to terms of the prior agreement to the maximum extent possible. However, in the instant case, as found by the Administrative Law Judge, the agency withdrew recognition and terminated the agreement, including refusing to process grievances under the Agreement. Under these circumstances, the Authority concludes that Respondent herein violated § 19(a)(1) and (5) of the Order.

However, with regard to the objection to the runoff election, the Authority concludes, in agreement with the Administrative Law Judge, that the objection should be overruled, although for different reasons. The record is clear that the basis for the objection is the same conduct which was the gravamen of the subject unfair labor practice complaint. It is equally clear from the record that the alleged conduct, which has already been determined to have constituted an unfair labor practice, occurred prior to the holding of the first election herein. In Report On A Ruling Of The Assistant Secretary, Report No. 50, it was held that:

> The critical period preceding a runoff election during which objectionable conduct of one party may be used as grounds for setting aside the runoff election begins running from the date of the first election. Conduct occurring prior to the first election, and not urged as objection to that election, may not be considered as grounds for setting aside the runoff election[.]

Under these circumstances the Authority concludes that the objection was untimely filed, and thus, should be overruled, and an appropriate certification should be issued by the Regional Director. */

ORDER

Pursuant to § 2400.2 of the Rules and Regulations of the Federal Labor Relations Authority and § 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the U.S. Department of the Navy, Naval Air Engineering Center, Lakehurst, New Jersey shall:

1. Cease and desist from:

(a) Refusing to accord appropriate recognition to a lawfully designated exclusive representative of its employees, after a reorganization and during the pendency of a representation matter, or refusing to adhere to the terms of its negotiated agreement with the exclusive representative, to the maximum extent possible, until the representation matter is resolved.

(b) In any like or related matter interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

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*/ In conformity with § 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

2. Take the following affirmative action in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) After a reorganization and during the pendency of a representation matter, maintain recognition of any exclusive representative of its employees, and adhere to the terms of any prior agreement, to the maximum extent possible, until the representation matter is resolved.

(b) If requested, process pursuant to the International Association of Machinists and Aerospace Workers, AFL-CIO, Local 2581 agreement those grievances rejected during the pendency of the representation case.

(c) Post at all facilities and installations of the U.S. Department of the Navy, Naval Air Engineering Center, Lakehurst, New Jersey, copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer of the U.S. Department of the Navy, Naval Air Engineering Center, Lakehurst, New Jersey, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Federal Labor Relations Authority in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the Objection to the Rerun Election in Case No. 32-05035(RA) be, and it hereby is, overruled, and the case be returned to the appropriate Regional Director for final action consistent with this Decision.

Issued, Washington, D.C., July 3, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to accord appropriate recognition to a lawfully designated exclusive representative of our employees after a reorganization and during the pendency of a representation matter, or refuse to adhere to the terms of our negotiated agreement with the exclusive representative, to the maximum extent possible, until the representation matter is resolved.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, if requested, process pursuant to the International Association of Machinists and Aerospace Workers, AFL-CIO, Local 2581 agreement those grievances rejected during the pendency of the representation case.

WE WILL, if requested by the current exclusive representative, reinstate the grievances which were unlawfully rejected by the Naval Air Engineering Center in Case No. 32-05681(CA) after September 22, 1978, and process such grievances pursuant to the terms of the negotiated agreement in effect at the time of the rejection.

_____
(Agency or Activity)

Dated_____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority whose address is: Room 241, 26 Federal Plaza, New York, New York 10007, and whose telephone number is: (212) 264-4934.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of

U.S. DEPARTMENT OF THE NAVY
NAVAL AIR ENGINEERING CENTER
LAKEHURST, NEW JERSEY

Activity-Petitioner

and

Case No. 32-05035 (RA)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 23/284, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, LOCAL 2581

Intervenors

U.S. DEPARTMENT OF THE NAVY
NAVAL AIR ENGINEERING CENTER
LAKEHURST, NEW JERSEY

Respondent

and

Case No. 32-05681 (CA)

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, LOCAL 2581

Complainant

Joseph Dallas
Senior Labor Relations Advisor
Naval Civilian Personnel Command
Northern Field Division, Navy Base
Philadelphia, PA 19112

For the Petitioner/Respondent

Peter Petrone
Special Representative
International Association of Machinists
and Aerospace Workers
35 Genesee Lane
Willingboro, New Jersey 08046

For the Complainant

Bruce Heppen, Esquire
1016 16th Street, N.W.
Washington, DC 20036
For the Intervenor, National
Federation of Federal Employees

Before: FRANCIS E. DOWD
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This is a proceeding under Executive Order 11491, as amended (hereinafter referred to as the Order). On June 5, 1979, Mr. Ronald T. Smith, Director of the New York Region of the Federal Labor Relations Authority issued a Notice of Hearing in which he consolidated for purpose of hearing and decision an unfair labor practice complaint alleging a violation of Section 19(a)(1) and (5) of the Order and an Objection to a Runoff Election encompassing the same facts which gave rise to the complaint.

Essentially the questions to be resolved are whether, in the circumstances of this case, the Respondent's unilateral termination of an unexpired collective bargaining agreement and its refusal to process grievances thereunder constitutes an unfair labor practice, and whether such conduct interfered with the Runoff election so as to warrant setting the election results aside.

At the hearing on October 23, 1979 in Lakehurst, New Jersey, the Respondent and Complainant were both represented. The National Federation of Federal Employees (hereinafter referred to as NFFE), an intervenor in Case No. 32-05035 (RA) and winner of the Runoff election, was also represented.

At the hearing, all parties were afforded full opportunity to be heard, adduce evidence, examine and cross-examine witnesses, and argue orally. The Respondent argued orally but did not file a brief. The Complainant and NFFE filed briefs which have been duly considered.

Upon consideration of the entire record in this case, including the stipulations of the parties, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence presented at the hearing, I make the following findings, conclusions, and recommendations.

Findings of Fact

1. On August 23, 1978, the Assistant Secretary of Labor for Labor-Management Relations issued a Decision, Order, and Direction of Election in Case No. 32-05035 (RA). That decision (A/SLMR No. 1104) contains certain background information, and findings and conclusions which deserve mention at this point.

a. The RA petition sought a determination with respect to the effect of a 1977 reorganization on the continued appropriateness of six out of eight exclusively recognized units represented by six unions. Not at issue was the appropriateness of a unit of professional employees and a unit of firefighters.

b. The Assistant Secretary found, contrary to the Activity, that two of the six units in dispute maintained their separate identity and were not materially affected by the reorganization. The petition was dismissed as to those two units. With respect to the remaining four units, however, the Assistant Secretary concluded that the employees shared a common mission, common overall supervision engaged in a highly organized and integrated work function, and enjoyed common personnel and labor relations policies and practices. Accordingly, he found they constituted an appropriate residual unit of all unrepresented employees and directed an election. The pertinent findings of the Assistant Secretary which formed the basis for his findings and conclusions are quoted here at length:

> With regard to the impact of the reorganization on these four exclusively recognized units, as noted above, the evidence establishes that the NAS and NATF were disestablished, and that the unit employees involved were physically and/or administratively transferred to the various divisions within the Activity where they were commingled with other employees of the Activity. As a consequence, employees of each of the three former commands now work along side each other, sharing common supervision, generally similar job classifications and duties, and enjoy a high degree of integration of operations with other employees in their own and in other divisions. The record also reveals that the reorganization of the Activity resulted in significant changes in, and additions to, the mission and organizational structure of the Activity. Thus, the Activity's mission was altered and enlarged so as to encompass the missions of the former NATF and NAS, the organizational structure of the Activity was significantly altered, refined and enlarged, and employees of the Activity and the former NATF and NAS were thoroughly integrated throughout the various organizational components of the Activity.
>
> Under these circumstances, I find that the June 6, 1977, reorganization, in effect, created a new organizational entity, and effected a substantial change in both the scope and character of each of the exclusively recognized units represented by the IAM, the MTC, and NFFE Locals 23 and 284 which

were not functional units within the meaning of Section 10(b) of the Order. Accordingly, I find that the reorganization rendered these exclusively recognized units inappropriate for the purpose of exclusive recognition under the Order.

2. Respondent and IAM have a history of collective bargaining at the location concerned herein and were party to a collective bargaining agreement with a term of December 9, 1976 to December 9, 1978.

3. On September 22, 1978, a meeting was held at Building 200, Naval Air Engineering Center, Lakehurst, New Jersey with representatives of Respondent and IAM in attendance. Ken Robinson, Labor Relations Officer for Respondent; and Richard Burke, President Local 2581 IAM, Robert Fauntlerey and Peter Petrone, Grand Lodge Representatives, IAM, and John Meese, National Coordinator, Government Employees Department, IAM were present. At this meeting Mr. Robinson advised the IAM that, based upon the Assistant Secretary's decision in A/SLMR No. 1104, the units of recognition had been terminated and, therefore, the contract between Respondent and IAM was no longer appropriate or valid. The decision applied to all four bargaining units, not IAM alone. I conclude that the Respondent, by such action, withdrew recognition from the IAM as exclusive representative of any of its employees.

4. A charge letter, dated September 22, 1978, was timely filed with Respondent by IAM, pursuant to Executive Order 11491, as amended, charging the improper termination of its collective bargaining agreement by Respondent.

5. Subsequent to the September 22 announcement, IAM filed certain grievances with Respondent pursuant to the grievance procedure of the collective bargaining agreement.

6. By memoranda dated October 12, 1978 and November 6, 1968, W.R. Ledder, Public Works Officer, acting as an agent of Respondent, responded to said grievances by expressing Respondent's position that the collective bargaining agreement was no longer recognized by Respondent, and that IAM was no longer the exclusive representative of the unit employees based upon the Assistant Secretary's decision in A/SLMR No. 1104 that the units no longer existed. Thus, grievances filed by IAM were not processed by the Activity under the contract. However, the agency grievance procedure was available.

7. IAM, alleging that it had not received a timely filed decision from Respondent on its charge, filed a timely complaint on November 1, 1978 with the U.S. Department of Labor alleging that Respondent had unilaterally terminated its collective bargaining agreement on or after August 23, 1978, in violation of Section 19(a)(1) and (5) of the Order. The complaint was filed on the same date as the tally of ballots was issued with respect to the first election, the results of which were inconclusive.

8. The Regional Director's Report and Findings on Objections was stipulated by the parties and contains the following statements:

> "On November 20, 1978, a pre-election meeting was held to prepare for a runoff election. During the course of this meeting, the IAM argued that the ULP should be decided before proceeding to the runoff election. At the conclusion of the meeting, the IAM, NFFE, and Activity signed an election agreement with the date of election left undecided. IAM signed the agreement under protest. On November 21, 1978, the Area Administrator of the LMSA's Newark Area Office decided that the runoff election would be held on December 12, 1978. This was incorporated in the election agreement which was transmitted by LMSA to all of the interested parties by letter dated November 22, 1978.
>
> By telegram dated November 17, 1978, the IAM, by Counsel, requested that the Assistant Secretary overrule the Regional Administrator and delay the election pending the resolution of the unfair labor practice complaint. It argued that the charges could affect the outcome of the election. By letter dated November 27, 1978, the Assistant Secretary denied IAM's request stating that the unfair labor practice did not block the scheduled runoff and that there was no provision in the Assistant Secretary's Regulations for overturning the Regional Administrator's decision on such a matter."

9. There were 1097 eligible voters in the runoff election. The Tally of Ballots shows that 330 votes were cast for NFFE and 235 votes for IAM. Two challenged ballots were not sufficient to affect the results of the election. Altogether 567 valid votes were counted plus challenged ballots.

10. Timely objections to conduct affecting the results of the election were filed on December 18, 1978 by IAM alleging, inter alia, that Respondent's alleged termination of its collective bargaining agreement, also the subject of its complaint in Case No. 32-05681 (CA), constituted objectionable conduct.

11. Following an investigation of said objections, pursuant to the Transition Rules and Regulations of the Federal Labor Relations Authority, the Regional Director for the New York Region issued a Report and Findings On Objections on June 5, 1979 which was duly served on all parties to this proceeding. The Regional Director concluded that IAM's Objection No. 2, the allegation that Respondent improperly terminated the collective bargaining agreement, raised a relevant issue of fact

which may have affected the results of the runoff election. The Regional Director also concluded that the remaining objections were without merit and were overruled. No request for review of the Regional Director's Report has been filed by any party and those objections which were overruled are not, therefore, a part of this proceeding.

12. As previously noted, on June 5, 1979 the Regional Director issued a Consolidated Notice of Hearing on Objections and Complaint Alleging Violations of Section 19 of Executive Order 11491, as Amended, consolidating Cases Nos. 32-05681 (CA) and 32-05035 (RA) for hearing.

13. Activity's Conduct During Pendency of RA Petition and Prior To Assistant Secretary's Decision. Joint Exhibit No. 4 is a memorandum dated March 23, 1978 from the Commanding Officer and entitled "Labor Relations Policy at NAEC, Pending Department of Labor Decision." This document notes that the pending RA petition is based upon a "good faith doubt as to what Union or Unions represent various employees at NAEC" as a result of the Phase II Command consolidation at Lakehurst. In pertinent part, this document states as follows:

> For the NAEC management to be consistent in handling further representation questions raised by these Unions, the following policy will apply.... The employer will, to the extent possible, honor the relationships with the organizations which had exclusive recognition from the three commands in existence prior to the Phase II of Command consolidation of 5 June 1977. The adherance to all provisions of the agreements that these organizations have entered into will be extremely difficult. If fairness is to prevail, while the parties are awaiting a Unit determination decision from the Department of Labor, the following principles should be adhered to by supervisors and managers during this period:
>
> a. The Employer will take each labor management situation and consider it on a case by case basis to determine if any conflict exists in unit determination.
>
> b. The employer will to the best of our ability honor contract provisions where it can determine no conflict of interest between or among two or more labor organizations.
>
> c. Whenever it is determined that the interest of more than one Union is involved, the employer will consult with all exclusively recognized Unions prior to formulating its position concerning the issue or issues in conflict.

d. Supervisors and managers should continue to resolve problems and grievances at the lowest level possible. Whenever there is doubt in a manager's/supervisor's mind as to whether a conflict exists between and/or among two or more labor organizations, the problem or grievance will be referred to the Labor Relations Office, Civilian Personnel Department (Code 123), for consultation as provided in 3.c above, prior to taking any action in the issue.

e. In determining whether a conflict exists, supervisors and managers should use the Unit definitions from existing agreements as a guide.

14. Communication to Employees of the Activity's Refusal to Process Grievances. Three Union Presidents testified with respect to the reaction of their respective memberships to the refusal of the Activity to permit use of the negotiated grievance procedures.

a. Richard W. Burke, President of IAM Local 2581 testified that he filed two grievances on October 11 and November 2, 1978 1/, that Respondent refused to process them, that these facts were communicated to IAM members who were "ticked off" when they heard about it because it meant taxation without representation. Burke testified that "probably all" his members heard about this and that support for his Local "dwindled." Burks's obviously self-serving testimony stands uncontradicted but also uncorroborated.

b. Albert Tart, President of NFFE Local 284 testified that he was still using the grievance procedure of an expired contract 2/ until the September 22 announcement by the Activity. Thereafter, he utilized the agency grievance procedure and his membership, like that of IAM, was unhappy because they did not like the Agency procedure and wanted to be represented by their Union.

1/ Since both grievances were filed after the date of the charge (September 22, 1978), and noting that the second grievance was not filed until the day after the complaint was filed (November 1, 1978), it seems clear that the charge and complaint are based primarily on the unilateral termination of the contract.

2/ Local 284's contract expired in May 1978 but, according to Tart, it was being "held in abeyance" during the period of reorganization and was supposed "to be kept in effect until the Department of Labor's Decision on the RA Petition."

c. Charles Fox, President of NFFE Local 23 testified that his membership was informed that the Union could not represent them through the negotiated grievance procedure and that the members were unhappy to be paying dues and not receiving any representation.

d. Charles Fox credibly testified that the inability of the IAM to file grievances was not an issue in the compaign. On the contrary, one of the IAM flyers during the compaign placed substantial emphasis on the fact that IAM filed a large number of grievances, thus attempting to demonstrate that they were a militant organization.

e. Although IAM President Burke testified that some members renewed their dues authorizations he stated that he did not know when this occurred (Tr. 36, 37). Therefore, I accord no weight to this vague testimony.

f. I also conclude that the evidence is insufficient to establish that bargaining unit employees other than the Union members of IAM or NFFE referred to above had any knowledge about the inability of the IAM or NFFE to process grievances or the fact that the Activity had unilaterally terminated the IAM agreement.

Contentions of the Parties

The Complainant contends that Respondent violated Section 19(a)(1) and (5) of the Order by "refusing to abide by the Negotiated Agreement and the further refusal to process grievances thereunder." It is also asserted that the Activity should not have withdrawn its exclusive recognition of the IAM. The election should be set aside, it contends, because (1) the Activity's refusal to process grievances, coupled with (2) the Department of Labor's refusal to issue a complaint, showed the IAM to be a passive organization having little clout in contrast with its prior representation as a militant union.

NFFE agrees with IAM that the Activity violated the Order by terminating the contract at the time that it did. NFFE argues that when a question concerning representation is raised and an election ordered as a result of that question, the duty to honor the existing agreement continues until the election is completed with a certification. NFFE further contends, however, that in this particular case the violation applied equally to IAM and NFFE and therefore had no discernible effect on the outcome of the election. In this regard, NFFE argues that IAM has not sustained its burden of proving all matters alleged in its objections by a preponderance of the evidence. NFFE argues (1) that the unfair labor practice had no effect on the election and (2) that, in any event, the Activity's conduct was like the imposition of a general rule (i.e. all unions are prohibited from using negotiated grievance procedures), which rule was imposed in a nondiscriminatory fashion.

The Respondent defends its action by relying on the Assistant Secretary's decision on the RA petition which held that the four existing

units were no longer appropriate for exclusive recognition. The Respondent asserts that since the labor organization did not have exclusive recognition for the new unit, it was not entitled to negotiate or to have a labor agreement. Further, the Respondent argues that upon termination of bargaining units by the Assistant Secretary, the employer would be in violation of the Order if it indeed permitted or allowed former Unions or bargaining units in any way to have a continuance of assistance. Rather, the Respondent points out that from August 23 until the Runoff election was held, its policy was to treat all parties alike and not to discriminate or show preference to one union at the expense of another.

Discussion and Conclusions of Law

1. The Withdrawal of Recognition

Section 19(a)(5) of the Order states that "Agency management shall not refuse to accord appropriate recognition to a labor organization qualified for such recognition" (emphasis supplied). Moreover, it has been held that "so long as the labor organization involved remains qualified under provisions of the Order," it is entitled to continued recognition. 3/ In my opinion, the Assistant Secretary's decision of August 23, 1978 extinguished IAM's entitlement to continued recognition.

In his decision, the Assistant Secretary concluded that the June 6, 1977 reorganization (1) created a new organizational entity and thus (2) rendered IAM's exclusive recognized unit "inappropriate for the purpose of exclusive recognition under the Order." It is well established that such a determination means that an Agency has no obligation to continue to recognize a labor organization as exclusive representative. 4/ Accordingly, I conclude that Respondent did not violate Sections 19(a)(1) and (5) when, in reliance on the Assistant Secretary's decision, it withdrew recognition from the IAM. 5/

3/ Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, 4 A/SLMR 163, at p. 167, 6 A/SLMR 104, A/SLMR No. 360.

4/ Defense Logistics Agency, 7 A/SLMR 980, A/SLMR No. 932, Defense Contract Audit Agency, 6 A/SLMR 251, A/SLMR No. 657; U.S. Department of Transportation, 5 A/SLMR 92, A/SLMR No. 482; Idaho Panhandle National Forests, 4 A/SLMR 351, A/SLMR No. 394.

5/ Cf. Army and Air Force Exchange Service, South Texas Area Exchange, Lackland Air Force Base, Texas, 6 A/SLMR 316, A/SLMR No. 669; United States Department of Defense, Department of the Navy, Naval Air Reserve Training Unit, Memphis, Tennessee, 1 A/SLMR 490, A/SLMR No. 106, a case where the unit remained appropriate after the recognition, there was no evidence of loss of majority status, and the Agency did not file a representation petition.

2. The Unilateral Termination of the Negotiated Agreement, including the Refusal to Process Grievances Thereunder

It has been previously held that matters related to an alleged improper refusal to accord appropriate recognition such as the termination of a negotiated agreement (as in this case) and the revocation of dues withholding are inseparable from the theory of violation discussed with respect to a withdrawal of recognition. 6/ Accordingly, since I have found no violation of Sections 19(a)(1) and (5) in the Agency's withdrawal of recognition, I also find no violation of Sections 19(a)(1) and (5) in the unilateral termination of the negotiated agreement and the refusal to process grievances.

However, in view of the issues posed by the Regional Director in his Report on Objections as well as NFFE's argument that Respondent was obliged to honor the negotiated agreement until the election was conducted and a certification issued, I will discuss this issue in the light of another line of precedent decisions. It has been held by the Assistant Secretary as follows:

> "In my view, absent evidence ... of an overriding exigency, which would require immediate changes in personnel policies and practices and matters affecting its employees' working conditions, during the pendency of an RA petition, the petitioning agency has an obligation to remain neutral and maintain the status quo with respect to the personnel policies and practice and matters affecting working conditions of employees who are covered by its RA petition." 7/

Further, the Federal Labor Relations Council has stated that during a reorganization

> "existing recognition agreements, and dues withholding arrangements should be honored to the maximum extent possible consistent with the rights of the parties involved pending final determination on issues raised by reorganizations" (emphasis supplied). 8/

6/ Ibid.

7/ Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, 4 A/SLMR 407, 409, A/SLMR No. 401.

8/ Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491, as amended, February 6, 1975.

In the foregoing Report which accompanied Executive Order 11838, the Council decided to adopt a case-by-case approach in determining the status of negotiated agreements during reorganizations. One of its reasons for rejecting the adoption of a fixed special policy was its concern that "the special policies suggested would not appear to be susceptible to equitable application to all situations where reorganizations result in changes in the assignment of personnel and affect existing bargaining relationships." 9/

In applying these principles to the facts of this case, I reach the following conclusions:

a. During the period commencing with the filing of the RA petition and ending with the September 22 meeting which followed the Assistant Secretary's final determination 10/ the Respondent properly remained neutral and properly maintained the status quo. Stated differently, Respondent honored its existing recognition and agreements "to the maximum extent possible." 11/ During this period the question of representation primarily concerned the issue of "appropriate unit" resulting from the reorganization.

b. As a result of the Assistant Secretary's Direction of Election, an election campaign period commenced during which the Activity had an obligation to maintain strict neutrality and avoid doing anything which would make itself vulnerable to a Section 19(a)(3) charge of unlawful assistance or to an allegation that its conduct interfered with an election. 12/

9/ As previously noted, the Assistant Secretary found that "unit employees involved were physically and/or administratively transferred to the various divisions within the Activity where they were commingled with other employees of the Activity." Moreover, the "disappearance" of the previously recognized units resulted in a termination of the existing bargaining relationships.

10/ Apparently no appeal to the Council was filed and, therefore, the Assistant Secretary's decision was indeed a "final determination." I make no finding on what the situation would have been if an appeal had been filed.

11/ For a discussion of the phrase "to the maximum extent possible" see Judge William Devaney's decision in Department of Energy, Case No. 22-09034 (CA), May 1, 1979, presently on appeal to the Authority.

12/ The obligation to maintain strict neutrality would be even more obvious if a rival "outside" union were seeking to represent the employees in the newly established appropriate unit for then the Activity would have to be particularly careful not to do anything which reasonably could be interpreted as favoring or giving advantage to an incumbent "inside" union.

Much has been written in private sector cases about an employer's duty to maintain strict neutrality. 13/ The present case presents an interesting issue as to whether strict neutrality can be demonstrated best by (1) maintaining the status quo and continuing to process grievances, or (2) changing the status quo by refusing to process grievances.

In my opinion, the obligation to maintain strict neutrality is not a lawful reason - in every factual situation - for automatically terminating or ceasing to give effect to an existing negotiated agreement. The lawfulness of such action by an Activity depends upon the facts of each case. Here, I conclude that the Order was not violated because the Activity acted in a manner consistent with the Assistant Secretary's decision. 14/ Thus, the "final determination" of the Assistant Secretary terminated the Activity's bargaining obligation when he found that the reorganization rendered the exclusively recognized units inappropriate for the purpose of exclusive recognition. Accordingly, I find and conclude that the Activity did not violate Section 19(a)(1) and (5) of the Order by terminating the contract and refusing to process grievances thereunder.

3. The Objection to the Runoff Election

Section 2422.20(h) of the applicable regulations specifies that "the party filing the objection shall have the burden of proving all matters alleged in its objections by a preponderance of the evidence." I have carefully considered all the evidence adduced at the hearing and I conclude that the IAM, objecting party herein, has not sustained its burden of proof. In my opinion, there is insufficient evidence to establish that the Activity's conduct - termination of the contract and refusal to process grievances - may have affected the election results, and thus be the basis for setting aside such election. In addition, I have concluded that the Activity's conduct was proper and did not constitute an unfair labor practice. 15/

13/ Southern Conference of Teamsters v. Red Ball Motor Treegut, Inc., 374 F.2d 932 (and cases cited therein). See also St. Louis Independent Packing Company v. N.L.R.B., 291 F.2d 700 (1961); Shea Chemical Corporation, 121 NLRB 1027 (1958).

14/ The complaint alleges that Respondent's decision and action was based upon advice received from the Senior Compliance Officer, Newark Office, A/SLMR. Such advice, if given, would at best be the opinion of an individual employee; it would not be binding on the Assistant Secretary at that time or on the Authority now; and it would not be a valid defense if asserted by the Respondent.

15/ In these circumstances, I find it unnecessary to discuss NFEE's argument that even if the Activity violated Section 19(a)(1) and (5), the election would not have to be set aside if it can be shown that "the violation applied equally to IAM and NFEE and therefore had no discernible effect on the outcome of the election."

Recommendation

Having concluded that the Respondent did not violate Sections 19(a)(1) and (5) of the Order, I recommend that the complaint be dismissed.

Having concluded that the Respondent did not engage in conduct which may have affected the results of the runoff election, I recommend that Objection No. 2 be overruled and that a certification of representative be issued by the Regional Director.

FRANCIS E. DOWD
Administrative Law Judge

Dated: January 10, 1980
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2578

(Union)

and

Case No. 0-NG-164

GENERAL SERVICES ADMINISTRATION,
NATIONAL ARCHIVES AND RECORDS
SERVICE, WASHINGTON, D.C.

(Activity)

DECISION ON NEGOTIABILITY APPEAL

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 et seq.).

During contract negotiations between the parties to renew their expiring basic agreement, the union submitted the following proposal which pertains to the development of the agency's plan for implementing the Federal Equal Opportunity Recruitment Program (FEORP) as provided in 5 U.S.C. § 7201 1/:

1/ 5 U.S.C. § 7201 provides in pertinent part:

§ 7201. Antidiscrimination policy; minority recruitment program

. . . . . .

(b) It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin. The President shall use his existing authority to carry out this policy.

(c) Not later than 180 days after the date of the enactment of the Civil Service Reform Act of 1978, the Office of Personnel Management shall, by regulation, implement a minority recruitment program which shall provide, to the maximum extent practicable --

(1) That each Executive agency conduct a continuing program for the recruitment of members of minorities for positions in the agency to carry out the anti-discrimination policy set forth in subsection (b) in a manner designed to eliminate underrepresentation of minorities in the various categories of civil service employment within the Federal service, with special efforts directed at recruiting in minority communities, in educational institutions, and from other sources from which minorities can be recruited;. . . .

Union Proposal

> Those sections of this contract that affect promotion, selection, and retention opportunities for women and minorities (e.g., promotion, training, evaluation, career development, and discipline) constitute the agency's program under 5 U.S.C. 7201(c) for the elimination of underrepresentation of women or minorities at any grade and occupational group as quickly as possible.

The agency alleged that the proposal conflicts with the Statute and is inconsistent with regulations implementing the FEORP. The union argued principally that the proposal is within the mandatory scope of bargaining as it concerns a condition of employment.

The Federal Equal Opportunity Recruitment Program is designed to insure equal employment opportunity by eliminating "underrepresentation" of minority groups within the Federal civil service through a continuing program of minority recruitment.[2/] Executive agencies which fall within the coverage of the FEORP are required to maintain equal opportunity recruitment plans covering positions at various organizational levels and geographic locations within the agency. While such plans are monitored by or receive assistance from the Equal Employment Opportunity Commission and the Office of Personnel Management, agencies have wide descretion in establishing and administering them.

As set forth above, the union's proposal in the instant case in effect seeks to negotiate, as applicable to bargaining unit employees, the contents of the activity's plan to eliminate underrepresentation of women and minorities. That is, the proposal in the instant case provides, in essence, that certain other sections of the parties' agreement will constitute the agency's FEORP plan. These other contract provisions are not presently before the Authority nor is there any indication as to their specific content. In fact, the record does not disclose whether these contract provisions referred to by the disputed proposal have been finalized or whether they are still being negotiated by the parties. In any event, given the fact that the proposal incorporates by reference other provisions which may in and of themselves raise questions regarding

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2/ "Underrepresentation" is defined in OPM's implementing regulations, 5 C.F.R. § 720.202(a)(1979), as:

> [A] situation in which the number of women or members of a minority group within a category of civil service employment constitutes a lower percentage of the total number of employees within the employment category than the percentage women or the minority constitutes within the civilian labor force of the United States. . . .

their consistency with laws, regulations or the Statute, the Authority finds the instant proposal is not specifically delineated to form the basis of a negotiability determination. In this regard, it is well established that a petition for review of a negotiability issue which does not present a proposal sufficiently specific and delimited in form and content as to permit the Authority to render a negotiability decision thereon does not meet the conditions for review set forth in section 7117 of the Statute and section 2424.1 of the Authority's regulations. Association of Civilian Technicians, Alabama ACT and State of Alabama National Guard, Case No. 0-NG-27, 2 FLRA No. 39 (Dec. 28, 1979) Report No. 25.

In the instant case, the proposal is not sufficiently specific and delimited in form and content at this time to permit the Authority to render a negotiability determination. Accordingly, and apart from other considerations, the appeal is hereby dismissed.

Issued, Washington, D.C., June 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

IMMIGRATION AND NATURALIZATION SERVICE,
DEPARTMENT OF JUSTICE

Activity

and

Case No. 0-AR-81

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL No. 1656

Union

ORDER GRANTING REQUEST FOR RECONSIDERATION

On April 21, 1980, as supplemented by an additional filing on May 15, 1980, the American Federation of Government Employees, AFL-CIO (the union) filed a request with the Authority asking, inter alia, that the Authority reconsider its decision of April 9, 1980, 3 FLRA No. 5, whereby the union's exceptions to the arbitrator's award in the instant case were dismissed as untimely filed. The Department of Justice, Immigration and Naturalization Service (the activity), filed an opposition to the union's exceptions, but has not opposed the union's request for reconsideration.

The arbitrator's award with respect to which the subject exceptions were filed, as included in the union's exceptions, was dated February 11, 1980. Therefore, under section 2425.1(b) of the Authority's rules and regulations (5 C.F.R. § 2425.1(b) (1980)), any exceptions to the subject arbitrator's award were due in the office of the Authority by the close of business on March 11, 1980. However, as indicated in the Authority's April 9, 1980, decision in the instant case, the union's exceptions appeared to have been filed with the Authority on March 12, 1980. Accordingly, the union's exceptions were dismissed as untimely filed.

Based upon documentation provided by the union in its request for reconsideration (a copy of a signed U.S. Postal Service certified mail receipt indicating that the exceptions were received in the 1900 E Street, NW. building mailroom on March 11, 1980), it now appears that the union's exceptions should be considered as timely under the Authority's regulations.

Accordingly, the union's request for reconsideration of the Authority's April 9, 1980, decision in the instant case has been granted, and that decision is hereby rescinded and the case reopened.

Issued, Washington, D.C., June 27, 1980.

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

3 FLRA No. 86

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

LOCAL 2532, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Union

and

Case No. 0-AR-64

UNITED STATES SMALL BUSINESS
ADMINISTRATION, CENTRAL OFFICE

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Robert Bennett Lubic filed by the union under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7122(a)).

According to the arbitrator, the dispute arose when an employee filed a grievance under the parties' negotiated grievance procedure alleging preselection in a promotion action in violation of the parties' collective bargaining agreement. The grievant sought promotion to the position involved as relief for the alleged violation. The activity, in denying the grievance, did not respond within the time limits prescribed in the negotiated grievance procedure, Article 22, Section I.

Thereafter, because of the activity's failure to respond within the contractual time limits, the union filed another grievance contending that the promotion sought by the grievant should be immediately awarded based on the language of Article 22, Section J of the contract which reads in pertinent part:

> . . .those official(s) who fail to meet the prescribed time limits to reply, cause the decision to be in favor of the aggrieved, and the relief sought by the aggrieved immediately awarded, provided the relief requested does not extend beyond the authority of the designated official to award, or any action prohibited by law or regulation.

The matter was ultimately submitted to arbitration.

The issue was stated by the arbitrator as follows:

> Whether section J of Article 22 of the General (Collective Bargaining) Agreement of the parties . . . requires retroactive promotion of an employee together with an award of back pay and counsel fees due to the untimely response by . . . [the agency] . . . to his grievance concerning the alleged failure of that Agency to promote him?

In the opinion accompanying his award, the arbitrator found that the last sentence of Article 22, Section J, along with various requirements of the Statute, and Executive Order 11491, as amended, mandated the application of Chapter 335 of the Federal Personnel Manual (FPM) entitled Promotion and Internal Placement. Further, he found that only the issue of untimely reply to the grievance was before him and not the issue of preselection raised in the employee's first grievance. Based upon his examination of this Chapter of the FPM, which requires promotions to be based on merit and contains no exception to that rule for an untimely reply to a grievance, he concluded that, "Article 22, Section J, by itself cannot mandate the automatic promotion of . . . [the grievant] . . . for untimely reply by the Agency to his grievance, based upon preselection, in contradiction to the requirements of the Federal Personnel Manual."

With respect to the union's contentions that a decision of the Comptroller General supported its theory that the untimely reply by the Activity must result in the retroactive promotion of the employee, the arbitrator noted that the inclusion in an agreement of language such as that found in the disputed provision does not make that provision mandatory. He concluded, in this regard:

> [T]here is nothing in Section J of Article 22 of the General Agreement requiring promotion due to an untimely response by the . . . [agency] . . . to a grievance if such action be "prohibited by law or regulation", and as stated above, a non-meritorious retroactive promotion in the present matter is specifically barred by the Federal Personnel Manual. Thus, Article 22, Section J, of the General Agreement is discretionary in respect to that portion which would be applicable to the promotion. . .

Therefore, the arbitrator found that he had no alternative other than to render an award in favor of the agency.

The union filed exceptions to the arbitrator's award under section 7122(a) of the Federal Service Labor-Management Relations Statute1/ and part 2425 of the Authority's interim rules and regulations, 44 F. R. 44766. The agency filed an opposition.

The question before the Authority is whether, on the basis of the union's two exceptions, the arbitrator's award is deficient because it is contrary to any law, rule, or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its first exception the union asserts the award is contrary to regulation. Specifically, the union alleges the award violates Federal merit promotion policy as contained in the FPM, Chapter 335. The union asserts the arbitrator violated the FPM by failing to apply the sections of Chapter 335 dealing with procedural violations such as preselection, which would serve as a basis for a retroactive promotion, and by his failure to consider alternative remedies in this regard.

On its face, the union's exception that the award is contrary to regulation states a ground on which the Authority will find an award deficient under section 7122(a) of the Statute. American Federation of Government Employees, AFL-CIO, Local 2094 and Veterans Administration Hospital, Case No. 0-AR-24, 2 FLRA No. 88 (Feb. 22, 1980). However, in this case there is no basis for a finding that the award is deficient. Thus, the union has not demonstrated the arbitrator's award, which holds that a retroactive promotion may not be awarded based on an untimely response to a grievance, is contrary to the cited provisions of the FPM. In this regard, the provisions of the FPM cited by the union relate to procedural violations in promotion actions. However, the arbitrator specifically refused to make a finding as to whether or not there has been a violation with respect to the promotion action, stating the issue was not before him. Accordingly, the union's first exception provides no basis for finding the award deficient under 5 U.S.C. §7122(a) and section 2425.3 of the Authority's interim rules and regulations.

1/ 5 U.S.C. §7122(a) provides:

> (a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient--
>
> (1) because it is contrary to any law, rule, or regulation; or
>
> (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;
>
> the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable law, rules, or regulations.

In its second exception, the union alleges the arbitrator "erred in misconstruing applicable Comptroller General decisions interpreting the Back Pay Act of 1966 . . . and its implementing regulations . . . ." In support of this exception the union cites certain Comptroller General decisions concerning retroactive promotions and back pay and asserts that the contract provision in question contains a "nondiscretionary provision" within the meaning of the Back Pay Act regulations which thereby mandates the award sought by the grievant because of the untimely reply to his grievance.2/

The thrust of the union's contentions in support of its second exception is that Article 22, Section J contains a nondiscretionary provision which would mandate the promotion sought by the grievant in this case. However, with reference to both the Comptroller General decisions cited by the Union and the Back Pay Act, the arbitrator found Article 22, Section J did not contain a nondiscretionary provision with respect to the grievant's promotion. Thus, the union is disagreeing with the arbitrator's interpretation and application of the collective bargaining provisions in question. It is a well established principle that the arbitrator's construction of the contract is not subject to review. United States Army Missile Materiel Readiness Command (USAMIRCOM) and American Federation of Government Employees, Local 1858, AFL-CIO, Case No. 0-AR-7, 2 FLRA No. 60 (Jan. 17, 1980). See Federal Aviation Science and Technological Association and Federal Aviation Administration, Albuquerque Airway Facilities Sector, Southwest Region, Case No. 0-AR-20, 2 FLRA No. 85 (Feb. 21, 1980), and the private sector cases cited therein. Therefore, the second exception provides no basis for finding the award deficient under 5 U.S.C. § 7122(a) and section 2425.3 of the Authority's interim rules and regulations.

For the foregoing reasons, and pursuant to section 2425.4 of the Authority's interim rules and regulations, we hereby sustain the arbitrator's award.

Issued, Washington, D.C., June 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ The definition of a nondiscretionary provision is found under 5 C.F.R. Section 550-802 (d) and reads as follows:

> "Non discretionary Provision" means any provision of law, Executive order, regulation, personnel policy issued by an agency, or a collective bargaining agreement that requires an agency to take a prescribed action under stated conditions or criteria.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
NATIONAL BORDER PATROL
COUNCIL

Union

and

Case No. 0-AR-49

U.S. IMMIGRATION AND
NATURALIZATION SERVICE,
SOUTHERN REGION, DALLAS,
TEXAS

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Harold H. Leeper filed by the union under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7122(a)).

According to the arbitrator, the dispute in this matter arose when the agency unilaterally terminated a consultation session after two days. The union filed a grievance alleging a violation of the collective bargaining agreement. Therein, the union asserted that management, by limiting the consulting meeting to two days, left nineteen agenda items undiscussed. The union asserted that the contract provides for three days of consultation and that therefore it was a contract violation to curtail the meeting after two days. The parties were unable to resolve the dispute and it was ultimately submitted to arbitration.

The issue addressed by the arbitrator was whether "the Southern Region violate[d] the collective bargaining agreement when it unilaterally terminated a consultation session after two days of discussion." The arbitrator found the agreement to be clear and unambiguous. Consequently, he concluded:

> Article 3, Paragraph D provides that "Regional meetings will not exceed three days each." It does not state, as the union urges, that Regional meetings will continue for three full days, unless shortening the meeting is agreed to by both parties. Therein lies the gist of this grievance.

In this light, the arbitrator held that the contract placed a limitation of three days, not a requirement of three days. He found that "no construction or interpretation" of the contract would support the union's contentions and he, therefore, denied the grievance.

The union filed exceptions to the arbitrator's award under section 7122(a) of the Federal Service Labor-Management Relations Statute*/ and part 2425 of the Authority's interim rules and regulations, 44 F.R. 44766. The agency filed an opposition.

The question before the Authority is whether, on the basis of the union's exceptions, the arbitrator's award is deficient because it is contrary to any law, rule, or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its first exception the union contends that the award is based on a nonfact. The union, in support of this exception, argues the arbitrator considered unsubstantiated evidence and refused to consider evidence of past practice and bargaining history. In addition, the union asserts that the arbitrator considered a nonfact in management's claim that the agenda was exhausted at the end of the second day even though, according to the union, fourteen union items were left undiscussed. Finally, the union asserts that the arbitrator's version of the "gist of the grievance" is a nonfact not supported by any evidence, and in effect "a gross mistake of fact but for which a different result would have been reached."

The union's first exception, that the award is based on a nonfact, states a ground on which the Authority will find an award deficient under section 7122(a)(2) of the Statute. United States Army Missile Materiel Readiness Command (USAMIRCOM) and American Federation of Government Employees, Local 185, AFL-CIO, Case No. 0-AR-7, 2 FLRA No. 60 (Jan. 17, 1980). However, in this case the union has not demonstrated that the award is based on a nonfact, that is, that the central fact underlying this award is concededly erroneous and in effect is a gross mistake of fact but for which a different result would have been reached. Rather, the union's assertions in support of its exception constitute disagreement with the arbitrator's findings of fact and with the arbitrator's reasoning and conclusions based on the evidence and testimony before him.

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*/ 5 U.S.C. § 7122(a) provides:

> (a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient--
>
> (1) because it is contrary to any law, rule, or regulation; or
> (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;
>
> the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

The Authority will not review an arbitrator's award where it appears that the exception constitutes disagreement with the reasoning employed by the arbitrator on the merits of the issue before him. Veterans Administration Hospital, Perry Point, Maryland and Local 331, American Federation of Government Employees, Case No. 0-AR-55, 3 FLRA No. 34 (May 21, 1980). Therefore, the union's first exception provides no basis for finding the award deficient under 5 U.S.C. §7122(a) and section 2425.3 of the Authority's interim rules and regulations.

In its second exception, the union contends that the award does not draw its essence from the collective bargaining agreement. In support of this exception the union argues that the arbitrator's interpretation of the agreement would allow management to terminate the meeting at their will.

The union's second exception states a ground on which the Authority will find an award deficient under section 7122(a)(2) of the Statute. United States Army Missile Materiel Readiness Command, supra. However, in this case the union does not demonstrate in its exception that this award fails to draw its essence from the collective bargaining agreement. Thus, the union has not demonstrated that the arbitrator's award cannot in any rational way be derived from the agreement; or is so unfounded in reason and fact, so unconnected with the wording and purpose of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; or that it evidences a manifest disregard of the agreement; or that, on its face, the award does not represent a plausible interpretation of the contract. See United States Army Missile Materiel Readiness Command, supra, and private sector cases cited therein. Instead, the union's arguments in support of its exception that the award does not draw its essence from the agreement constitute disagreement with the arbitrator's interpretation and application of the agreement provision before him. That is, the union is seeking to have its own interpretation of Article 3, Paragraph D substituted for the arbitrator's interpretation and his application thereof to the matter before him. This does not constitute a basis for finding an award deficient. United States Army Missile Materiel Readiness Command, supra. Therefore, the union's second exception provides no basis for finding the award deficient under 5 U.S.C. §7122(a) and section 2425.3 of the Authority's interim rules and regulations.

For the foregoing reasons, and pursuant to section 2425.4 of the Authority's interim rules and regulations, we hereby sustain the arbitrator's award.

Issued, Washington, D.C., June 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL AVIATION SCIENCE
AND TECHNOLOGICAL ASSOCIATION,
LOCAL NO. 291, FORT WORTH, TEXAS

Union

and

Case No. 0-AR-13

FEDERAL AVIATION ADMINISTRATION,
FORT WORTH AIR ROUTE TRAFFIC
CONTROL CENTER, AIRWAY
FACILITIES SECTOR, SOUTHWEST
REGION, FORT WORTH, TEXAS

Activity

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator Henry L. Sisk filed by the union under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)).

According to the arbitrator, the dispute before him involved the question of whether employees who worked rotating shifts were entitled to a workweek consisting of 5 consecutive workdays followed by 2 consecutive days off under the provisions of Article 35, Section 1 of the parties' collective bargaining agreement. Article 35 states pertinently:

> Section 1. The normal workday shall consist of eight (8) hours, exclusive of designated meal periods, and the normal workweek shall consist of five (5) consecutive workdays followed by two (2) consecutive days' off.
>
> Section 2. Working hours will not normally be scheduled for more than five (5) consecutive days within the administrative workweek. However, the Parties recognize that special conditions exist in unique work situations which may require variations from the normal workday and/or workweek. When such a special condition exists, the Employer shall consult with the Union when necessary for the purpose of establishing work schedules adaptable to those special working conditions.

The arbitrator stated that the parties had submitted the following issue to him:

> Does Article 35, Section 1, of the agreement require that each employee at the Fort Worth Air Route Traffic Control Center, Airway Facilities Sector, be assigned a workweek consisting of 5 consecutive workdays followed by 2 consecutive days off?

The arbitrator denied the grievance. In his analysis of the agreement, the arbitrator found that there are two exceptions to the "normal workweek" as defined in Article 35, Section 1. The first exception, according to the arbitrator, is set forth in Article 35, Section 2, and is concerned only with unique work situations. The second exception is contained in Article 37, which provides for the establishment of watch schedules. Article 37 states:

> Section 1. The basic watch schedule is concerned only with regular, recurring shift or work assignments and is defined as the days of the week, hours of the day, rotation of shifts, and change in regular days off. Assignments of individual employees to the watch schedule are not considered as changes to the basic watch schedule. The basic watch schedule will not be changed without prior consultation with the Union. In developing the basic watch schedule, the sector manager/sector field office chief or their designee shall meet with the Union representative and carefully consider his/her views and recommendations concerning the schedule. The objective of this meeting or meetings shall be to carefully and thoroughly examine the alternatives and options available as suggested by the Union representative.
>
> Section 2. Assignments to the watch schedule shall be posted at least fourteen (14) days in advance, or for a longer period where local conditions permit. The Employer recognizes that changes of individual assignments to the watch schedule are undesirable, therefore, the Employer agrees to make every reasonable effort to avoid such changes. If circumstances arise which will require a change to the posted schedule, the Employer will use any of the following alternatives to the extent feasible prior to making the change:
>
> (a) overtime;
>
> (b) personnel on detail assignments;
>
> (c) relief technicians;
>
> (d) line supervisors or staff;
>
> (e) rescheduling of training.
>
> In the event none of the above alternatives are found to be feasible, the employee's posted shift assignment can be changed.
>
> Section 3. The basic watch schedule will cover at least a one-year period and be posted at least 90 days prior to the beginning of the period.

In relation to Article 37, the arbitrator held based upon his interpretation of that article, "it must be concluded that there has been no violation of Section 1 of Article 35 since Article 37 is a clear exception to the five and two workweek in that it provides for the establishment for basic watch schedules consisting of the days of the week, the hours of the day, rotation of shifts, and change in regular days off. There is no requirement that the days worked and the days off conform to a five and two workweek." The arbitrator concluded that the agency had not violated any portion of the current agreement between the parties.

The union filed a petition for review of the arbitrator's award pursuant to the rules of procedure set forth in 5 C.F.R. part 2411 (1978), which, to the extent consistent with the provisions of section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)) and as amended by section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority, 44 F.R. 44741, remain operative with respect to this case. The union seeks Authority acceptance of its petition on the basis of the exceptions discussed below. The agency did not file an opposition.

Pursuant to section 2411.32 of the amended rules and section 7122(a) of the Statute, the Authority will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award is deficient because it is contrary to law or regulation, or on other grounds similar to those applied by courts in private sector labor-management relations cases.

In its first exception, the union contends that the arbitrator was biased. In support of this exception, the union asserts that the arbitrator made statements during the hearing which, the union alleges, demonstrates that the arbitrator had preconceived notions of what constituted a good or bad work schedule, and that such preconceptions influenced his decision in this case. Thus the union asserts that the decision is based on the arbitrator's partiality rather than his interpretation of the contract.

Without deciding under what circumstances an exception alleging that an arbitrator was biased or partial may present a ground for review of an arbitration award under the Statute, the union's assertions in this case provide no basis for acceptance of its petition for review. Thus the union has cited no private sector cases in which Federal courts have sustained a challenge to an arbitration award on the ground that the arbitrator was biased based upon remarks made by the arbitrator during the course of a hearing. Further, nothing in the award itself in any manner supports the union's assertions that "absent the Arbitrator's pre-conceived notions of good and bad schedules a different result would have been reached." Therefore, the union's first exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules.

The union's second exception is that the arbitrator exceeded his authority by determining issues not included in the question submitted to him. The union argues in this regard that the arbitrator was asked in the issue submitted to him to make determinations concerning Article 35, Section 1 of the agreement, and instead "took it upon himself" to apply Article 37 in his disposition of the grievance. The union refers to Article 56, Section 6 of the parties' agreement*/ and states that, rather than confining himself to the precise issue presented, the arbitrator included "an unwarranted interpretation and application of another article."

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*/ Article 56, Section 6 provides:

> The arbitrator shall confine himself/herself to the precise issue submitted for arbitration and shall have no authority to determine any other issue not so submitted to him/her.

The Authority will grant a petition for review of an arbitration award where it appears, based on the facts and circumstances described in the petition, that an exception presents a ground for review similar to those applied by Federal courts in private sector labor-management relations cases. Courts in the private sector have sustained challenges to arbitration awards when it is demonstrated that an arbitrator exceeded his or her authority by determining an issue not included in the subject matter submitted to arbitration. E.g., Local 791, International Union of Electrical, Radio & Machine Workers, AFL-CIO v. Magnavox Company, 286 F.2d 465 (6th Cir. 1961). Therefore, the Federal Labor Relations Authority will grant a petition for review of an arbitrator's award where it appears, based on the facts and circumstances described in the petition for review, that the exception presents the ground that the arbitrator exceeded his or her authority by determining an issue not included in the subject matter submitted to arbitration.

In this case, however, the union fails to describe the facts and circumstances necessary to support its exception that the arbitrator exceeded his authority. The union in no manner demonstrates how the arbitrator, in answering the question submitted to him, exceeded his authority by looking at the agreement as a whole as an aid in interpreting the specific agreement provision before him and determining whether or not there had been a violation of that provision. Nor does the union cite any private sector cases which would support such a proposition. Moreover, and especially significant, it is noted that the union in its post hearing brief to the arbitrator, after setting forth the provisions of Article 35 as pertinent to the dispute, went on to add that "[a]dditionally, the Arbitrator should consider the following Articles in deciding this matter" and specifically cited, among others, Article 37 of the agreement. Therefore, the union's second exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules.

Accordingly, the union's petition for review of the arbitrator's award is denied because it fails to meet the requirements set forth in section 2411.32 of the amended rules of procedure.

Issued, Washington, D.C., June 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 987

Union

and

Case No. 0-AR-22

WARNER ROBINS AIR LOGISTICS CENTER,
ROBINS AIR FORCE BASE, GEORGIA

Activity

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator Harold P. Knight filed by the agency under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)).

The facts which gave rise to this dispute are not specifically set forth in the arbitrator's award. However, from the arbitrator's award and the submissions to the Authority by the parties, it appears that this dispute involved the filling by the activity of GS-7 vacancies in the procurement field. In filling GS-1102-5 or 7 positions, the activity had been determining the qualifications of candidates by either the GS-1102-5/7 qualification standard, which requires specialized experience, or the GS-000-5/7 qualification standard, which requires general experience and/or education supplemented by the Professional and Administrative Career Exam (PACE). The union filed a grievance which alleged that a competitive promotion certificate for GS-7 vacancies in procurement included individuals who did not meet the qualification standard for the procurement series. The union argued that the activity was required to use the specialized experience requirements of the GS-1102-7 qualification standard in determining the qualification of candidates.

As noted by the arbitrator, the parties, during the processing of the grievance, mutually agreed to submit this dispute to the Civil Service Commission. Both of the parties believed that this dispute could be resolved by an interpretation of CSC Handbook X-118, which deals with qualification standards. This request resulted in correspondence, noted by the arbitrator, between the activity and the Civil Service Commission and later between the agency and the Civil Service Commission. The activity received three letters from the Atlanta Regional Office of the Civil Service Commission, dated October 21, 1977, December 5, 1977, and February 24, 1978. Thereafter, the Department of the Air Force directly corresponded with the Central Office of the Civil Service Commission. This inquiry resulted in a response from the Commission's Central Office dated May 23, 1978.

Apparently, the correspondence did not resolve this dispute because the matter was submitted to arbitration. The arbitrator stated the issue to be resolved as follows:

> Was the method, used by management to determine the individual employee qualifications, in compliance with the Civil Service Commission Standard for GS-1102 series classification?

In his award the arbitrator referred specifically to certain exhibits which had been introduced at the arbitration hearing, stating that he was noting them "for their application in this hearing." One of these exhibits was the May 23, 1978, letter from the Central Office of the Civil Service Commission, which the arbitrator quoted from as follows:

> In all cases, however, specialized or job-related experience should be given due weight in evaluating the potential of employees to fill a vacancy.

He also noted that the letter stated that written tests such as PACE should be used as one of several evaluation factors, including job-related experience when such experience exists. Referring to the February 24, 1978, letter from the Atlanta Regional Office of the Civil Service Commission, the arbitrator concluded that the activity's method of determining qualifications was unacceptable to the Commission. The arbitrator noted that this letter was the last advice concerning the selection of persons for occupations and that in this letter the procedure used by the activity was specifically disapproved. The arbitrator made the following award:

> The method used was not acceptable to the Civil Service Commission and therefore the grievance is granted and new promotion certificates are to be issued under proper procedure of selection.

The agency filed a petition for review of the arbitrator's award pursuant to the rules of procedure set forth in 5 C.F.R. part 2411 (1978), which, to the extent consistent with the provisions of section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)) and as amended by section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority, 44 F.R. 44741, remain operative with respect to this case. The agency requests that the Authority accept its petition for review of the arbitrator's award on the basis of its one exception which is discussed below. The union filed an opposition.

In its exception to the arbitrator's award, the agency contends that the award is based on a nonfact. In support of its exception, the agency principally argues that the February 24, 1978, letter from the Atlanta Regional Office of the Civil Service Commission, which the arbitrator termed the "last such advice concerning the selection of persons for occupations," was not the last such advice. To the contrary, the agency claims that the last such advice was contained in the May 23, 1978, letter from the Civil Service Commission's Central Office. Moreover, the agency asserts that the May 23 letter reversed the earlier regional office responses and specifically approved the activity's method of determining qualification. Thus, the agency maintains that the arbitrator's award is based on a nonfact.

Pursuant to section 2411.32 of the amended rules and section 7122(a) of the Statute, the Authority will grant a petition for review of an arbitrator's

award where it appears, based on the facts and circumstances described in the petition, that an exception presents a ground for review "similar to those applied by Federal courts in private sector labor-management relations." Federal courts in private sector labor-management relations cases will find an arbitration award deficient on the ground that it is based on a nonfact.1/ More precisely, Federal courts in private sector labor-management relations will find an arbitrator's award deficient on the ground that the central fact underlying an arbitrator's award is concededly erroneous and in effect is a gross mistake of fact but for which a different result would have been reached.2/ Accordingly, the Authority will grant a petition for review of an arbitrator's award where it appears, based on the facts and circumstances described in the petition for review, that the exception presents the ground that the central fact underlying an arbitrator's award is concededly erroneous and in effect is a gross mistake of fact but for which a different result would have been reached. United States Army Missile Materiel Readiness Command (USAMIRCOM) and American Federation of Government Employees, Local 1858, AFL-CIO, Case No. 0-AR-7, 2 FLRA No. 60 (Jan. 17, 1980).

In this case, however, although the agency's exception states a ground on which review is granted, the agency's exception is not supported by the facts and circumstances described in its petition for review. In contending the award is based on a nonfact, the agency essentially argues that the arbitrator failed to consider the May 23 letter, otherwise he would not have termed the February 24 letter the last advice concerning the selection of persons for occupations. The agency further argues that the May 23 letter approved the activity's method of determining qualifications. In this respect, contrary to the agency's assertions, the arbitrator's quotation from and discussion of the May 23 letter in his award evidences his express review and consideration of that letter in reaching his award in this case. Moreover, the agency fails to demonstrate that the arbitrator not only erred in his view of the facts, but that the sole articulated basis for his award was concededly and indisputably in error. The agency further fails to demonstrate that the evidence in this case discloses a gross mistake of fact but for which, in accordance with the expressed rationale of the arbitrator, a different result would have been reached.3/ Instead, by arguing, contrary to what the arbitrator found, that the May 23 letter approved the activity's method, the agency's assertions constitute nothing more than disagreement with the arbitrator's findings as to the facts and with the specific reasoning and conclusions employed by the arbitrator in reaching his award. As is well established in private sector labor-management relations cases and as has been recognized by the Federal Labor Relations Authority with respect to review of arbitration awards in Federal sector cases, it is the award rather than the specific reasoning and conclusions employed by the arbitrator that is subject to review and the

1/ Electronics Corporation of America v. International Union of Electrical, Radio and Machine Workers, AFL-CIO Local 272, 492 F. 2d 1255 (1st Cir. 1974).

2/ Id. at 1257.

3/ See id. at 1257 & n.3.

arbitrator's findings of fact are not to be questioned on appeal.[4/] Therefore, the agency's petition for review fails to present facts and circumstances to demonstrate that the central fact underlying the arbitrator's award is concededly erroneous and in effect is a gross mistake of fact but for which a different result would have been reached, a showing necessary to support its exception that the arbitrator's award was based on a nonfact.

Accordingly, the agency's petition for review of the arbitrator's award is denied because it fails to meet the requirements of section 2411.32 of the amended rules for acceptance by the Authority of a petition for review of an arbitrator's award. The agency's request for a stay of the award is also denied.

Issued, Washington, D.C., June 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

4/ E.g., Meat Cutters, Local 540 v. Neuhoff Bros. Packers, Inc., 481 F.2d 817 (5th Cir. 1973) (arbitrator's findings as to the facts); Safeway Stores, Inc. v. American Bakery and Confectionery Workers, Local 111, 390 F.2d 79 (5th Cir. 1968) (arbitrator's reasoning); United States Army Missile Materiel Readiness Command (USAMIRCOM) and American Federation of Government Employees, Local 1858, AFL-CIO, Case No. 0-AR-7, 2 FLRA No. 60 (Jan. 17, 1980) (arbitrator's findings of fact); Federal Aviation Science and Technological Association and Federal Aviation Administration, Albuquerque Airway Facilities Sector, Southwest Region, Case No. 0-AR-20, 2 FLRA No. 85 (Feb. 21, 1980) (arbitrator's reasoning).

3 FLRA No. 90

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL EMPLOYEES METAL
TRADES COUNCIL

Union

and

FLRC No. 78A-42

MARE ISLAND NAVAL
SHIPYARD

Activity

DECISION

This matter is before the Authority on the agency's petition for review of the award of Arbitrator William Eaton filed with the Federal Labor Relations Council.[1/]

According to the arbitrator's award, this matter involves the grievant who was initially employed at the activity under a career appointment for approximately ten years prior to his voluntary resignation in August 1976. In December 1976 the grievant was rehired under a temporary appointment that was made noncompetitively on the basis of his eligibility for reinstatement. Because the grievant was eligible for reinstatement, the activity was authorized to convert the grievant's temporary limited appointment to a permanent (career) appointment. However, the activity refused to grant the grievant's request for conversion to career status although during this time other temporary employees hired on the same basis as the grievant but with less service at the activity were granted career appointments. The grievant remained a temporary employee with the activity until his temporary appointment terminated.

A grievance was filed and submitted to arbitration protesting that the grievant was improperly denied conversion to career status because of his union activities. The arbitrator found that the activity's denial of the

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1/ The functions of the Federal Labor Relations Council, in matters such as here involved, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978, 43 F.R. 36040, which transfer of functions is implemented by section 2400.5 of the Authority's transition rules and regulations, 44 F.R. 44741. The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7135(b)).

grievant's request for conversion to career status was in violation of the parties' negotiated agreement. The arbitrator concluded in this respect that the denial was discrimination against the grievant "because of his engagement in legitimate and authorized union activities." As a remedy the arbitrator ordered that the grievant be converted to permanent status and be awarded "pay for all work lost as a result of the employer's improper action."

As previously stated, the agency had filed a petition for review of the arbitrator's award with the Federal Labor Relations Council. The Council had accepted the agency's petition for review on the agency's exceptions that the award violates law and violates Executive Order 11491, as amended. The Council also had granted the agency's request for a stay of the award pending determination of the appeal. This case was pending before the Council on December 31, 1978.

In accordance with section 2400.5 of the transition rules and regulations of the Authority, 44 F.R. 44741, and section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215), the rules of procedure of the Federal Labor Relations Council, 5 C.F.R. part 2411 (1978), remain operative with respect to this case except that the word "Authority" is substituted, as appropriate, wherever the word "Council" appears in such rules. Section 2411.37(a) of the amended rules provides:

> (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

In accordance with established practice, the Council had requested from the Civil Service Commission its interpretation of applicable law and civil service regulations as they pertain to the arbitrator's award in this case. The Office of Personnel Management (the successor agency to the Civil Service Commission with respect to these matters) replied in relevant part as follows:

> The grievant in this case alleged that the agency improperly denied him career status because of his union activities. The grievant had been employed at the shipyard under a career appointment for approximatley ten years prior to his voluntary resignation in August 1976. In December 1976, the greivant was rehired under a temporary appointment that was made noncompetitively on the basis of this eligibility for reinstatement. The temporary appointment was terminated in September 1977. During the period of the grievant's temporary appointment, other temporary employees with less service at the shipyard (and hired on the same basis as the grievant) were given career appointments.
>
> The arbitrator found that the agency's failure to give the grievant a career appointment was based on discrimination because of "his engagement in legitimate and authorized union activities." The arbitrator ordered the agency to convert the grievant to career status as of July 1, 1977, and pay him for all work lost as a result of the employer's improper action.

Section 316.402(b)(1) of the former Civil Service Commission's regulations (5 CFR) authorized appointments to former Federal employees who, like the grievant, are eligible for noncompetitive reinstatement to career positions. Section 4-8 of Chapter 316 of the Federal Personnel Manual further authorized agencies to convert temporary limited appointments based on reinstatement eligibility to reinstatement without time limitation (i.e., career appointments) when appropriate. Whether conversion to career status would be appropriate in any particular situation was a matter to be determined by agency management.

Acceptance of a temporary appointment by the grievant did not convey to him any entitlement to conversion to a permanent (career) appointment at a later date. Pursuant to Civil Service Rule 7.1, management retained the discretion to "fill any position in the competitive service either by competitive appointment from a Civil Service register or by noncompetitive selection of a present or former Federal employee in accordance with the Civil Service Regulations." Agency management, therefore, must retain this discretion reserved to it by Civil Service Rule, and cannot, through its collective bargaining agreement, abrogate that discretion by any provision which would directly or indirectly grant to an arbitrator the authority to exercise this reserved discretion. Therefore, an arbitrator cannot order that a position be filled by a specific employee, through reinstatement or through any other means. Accordingly, the arbitrator's order to convert the employee as of July 1, 1977, therefore, is inconsistent with applicable civil service rules, regulations and instructions.

Furthermore, in reference to the arbitrator's award of back pay, we wish to point out that the Comptroller General ruled on March 19, 1975, that the Back Pay Act of 1966, 5 U.S.C. 5596, is applicable only to Federal employees and does not apply to unsuccessful applicants for employment, like the grievant in this case. Specifically, the Comptroller General stated as follows in decision No. B-180010 (March 19, 1975) which related to the availability of make-whole remedies to the Assistant Secretary of Labor (A/SLMR) as remedies for improper personnel actions caused by unfair labor practices:

> "Regarding agency discrimination in hiring we point out that the Back Pay Act, 5 U.S.C. 5596, Supra, is apposite only to Federal Employees and does not provide a remedy for unsuccessful applicants for Federal employment. Also, the authority to appoint is in the administrative agencies under regulations prescribed by the Civil Service Commission. In view of this and since there is nothing in any legislation of which we are aware which authorizes the A/SLMR to make appointments to civil service positions, it is our opinion that he may not direct an applicant's appointment even though he is authorized to take affirmative action in cases involving discrimination in hiring as a result of an unfair labor practice."

We believe that the arbitrator's authority to order the grievant retroactively appointed to a career position with appropriate back pay would be limited in a similar manner.

Based on the preceding analysis, we conclude that the arbitrator's award conflicts with applicable civil service law, regulations and instructions, and therefore cannot be implemented.

Based on the foregoing interpretation of the Office of Personnel Management, the Authority finds that the award of the arbitrator (entitled Decision and constituting five separately numbered paragraphs) violates applicable law and civil service regulations and instructions and must therefore be set aside.[2/] Accordingly, pursuant to section 2411.37(b) of the amended rules, the arbitrator's award is set aside in its entirety.[3/]

Issued, Washington, D.C., June 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In view of this decision, it is unnecessary to address the other exception on which the agency's petition for review was accepted by the Council.

3/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the instant case was decided solely on the basis of E.O. 11491, as amended, and as if the Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision does not prejudge in any manner either the meaning or application of related provisions of the Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Order.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION
MEDICAL CENTER

Activity

and

Case No. 0-AR-46

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES,
LOCAL 1985

Union

DECISION

This matter is before the Authority on an exception to the award of Arbitrator Ferrin Y. Mathews filed by the union under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7122(a)).

According to the arbitrator's award, the dispute in this matter arose when the activity's Personnel Service sent only the name of one highly qualified candidate to the selecting official for consideration with respect to a promotional opportunity. The union filed a grievance contending that such action by the activity violated Article 24, Section 1(4) of the Negotiated Agreement, which provides that "[n]o more than the 3 best qualified candidates will be certified . . . ."

Therein, the union interpreted the contract section to mean:

> [T]he three highest ranking candidates will be certified and referred to the selecting official for consideration, regardless of whether or not they are highly qualified.

Additionally, the union asserted that management had agreed to send the names of the three "highest ranking candidates" to the selecting official and that such procedure had become an established practice. The parties were unable to resolve the dispute and it was ultimately submitted to arbitration.

The issue as stipulated by the parties was:

> With respect to Merit Promotion Opportunity 79-5, did the Medical Center violate the contract or past practice, if such existed, by referring for promotion consideration only the single candidate determined to be "Highly Qualified"? If so, what is the remedy?

In considering this issue the arbitrator concluded that "the agency acted properly in submitting . . . the one name of the Highly Qualified Candidate

. . . ." He found nothing in the provisions of the collective bargaining agreement which required the submission of at least three "best qualified candidates" to the selecting official. Thus he held:

> The words "No more than the three best qualified candidates . . ." do not mean "at least three best qualified candidates . . . ."

Rejecting the union's interpretation of the contract, the arbitrator concluded that management had not violated the contract.

The union also contended before the arbitrator that management's action was contrary to established practice. In support of this contention the union introduced evidence of five instances where highly qualified and qualified candidates, together, had been submitted to the selecting official, or where only qualified candidates had been submitted. Although the arbitrator recognized that the existence of past practice could alter the terms of the negotiated agreement, he found the evidence, as relied upon by the union, did not establish a "clear and consistent practice" over a sufficiently long period of time to establish an agreement by the parties through their course of conduct and actions. Consequently, finding neither contract violation nor past practice which would alter the contract, the arbitrator denied the grievance.

The union filed exceptions to the arbitrator's award under section 7122(a) of the Federal Service Labor-Management Relations Statute*/ and part 2425 of the Authority's interim rules and regulations, 44 F.R. 44766. The agency did not file an opposition.

The question before the Authority is whether, on the basis of the union's exceptions, the arbitrator's award is deficient because it is contrary to any law, rule, or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its exception the union contends the arbitrator's award is arbitrary and capricious in that it does not take into account facts in evidence. To support its exception the union refers to the testimony of certain union witnesses cited by the arbitrator in his award and states that "the union feels that a case in support of past practices was established."

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*/ 5 U.S.C. § 7122(a) provides:

> (a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—
>
> (1) because it is contrary to any law, rule, or regulation; or
> (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;
>
> the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

It is clear from the union's exception that the union is attempting to relitigate the merits of the case before the Authority and its exception actually constitutes disagreement with the arbitrator's reasoning and conclusions based on the evidence and testimony before him.

The Authority will not review an arbitrator's award where, as in this case, it appears that the exception constitutes disagreement with the reasoning employed by the arbitrator on the merits of the issue before him. Veterans Administration Hospital, Perry Point, Maryland and Local 331, American Federation of Government Employees, Case No. 0-AR-55, 3 FLRA No. 34 (May 21, 1980). Therefore, the union's exception to the arbitrator's award provides no basis for finding the award deficient under 5 U.S.C. § 7122(a) and section 2425.3 of the Authority's interim rules and regulations.

For the foregoing reasons, and pursuant to section 2425.4 of the Authority's interim rules and regulations, we hereby sustain the arbitrator's award.

Issued, Washington, D.C., June 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

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FLRA Report of Case Decisions and FSIP Releases

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Contents of Package

This package should include the following items:

FLRA Report of Case Decision Number 46

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FLRA Report of Case Decision Number 49

If any of the above items are not included, please contact the Administrative Office, Federal Labor Relations Authority, 1900 E Street, NW., Room 7469, Washington, D. C. 20424 - telephone 202- 653-8040.

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 46 REPORT OF CASE DECISIONS August 22, 1980

REPRESENTATION CASES

3 FLRA No. 95 (July 10, 1980)

Army and Air Force Exchange Service, Base Exchange, Fort Carson, Fort Carson, Colorado, Case No. 7-CU-10. The activity filed a petition for clarification of unit (CU) under section 7111(b)(2) of the Statute, seeking to exclude, from the unit of exclusive recognition represented by the union (AFGE, Local 1345), 33 employees in 12 positions as "supervisory employees" within the definition of section 7103(a)(10) of the Statute. At the hearing, the parties stipulated that 13 of the incumbents were "supervisory employees" and that 10 were "nonsupervisory employees," leaving the status of the remaining 10 employees in dispute. Each of the remaining 10 employees was considered separately by the Authority. Based on its findings, the Authority issued an Order clarifying the bargaining unit to exclude 4 of the 10 incumbents, finding them to be "supervisors" within the meaning of the Statute. (Decision and Order attached.)

3 FLRA No. 99 (July 10, 1980)

Fort Bragg Schools System, Fort Bragg, North Carolina, Case No. 4-RO-30. The union (AFGE Local 1770) filed a representation petition under section 7111(b)(2) of the Statute, seeking to represent a unit of employees of Fort Bragg Schools Cafeteria Fund (Fund). The activity contended that the Fund was not an "agency" within the meaning of section 7103(a)(3) of the Statute, that the employees of the Fund was not employees within the meaning of section 7103(a)(2), and, therefore, that the Fund was not subject to the jurisdiction of the Authority. The Authority concluded that the Fund was an Executive agency and no longer a nonappropriated fund instrumentality of the U.S. Army and, therefore, did not come within the definition of "agency" under section 7103(a)(3) of the Statute. Accordingly, the Authority dismissed the union's petition on jurisdictional grounds. (Decision and Order attached.)

3 FLRA No. 104 (July 17, 1980)

U.S. Department of Labor, Washington, D.C., Case No. 3-CU-26. The agency filed a petition for clarification under section 7111(b)(2) of the Statute, seeking to clarify two existing bargaining units of employees. The agency contends that field office employees in the Washington D.C. area in a unit currently represented by AFGE (Local 12) should be accreted to a unit containing all other field office employees outside the Washington, D.C. area represented by the National Council of Field Labor Locals, AFGE (the Council). The Authority found that the unit of recognition represented by Local 12 has not changed either by voluntary action of the parties, or by reason of changes in the agency's field office structure. The Authority therefore ordered that the unit represented by Local 12 be clarified to continue to include all eligible employees in the agency's field offices within the Washington, D.C. geographical area. (Decision and Order attached.)

3 FLRA No. 105 (July 17, 1980)

The Alaska Railroad, Federal Railroad Administration, Department of Transportation, Case No. 9-RO-19. The union (American Train Dispatchers Association) filed a representation petition under section 7111(b)(1) of the Statute, seeking to represent a unit of agents, agent-telegraphers, telegrapher-clerk-yardmaster, telegraphers, and printer machine and teletype operators within the activity. The activity objected, contending that the unit was not appropriate and that the employees in the unit sought should be more properly part of a unit of clerical employees represented by another union. In its alternate position, the activity contended that if the unit sought were found appropriate, two employees classified as General Agent/Yardmaster should be excluded from the unit as supervisors within the meaning of section 7103(a)(10) of the Statute classified as General Agent/Yardmaster and assigned to named locations were supervisors within the meaning of section 7103(a)(10) of the Statute and, accordingly, excluded them from the unit found appropriate. The Authority thereupon directed that a representation election be conducted among the employees in the unit found appropriate. (Decision and Direction of Election attached.)

UNFAIR LABOR PRACTICE CASES

3 FLRA No. 94 (July 10, 1980)

Veterans Administration Medical Center (Canadaigua, New York), Case Nos. 1-CA-47; 1-CA-62; 1-CA-123; 1-CA-249; 1-CA-257; 1-CA-264. The Authority approved a formal settlement agreement

entered into by the activity the charging party and union (AFGE Local 3306) and the General Counsel of the Authority and issued an Order pursuant to the provisions of the subject agreement (Order attached.)

3 FLRA No. 103 (July 17, 1980)

Department of Treasury, Internal Revenue Service, Jacksonville District, Case No. 4-CA-50(1). Upon a complaint filed by the Regional Director, the ALJ found that the activity had violated section 7116(a)(1) and (5) of the Statute when it unilaterally changed the existing time frame for the processing of cases within the Estate and Gift Tax Group without giving the union notification and an opportunity to bargain over impact and implementation of the change. The Authority adopted the ALJ's findings, conclusions and recommendations and issued an appropriate remedial order. (Decision and Order attached.)

NEGOTIABILITY CASES

3 FLRA No. 96 (July 10, 1980)

American Federation of Government Employees, AFL-CIO, Local 2578 and General Services Administration, National Archives and Records Service, Washington, D.C., Case No. 0-NG-166. The dispute involved a union proposal pertaining to the agency's plan for implementing the Federal Equal Opportunity Recruitment Program, pursuant to 5 U.S.C. § 7201. The Authority held that the proposal concerned a matter within the duty to bargain under the Statute and therefore set aside the activity's allegation to the contrary. (Decision attached.)

3 FLRA No. 97 (July 10, 1980)

National Federation of Federal Employees (NFFE), Local 1332 and Headquarters, U.S. Army Materiel Development and Readiness Command, Alexandria, Virginia, Case No. 0-NG-155. The dispute involved a union proposal that provided, among other things, that in the event of a realignment of the workforce the activity would negotiate with the union on the imposition of a freeze on outside hiring. The Authority found that the union's proposal concerned a matter which is negotiable only at the election of the activity under section 7106(b)(1) of the Statute. Accordingly, since the activity had declined to negotiate on the proposal, the Authority sustained the allegation that the proposal was not within the duty to bargain. (Decision attached.)

ARBITRATION CASES

3 FLRA No. 98 (July 10, 1980)

U.S. Department of Commerce, National Bureau of Standards, Washington, D.C. and AFGE Local 2186, Boulder, Colorado, (Rockwell, Arbitrator), Case No. 0-AR-6. The arbitrator determined that the activity violated the parties' agreement when it did not select the grievant for the WG-6 position involved. The arbitrator also found that the grievant would not have been selected from among the other applicants for the position even though an unwarranted personnel action had taken place; and, therefore, the grievant in this situation did not meet the "but for" criteria of the Back Pay Act and was not entitled to backpay. As his award, the arbitrator sustained the grievance; directed that the grievant be assigned to the position within a certain period of time; and that the grievant was not to receive backpay. The Authority, under the procedures then applicable, accepted the agency's petition for review of the award insofar as it related to the agency's exception alleging that the award violated appropriate regulation, specifically the Federal Personnel Manual (FPM). The Authority also granted the agency's request for a stay. (Report No. 8) Thereafter, in accordance with the provisions of section 7105(i) of the Statute, the Authority requested an advisory opinion from the Office of Personnel Management (OPM) concerning the proper interpretation of the relevant provisions of the FPM. Upon consideration of the opinion rendered by OPM in response to the Authority's request, the Authority held that to the extent that the award ordered the grievant be assigned to the position, the award was contrary to civil service rules and regulations and therefore deficient. Accordingly, the Authority modified the award by striking the second and third sentences thereof. As so modified, the Authority sustained the award and vacated the stay which it had previously granted. (Decision attached.)

3 FLRA No. 101 (July 10, 1980)

American Federation of Government Employees, Local No. 1122, AFL-CIO and Western Program Service Center, Social Security Administration, Department of Health, Education and Welfare (Barsamian, Arbitrator). Case No. 0-AR-112. The Authority dismissed the union's exceptions to the arbitrator's award as untimely filed under section 2425.1 of the Authority's regulations. (Order attached.)

3 FLRA No. 102 (July 10, 1980)

American Federation of Government Employees, Social Security Local No. 1760 and Social Security Administration, Northeastern Program Service Center, Flushing, New York (Simons, Arbitrator), Case No. 0-AR-115. The Authority dismissed the union's exceptions to the arbitrator's award as untimely filed under section 2425.1 of the Authority's regulations. (Order attached.)

GENERAL STATEMENT OF POLICY OR GUIDANCE

3 FLRA No. 100 (July 10, 1980)

National Treasury Employees Union, Case No. 0-PS-13. NTEU requested that the Authority issue a major policy determination on the question of how parties to a collective bargaining agreement achieve enforcement of a binding arbitration award under section 7121 of the Statute. The Authority determined that the question presented in the union's request could be more appropriately resolved by other means. The Authority therefore denied NTEU's request. (Decision attached.)

Attachments (12)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ARMY AND AIR FORCE EXCHANGE SERVICE
BASE EXCHANGE, FORT CARSON
FORT CARSON, COLORADO

Activity-Petitioner

and

Case No. 7-CU-10

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL NO. 1345

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed with the Federal Labor Relations Authority under section 7111(b)(2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101-7135, a hearing was held before a hearing officer of the Authority. The Authority has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case, including a brief filed by the Labor Organization, the Authority finds:

The Activity, Army and Air Force Exchange Service, Base Exchange, Fort Carson, Colorado, filed a petition for clarification of unit (CU) seeking to exclude 33 employees in 12 positions as supervisory employees from the unit of exclusive recognition represented by the American Federation of Government Employees, Local No. 1345, AFL-CIO (AFGE).*/ At the hearing in this matter, the parties stipulated that 13 of the incumbents were supervisory employees and

*/ The AFGE was certified as the exclusive representative in the following unit on August 13, 1971:

Included: All regular full-time and regular part-time Hourly Pay Plan (HPP) and Commission Pay Plan (CPP) nonsupervisory employees employed by the Fort Carson Post Exchange, Colorado, and the Pueblo Army Depot, Pueblo, Colorado.

Excluded: Temporary full-time, temporary part-time and casual employees, managerial executive and supervisory employees, managerial trainees, employees engaged in personnel work in other than a purely clerical capacity, professional employees, guards, watchmen and employees of the Colorado Exchange Region.

that 10 others were nonsupervisory employees. The Activity amended its petition to delete those positions and incumbents from consideration before the Authority. Accordingly, the only dispute is whether the 10 remaining incumbents should be excluded from the exclusive unit as supervisory employees under section 7103(a)(10) of the Statute, which states:

> 'supervisor' means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority.

Although certain of the remaining incumbents have the same job classification as those stipulated by the parties to be supervisors, their duties vary because of their location in the Exchange and the amount of independent authority their immediate supervisor allows them. As unit status depends on actual duties performed, each of the incumbents is considered separately.

Joyce Bergey, Branch 1210. Retail Supervisor (Shift) 5186P05-01

The record indicates that Bergey has worked in the position at issue herein since September, 1978. However, since June, 1979, her position has been designated "in excess" and she currently works as a regular employee and does not exercise any supervisory authority.

Based on the fact that Bergey does not presently exercise any of the indicia of supervisory authority under the provisions of section 7103(a)(10) of the Statute, the Authority finds that Bergey should be included in the exclusively recognized unit.

Dorothy Harton, Branch 1104. Retail Supervisor (Shift) 5186P05-01

Harton has been in her present position since July, 1979. In addition to Harton there are three lower graded part-time employees in the branch. In terms of exercising any supervisory authority, the record indicates that Harton has not filled out employees' evaluation reports or leave slips nor has she recommended that an employee be disciplined or receive an award. The record shows that Harton's supervisor, Ms. Leintz, a grade 7, does all the interviewing and

hiring of new employees. The record indicates further that the only responsibilities that Harton exercises in regard to other employees are directing them in their daily routine duties and occasionally counselling them by reviewing their job descriptions with them.

The Authority finds that Harton is not a supervisor within the meaning of section 7103(a)(10) of the Statute, as her directing of employees is merely routine in nature and standing alone is insufficient to meet the requirement for the consistent exercise of independent judgment in carrying out such authority. Thus, the Authority concludes that Harton should be included in the exclusively recognized unit.

Clara Benson, Branch 1108. Retail Supervisor (Annex) 5183P06-01

The record establishes that Benson is the highest graded employee in her branch, and that her supervisor, Mrs. McElhannon, has not been physically stationed at Benson's worksite since July, 1978. In December, 1978, Benson was promoted to her present grade 6 without a change in job title. There are two part-time grade 2 sales clerks and a grade 2 part-time laborer at the branch.

The evidence indicates that there have been seven or eight people in the laborer's position in the last six months. Benson testified that she remembered the details of her involvment in only the last two hires. The evidence regarding those two hires is insufficient to show that her recommendations for selection were effective and involved the exercise of independent judgment, because in both cases she had only one person on the list to recommend. There has not been a vacancy involving the sales clerks positions although one of the sales clerks was transferred to the branch by McElhannon.

The record discloses further that a recommendation by Benson to McElhannon that the sales clerks positions be upgraded was not followed. Although prior to the hearing Benson was given the authority to schedule employees' work times on the rare occasions when changes are made, there is no evidence to indicate that Benson has exercised this authority. Benson has not handled employees' grievances nor recommended that employees be disciplined, suspended, fired or transferred.

Based on the record, the Authority finds insufficient evidence to establish that Benson exercises any of the indicia of supervisory authority with the required consistent exercise of independent judgment. Thus, the record does not establish that Benson is a supervisor within the meaning of section 7103(a)(10) of the Statute. Therefore, the Authority concludes that Benson should be included in the exclusively recognized unit.

Geneva Bjorvedt, Branch 2107. Food Activity Foreman 5682H04-92

Bjorvedt has worked in this position at the Ivy Snack Bar of the Activity for a number of years. Her supervisor, Eva Blackwell, although physically located at the facility, is responsible for another branch and spends some of her time overseeing its operation. Further, the evidence shows that Bjorvedt is the "supervisor" for the evening shift while Phyllis Gavin, a recent hire and Bjorvedt's counterpart, is responsible for the day shift. There is an overlap of the two shifts.

Except for one recent hiring prior to the hearing in this matter, Bjorvedt, Gavin's predecessor, and Blackwell, jointly interviewed and conferred on the hiring of new employees. The record establishes that Blackwell has disagreed with Bjorvedt's recommendation on hiring for the day shift, but has usually gone along with her recommendations for the evening shift. Further, the record establishes that they jointly make up the employees' work schedules. Bjorvedt has orally reprimanded an employee after being told to do so by Blackwell. She has recommended the firing of an employee, but it was not effective. Finally, the record indicates that about a week before the hearing Bjorvedt recommended an employee for a proficiency award after conferring with Blackwell. There is no evidence whether this recommendation was effective. It appears from the evidence that, except for the one recent hiring, even where Bjorvedt's recommendations were effective they did not involve the use of independent judgment, nor was independent judgment involved when she exercised any of the other indicia of supervisory authority under section 7103(a)(10) of the Statute.

As noted, the Statute defines a "supervisor" as an employee with certain authority, the exercise of which "requires the consistent exercise of independent judgment...." Thus, when assessing an individual's performance in regard to tasks indicating supervisory authority, the evidence must establish the exercise by the employee of independent judgment, and it must establish that independent judgment is a consistent feature of the employee's performance of such tasks. Under the circumstances herein, it is concluded the Bjorvedt's single exercise of the authority to hire, with independent judgment, is insufficient to establish a consistent exercise of independent judgment with respect to the performance of supervisory duties. Accordingly, the Authority finds that Bjorvedt should be included in the exclusively recognized unit.

Maria Piluso, Branch 2106. Food Activity Foreman 5682H04-91

Piluso has worked in her present position at the Exchange since November, 1977. Her supervisor, Mr. Sousa, works at the branch in the morning and Piluso works the afternoon shift while Sousa goes to the other branches that are under his jurisdiction. Piluso has two employees, a janitor and a cook, working under her in the afternoon. The evidence indicates that three weeks before the hearing, Piluso interviewed applicants for the cook's position and, after a discussion with Sousa, recommended the hiring of the cook. The record establishes that Piluso has never handled a grievance nor recommended employees be disciplined, fired, transferred or promoted. She schedules employees' leave,

but she can only change an employee's vacation leave with Sousa's approval.

The Authority finds, although Piluso recommended the hire for the cook's position the evidence does not establish that she did so using independent judgment but instead that her recommendation was merely routine in nature. Thus, as the evidence is insufficient to establish the consistent exercise of independent judgment by Piluso while performing the above functions, the Authority finds that Piluso should be included in the exclusively recognized unit.

Gracetta Kamohalii, Branch 2112. Food Activity Foreman 5682H04-92

Kamohalii has worked in her present position at the Mountaineer Snack Bar of the Activity for five years. She directs the everyday duties of one full-time and two part-time employees at the branch and determines the hours of the part-timers. She has also orally reprimanded an employee for not doing his job. On a number of occasions she has interviewed applicants for positions and effectively recommended selection, although on some occasions her supervisor, Sousa, has been involved in the selection process at her invitation. Kamohalii has not exercised authority to recommend suspending, firing, transferring or promoting an employee.

The Authority finds that Kamohalii is a supervisor within the meaning of section 7103(a)(10) of the Statute based on the fact that Kamohalii has effectively recommended the selection of applicants on several occasions and consistently determines the hours of the part-timers. Thus, the Authority shall order that Kamohalii be excluded from the exclusively recognized unit.

Beatrice Huber, Branch 2102. Food Activity Foreman 5682H04-92

Huber was promoted to a grade 4 from a grade 3 a few weeks before the hearing, apparently without a change in position. Her supervisor, Mrs. McGhee, the manager of the branch, runs the day-to-day operation of the branch and arrives first at 5:30 a.m. and leaves at 2:00 p.m. Huber comes in at 9:30 a.m. and works until 6:00 p.m. Huber has three employees working under her in the afternoon. The evidence establishes that the supervisor, McGhee, gets replacements to fill in and to replace absent employees. Further, McGhee often interviews and hires new employees. Three weeks before the hearing Huber interviewed applicants for a position and turned in the referral slips directly to personnel. In 1978, Huber interviewed and effectively recommended a hire. Further, although Huber has not recommended that an employee be promoted or nominated for an award, she has effectively recommended that an employee be fired during his probationary period after conferring with McGhee.

The Authority finds that the hiring, and the effective recommendation for discharge after conferring with her supervisor, demonstrates a consistent exercise of independent judgment in the performance of the supervisory indicia contained in section 7103 of the Statute. Thus, the Authority concludes that Huber is a supervisor and should be excluded from the the exclusively recognized unit.

Mary Toth, Branch 1001. Cashier Checker Supervisor 5081P04-91

Toth for ten months prior to the hearing has supervised 15 regular and 5 intermittent employees in the Main Exchange's front check-out department as a grade 4. All the employees under her are grade 2's except for a grade 3 leader. The record indicates that Toth's department experiences a high turn-over in personnel and that Toth does all the interviewing of applicants for these vacancies, does the paper work involved, and forwards the papers directly to the personnel office for processing. Toth's supervisor, Olive, signs off on the hiring referral slips. None of Toth's selections has been rejected.

With the concurrence of her supervisor, Toth has terminated one probationary employee. The evidence also indicates that she has criticized employees on their counselling cards concerning their work performance. Further, although regular weekly schedules do not change, Toth assigns employees to given work stations. Toth has not recommended an employee for promotion or for an award.

The Authority finds, based on the record herein, that Toth is a supervisor within the meaning of section 7103(a)(10) of the Statute, as she effectively recommends hire and assignment of work, each with the consistent exercise of independent judgment. Thus, the Authority shall order that Toth be excluded from the exclusively recognized unit.

Beverly Conners, Branch 1001. Operations Clerk (Retail) Supervisor 5132A06-91

Conners is assigned to the office that keeps the accounting and bookkeeping records for the Activity. Four grade 4 operation clerks and grade 3 general clerks work under her. Conners reports directly to the Exchange's Operations manager, Dixon. Conners has, on occasion, effectively recommended that a clerk change desks (accounts) when a vacancy has occurred. The evidence also shows that Conners spends about 50% of her time directing other employees and inspecting their work. The record indicates that when a vacancy occurs in the office, Conners interviews the applicants and recommends to her supervisor a person for selection. While an issue was raised as to the effectiveness of her recommendations the record reflects that of the five applicants she recommended for selection, three were hired. Conners can approve leave on a one-day basis although she must get Dixon's approval for any other type of leave.

The Authority finds, based on the record herein, that Conners is a supervisor within the meaning of section 7103(a)(10) of the Statute by reason of the consistent exercise of independent judgment in directing and inspecting the work of the other employees at the branch. Thus, the Authority shall order that Conners be excluded from the exclusively recognized unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of Government Employees, Local No. 1345, AFL-CIO, was certified on August 13, 1971, be and hereby is, clarified by excluding from said unit Gracetta Kamahalii, Branch 2112, Food Activity Foreman 5682H04-92; Beatrice Huber, Branch 2102, Food Activity Foreman 5682H04-92; Mary Toth, Branch 1001, Cashier Checker Supervisor 5081P04-91; and Beverly Conners, Branch 1001, Operations Clerk (Retail) Supervisor, 5132A06-91.

Dated, Washington, D.C., July 10, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

3 FLRA No. 99

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FORT BRAGG SCHOOLS SYSTEM,
FORT BRAGG, NORTH CAROLINA

Activity

and

Case No. 4-RO-30

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1770

Petitioner

DECISION AND ORDER

Upon a petition duly filed with the Federal Labor Relations Authority under section 7111(b)(2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135, a hearing was held before a hearing officer of the Authority. The Authority has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case, the Authority finds:

The Petitioner filed an amended petition seeking exclusive recognition as the certified representative of all employees of Fort Bragg Schools Cafeteria Fund (Fund), excluding management officials, professional employees, supervisors, and employees excluded by provisions of 5 U.S.C. § 7112(b)(2), (3), (4), (6) and (7). Petitioner argues that the Fort Bragg Schools System (System) is the Activity because the Fund is an instrumentality of the Army at Fort Bragg, and not a separate and distinct entity as contended by the Activity. The Activity asserts the Fund is not an "agency" within the meaning of section 7103(a)(3)[1/],

---

1/ Section 7103. Definitions; application

(a) For the purpose of this chapter -

. . . . . .

'agency' means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Veterans' Administration), the Library of Congress, and the Government Printing Office, but does not include-
(A) the General Accounting Office;
(B) the Federal Bureau of Investigation;
(C) the Central Intelligence Agency;

(Continued)

the employees of the Fund are not "employees" within the meaning of section 7103(a)(2)[2/] of the Statute and, therefore, the Fund is not subject to the Authority's jurisdiction. The sole issue herein is whether the Fund is an "agency" within the meaning of the Statute, and therefore subject to the jurisdiction of the Authority.

The Fund is a private organization that provides noonday meals to students and faculty for Fort Bragg Schools System. The Fund employs approximately 36 employees at seven schools. Approximately 98% of the students are either military dependents, children of civilian base residents, or non-military related dependents of military households.

Revenue is derived primarily from cash receipts for lunches and milk sold in the school cafeterias and is expended for salaries, supplies, and other expenses necessary for the cafeteria operation. The Fund also participates in the reimbursement plan of the U.S. Department of Agriculture surplus food commodities program via the State of North Carolina.

(Continued)

(D) the National Security Agency;
(E) the Tennessee Valley Authority;
(F) the Federal Labor Relations Authority; or
(G) the Federal Service Impasses Panel;

2/ Section 7103. Definitions; application

(a) For the purpose of this chapter -

. . . . . .

(2) 'employee' means an individual -
(A) employed in an agency; or
(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;
but does not include-
(i) an alien or noncitizen of the United States who occupies a position outside the United States;
(ii) a member of the uniformed services;
(iii) a supervisor or management official;
(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the Agency for International Development, or the International Communication Agency; or
(v) any person who participates in a strike in violation of section 7311 of this title;

The Fund employees were nonappropriated fund (NAF) employees until 1976 when the cafeteria operation's status was changed to a "Type 3" private organization under Army Regulation 210-1, with the approval of the Commanding General. Although the Commanding General has the right to revoke his approval of the Fund as a private organization, he does not have control over its day-to-day operations. Such classification is defined in Army Regulation 210-1 as an independent private organization that is "controlled locally by a common interest group with no formal connection with outside organizations." The status was changed at the request of North Carolina State officials for the stated reason that it was inappropriate for the school system to be taking monies (lunch payments) from the cafeteria operation and paying it to the central post for support services. The State directed that the cafeteria operation be operated in a manner comparable to other systems in North Carolina. At the time of the change, employees had the option to resign and seek outside employment, be assigned to another NAF unit, or be hired by the new private organization, the Fund. None of the employees sought other NAF jobs. All of them sought positions with, and were hired by the Fund. As a result of the change, employees were refunded their "NAF" retirement benefits because the Fund does not have a retirement plan.

A representational certificate had been granted to the National Association of Government Employees (NAGE) in 1973 for all NAF employees at Fort Bragg. NAGE did not challenge the loss of the Fund employees at the time of the creation of the Fund, nor did it intervene in the instant proceeding.

The Fund's constitution and employee contracts are the only written documents governing the Fund's operations. Article II(f) of the constitution states that the "organization will be self-sustaining and receive no support assistance or facilities from the Army or from nonappropriated fund instrumentalities . . . ." Article V states that the Fort Bragg School Board will constitute the officers of the Fund and will serve as the Fund Council (Council). Presently, the School Board members are appointed by the Commanding General. Article V, Section II requires that the Superintendent of Schools be appointed Custodian of the Fund. Membership in the Fund is voluntary and open to all parents of dependent children enrolled in the System and all school employees. The constitution also includes employee policies and regulations.

The School Food Services Supervisor is in charge of managing the food operations at the seven schools and reports to the Assistant Superintendent for Business, who reports directly to the Superintendent. Although the Superintendent, Assistant Superintendent, and Food Services Supervisor are appropriated fund employees and receive government checks, the employees receive non-government checks against the Fund's account, endorsed by the Superintendent. The Superintendent approves leave but employees have a right of appeal to the Council. There is no interchange of assignments between the employees of the System and those of the Fund, and no common first level supervision.

Based on the foregoing, it is concluded that the Fund is not an "agency" as defined in section 7103(a)(3) of the Statute. That is, the Fund is not an

Executive agency, or a nonappropriated fund instrumentality of the U.S. Army. As to whether it continues to be an NAF instrumentality of the U.S. Army, as set forth above, the record reveals that the Fund was established and exists as a private organization in accordance with Army regulations and in response to a legitimate purpose. Further, the Fund's employees, in contrast to other NAF employees, do not have a retirement plan, and are now covered by social security. Although the Commanding General controls appointments to the Fund Council via the School Board, he does not exercise control over its day-to-day operations, or the wages, hours and working conditions of the Fund's employees.

Under these circumstances, it is concluded that the Fund is no longer a NAF instrumentality and therefore does not come within the definition of "agency" under section 7103(a)(3) of the Statute. Thus, the employees are not "employees" within the meaning of section 7103(a)(2).3/ Accordingly, it shall be ordered that the petition herein be dismissed on jurisdictional grounds.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 4-RO-30 be, and it hereby is, dismissed.

Issued, Washington, D.C., July 10, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ See General Services Administration, National Archives and Records Service, 8 A/SLMR 747, A/SLMR No. 1075, FLRC No. 78A-98 (1978); National Science Foundation, 3 A/SLMR 564, A/SLMR No. 316 (1973); Action, 2 A/SLMR 495, A/SLMR No. 207 (1972).

CORRECTED COPY

3 FLRA No. 104

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF LABOR,
WASHINGTON, D.C.

Activity

and

Case No. 3-CU-26

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 12, AFL-CIO

Labor Organization

and

NATIONAL COUNCIL OF FIELD LABOR
LOCALS, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed with the Federal Labor Relations Authority under section 7111(b)(2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135, a hearing was held before a hearing officer of the Authority. The Authority has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case, including briefs filed by the Activity and the American Federation of Government Employees, Local 12, AFL-CIO (Local 12), the Authority finds: the Petitioner, the U.S. Department of Labor (Activity/Department), seeks to clarify two existing bargaining units within the Department. It contends that the field office employees in the Washington, D.C. area, that had previously been included in a unit for which Local 12 was granted recognition in 1962, should no longer be included in the unit. Instead, it contends that they should now, by clarification, be included within another unit granted recognition by the Activity in 1965, which unit consists of all field office employees located outside the Washington, D.C area, represented by the National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO (Council). In this connection, the Activity asserts the purpose of the instant petition was not to change Local 12's bargaining unit but merely to have it accurately reflect what had been a reality since 1965, brought

about by a Memorandum of Understanding between the parties. The Activity seeks such clarification essentially to "insure that the official unit definition records of the FLRA reflect the unit definition which had been clarified in December 1965." Such Memorandum, it contended, indicates that at the time, the parties agreed the D.C. Metropolitan field office employees, although represented for collective bargaining purposes by Local 12, which for those purposes was an affiliated Council lodge, were included within the Council's unit. The Activity argues such contention is reinforced by its subsequent changes in its field structure, its 1973 Labor agreement with Local 12, and its 1978 agreement with the Council. The Activity contends the inclusion of such field office employees in the Council unit would promote effective dealings and efficiency of operations.

Local 12 opposes the inclusion of the field employees in question in any unit other than its existing unit. In this regard, Local 12 asserts no changes of consequence have been made in the Activity's field structure since 1962, which would warrant accreting these employees represented since 1962 by Local 12, into the Council's unit. It also maintains that the field offices in question were in existence at the time of its original recognition and the 1965 exclusive recognition accorded the Council, specifically excluded the field employees in question because they were already included in Local 12's 1962 exclusive recognition. Local 12 regards the 1965 Memorandum of Understanding as merely a reaffirmation of that reality, and the 1973 agreement between itself and the Activity as further underscoring that fact. It views the Activity's 1978 agreement with the Council as an illegal attempt to include the D.C. Metropolitan field office employees previously included within Local 12's 1962 recognition and specifically excluded by the Council's 1965 recognition mentioned above, which had never been altered by a clarification of the parties or any third party proceeding. The Council took no position at the hearing or by submission of briefs.

There are roughly 22,000 employees in the Department of Labor, with approximately 9,000 in the Washington Metropolitan area, and the balance in the field. The Council herein represents over 6,000 employees in a Department-wide unit outside the Washington, D.C. area, while Local 12 represents over 4,000 employees in the Washington, D.C. area. The number of employees in the D.C. metropolitan area sought to be clarified out of Local 12's unit is about 226. In 1962, pursuant to a secret ballot election, the Activity granted Local 12 exclusive recognition under Executive Order 10988, for a unit consisting of employees of the Activity located in the metropolitan area of Washington, D.C., which included the National office and certain field offices located in that area. In 1965, after an election, the Activity granted exclusive recognition under Executive Order 10988, to the Council, for a unit of all Activity field offices outside of the Washington, D.C. metropolitan area. Because of some confusion with respect to the foregoing recognitions, the previously cited Memorandum of Understanding between the parties was executed in 1965, which appears to be one of the major reasons for the instant petition. Local 12 contends that such document clarified the previously granted recognition by reaffirming Local 12's inclusion of Washington, D.C. field employees in its

unit, and the Activity contends that by such document the original recognitions were modified to include these employees within the Council's unit. The 1973 agreement between Local 12 and the Activity, also contains some ambiguity. Thus, the preamble of that document, Local 12 insists, is supportive of its unit contention by virtue of the language therein, to wit:" This agreement . . . shall be applicable throughout the bargaining unit in the Department in the Washington Metropolitan area, for which Local 12 is the exclusive representative." However, the unit definition in that agreement states in pertinent part: "The unit includes all employees in the National Office." The Activity asserts that the latter provision recognizes an accomplished fact; namely, that D.C. metropolitan area field office employees were clarified out of Local 12's unit by the 1965 Memorandum of Understanding, and so were purposely not mentioned in the above unit description. This verity is bolstered, the Activity would urge, by the 1978 current agreement between itself and the Council. Section 2 of the 1978 agreement specifically includes in the unit, field duty stations located within the D.C. metropolitan area. With respect to a Regional Office organized in 1968 in Philadelphia to engage in some dealings with the field offices located in the D.C. area, there is no indication that such organization affected any noticeable change in the field offices in existence at the time or today.

Upon consideration of the foregoing, it is the Authority's view the unit of recognition represented by Local 12, including the field office employees located in the D.C. Metropolitan area, sought to be clarified herein by accreting such field employees into the unit represented by the Council, has not changed either by voluntary action of the parties, or by reason of changes in the Activity's field office structure. In this regard, the record reveals the 1962 Local 12 Recognition covered all Department employees in the Washington Metropolitan area, which necessarily included field employees. The 1965 Recognition accorded the Council, recognized this fact by limiting the Council's recognition to field offices outside the Washington Metropolitan area. The 1965 Memorandum of Understanding between the parties alludes to the exclusive representation of the Washington metropolitan area bargaining unit represented exclusively by Local 12 in 1962 which included the employees in question. */

*/ The 1965 Memorandum of Understanding between the parties states in pertinent part:

> "In view of the fact that the Washington area bargaining unit represented exclusively by Labor Lodge 12, American Federation of Government Employees, includes certain field service offices engaged in the administration of nationwide programs of the field establishment of certain bureaus, offices, or administration of the U.S. Department of Labor.
>
> In view of the fact that the granting of exclusive recognition to the National Council of Field Labor Lodges, American Federation of Government

(Continued)

It is undisputed that since 1962, with one specifically permitted exception by Local 12, Local 12 has historically represented the employees sought in the petition, in numerous grievances, personnel problems, arbitrations and other collective bargaining areas. During this time, the Activity had dealt with Local 12 in its capacity as exclusive representative of such employees, and has acquiesced in the arrangement between Local 12 and the Council by which Local 12 administers the Council's agreement covering the employees in question. In this regard, it should be noted that even though the Local 12 unit at issue was accorded exclusive recognition under Executive Order 10988, which became effective in 1962, the Authority finds that such units continued to be recognized by the Assistant Secretary under Executive Order 11491, and are recognized under the present Federal Service Labor-Management Relations Statute in the absence of any events warranting a change. Accordingly, the Authority will order the unit represented by Local 12 be clarified by continuing to include field office employees in the D.C. Washington metropolitan area.

(Continued)

Employees, provides an appropriate bargaining representative for all field service employees of the Department.

Therefore, it is agreed between the management of the Department of Labor and Labor Lodge 12, American Federation of Government Employees, in such field organizational units in the Washington metropolitan area, Labor Lodge 12 shall, for collective bargaining purposes, act as an affiliated lodge through the National Council of Field Labor Lodges, American Federation of Government Employees, which has exclusive recognition status for the field service employees of the Department, exclusive of the metropolitan area.

It is further agreed that in the representation of employees in field organization units in the Washington metropolitan area on day-to-day matters of personnel policy, practice, and working conditions, including employee representation on grievances and adverse action appeals as defined in the General Agreement between the Department of Labor and Labor Lodge 12, the union shall continue to act for such employees in direct consultation with appropriate management representation in its status as their exclusive representative as it has since the signing of the General Agreement on January 30, 1963.

ORDER

IT IS HEREBY ORDERED that the unit of exclusive recognition granted to the American Federation of Government Employees, Local 12, AFL-CIO for a Department-wide unit in Washington, D.C. be and it hereby is, clarified by continuing to include all eligible employees in the Department of Labor field offices within the Washington, D.C. metropolitan area.

Issued, Washington, D.C., July 17, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

THE ALASKA RAILROAD, FEDERAL
RAILROAD ADMINISTRATION,
DEPARTMENT OF TRANSPORTATION

Activity

and

Case No. 9-RO-19

AMERICAN TRAIN DISPATCHERS
ASSOCIATION, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under § 7111(b)(1) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), a hearing was held before a hearing officer of the Authority. The Authority has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record in the subject case, the Authority finds:

American Train Dispatchers Association, AFL-CIO (Petitioner) seeks to represent exclusively employees of the Alaska Railroad (Activity) in a unit described as: "Agents, Agent-Telegraphers, Telegraphers-Clerk-Yardmaster, Telegraphers, and Printer Machine and Teletype Operators, excluding all professional employees, management officials, supervisors, employees described in 5 U.S.C. § 7112(b)(2), (3), (4), (6) and (7), and all employees with exclusive recognition on the record." */ The Activity contends that the proposed unit is not appropriate for the purpose of exclusive recognition under the Statute, essentially because it does not include employees who share a community of interest with the employees within the petitioned for unit, and that such a unit would not promote effective dealings or efficiency of agency operations. In this regard, the Activity contended that the employees in the sought unit more properly should be part of a unit of clerical employees currently represented exclusively by American Federation of Government Employees, Local 183, AFL-CIO (AFGE).

The Activity is one of several components of the Federal Railroad Administration, which is part of the Department of Transportation. The mission of the Activity is to provide transportation for persons and property of the general public, carry mail, and support defense and other governmental requirements by operating a rail line between the ports of Seward and Whittier, through Anchorage, to Fairbanks, Alaska.

*/ The unit sought appears as amended at the hearing.

The Activity is organized, under the overall direction of a General Manager, into four staff sections and six departments, among which is the Transportation Department. The employees in the petitioned for unit are administratively assigned to the Transportation Department, but, they are physically located at various geographic locations throughout the Activity's operation.

The employees in the sought unit have historically been represented in a separate bargaining unit since sometime in the 1920's, apparently coinciding with the start of the Activity's operations. At that time, the exclusive bargaining representative of these employees was the Order of Railroad Telegraphers. Sometime in the 1960's, the Order of Railroad Telegraphers became part of the Transportation and Communication Employees Union, and, in 1969, the latter organization merged with the Brotherhood of Railroad, Airline and Steamship Clerks (BRASC). In 1978, the BRASC disclaimed any further interest in representing the unit. Prior to the disclaimer, for a period of approximately 19 years the Activity has maintained a collective bargaining agreement and 11 supplements with the exclusive representative of the petitioned for employees. At the time of the hearing, the employees in the sought unit were the only employees of the Activity eligible to be represented exclusively who were not currently represented by an exclusive bargaining representative.

As noted above, the employees in the petitioned for unit (herein called telegraphers) are all administratively assigned to the Transportation Department, under the direction of the Superintendent of Transportation. Whereas, the Chief Train Dispatcher is the first level supervisor for all the telegraphers, clerical employees of the Activity have different immediate supervisors. The record discloses that, generally, telegraphers are engaged in maintaining records concerning on-track equipment, demurrage, shipping, receiving and billings, and also deal with the public with regard to information and sales. In this regard, the telegraphers' functions are similar to those of the Activity's clerical employees, represented by the AFGE. However, there are some critical existing and historical distinctions between the clerks and the telegraphers. The most obvious distinction is historical; that is, that the telegraphers, unlike any other employee, were required to be expert in the transmission and reception of Morse code. Although technological changes have made this skill irrelevant to the job, certain duties, responsibilities and qualifications imposed on the telegraphers as a consequence of this skill still remain. For example, unlike clerks, telegraphers spend a significant percentage of their working time near and on trains while clerical work is performed exclusively in offices; telegraphers prepare and transmit train orders; and, they are required to know, and are examined on, the operating rules and regulations for on-track equipment. Personnel and labor relations policies for all employees of the Activity are established and implemented under the direction of the General Manager by the Personnel Division of the Administration Department.

Based on all the above circumstances, the Authority finds that the petitioned for unit encompasses all employees who share a clear and identifiable community of interest. In this regard, the Authority notes that such employees enjoy a common mission, common supervision, essentially similar duties, training, classifications, and are subject to uniform personnel and labor relations policies. Moreover, contrary to the contention of the Activity, the Authority finds that such a unit will promote effective dealings and efficiency of agency operations. In this latter

regard, the Authority notes that this unit has historically resulted in effective dealings, and notes the testimony of the Activity that such unit will not interfere with the efficiency of Agency operations. Finally, the Authority notes that the sought unit is a residual unit of all unrepresented eligible employees of the Activity.

The Activity, in its alternative position, asserted that if the petitioned for unit was found appropriate, certain employees should be excluded therefrom based on their exercise of supervisory authority. The Petitioner does not agree.

The record discloses that the employees in the petitioned for unit are in the process of having their job titles changed to more accurately reflect their actual duties. Thus, instead of the job titles set forth in the description of the petitioned for unit, the employees were to receive, after the hearing herein, the new job titles of: Train Order Clerk, Ticket Agent, Passenger Agent, Station Agent, and General Agent/Yardmaster. The Activity, utilizing the prospective job titles, contends that two employees who are to be classified as General Agent/Yardmaster, and who are assigned to Healy and Nenana, Alaska, respectively, should be excluded from the unit as supervisors. The record discloses that both disputed employees spend a significant portion of their time directing the activities of other employees. In the case of the General Agent/Yardmaster assigned to Nenana, Alaska, he directs the activities of a train crew, and also the activities of other telegraphers at that location, in the absence of specific orders from the Chief Dispatcher. In addition, he is authorized to order overtime work. In the case of the General Agent/Yardmaster assigned to Healy, Alaska, he directs the activities of a yard crew in loading, unloading and switching cars. In addition, he is authorized to change assignments of individual train crew members. The record clearly establishes that in exercising the authority to direct the actions of other employees, the two disputed employees consistently exercise independent judgment.

Section 7103(a)(10) of the Statute provides, in pertinent part:

> 'supervisor' means an individual employed by an agency having authority in the interest of the agency to . . . direct, assign . . . if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment . . . [;]

Under these circumstances, the Authority concludes that the employees to be classified as General Agent/Yardmaster, and assigned to Nenana and Healy, Alaska, are supervisors within the meaning of § 7103 of the Statute, and are excluded from the unit herein found appropriate for the purpose of exclusive recognition.

Accordingly, based on all the above circumstances, the Authority finds the following unit to be appropriate for the purpose of exclusive recognition under the Statute:

> All Agents, Agent-Telegraphers, Telegraphers-Clerk-Yardmaster, Telegraphers, and Printer Machine and Teletype Operators, excluding all professional employees, management officials, supervisors, and employees described in 5 U.S.C. § 7112(b)(2), (3), (4), (6) and (7).

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Regional Director shall supervise the election, subject to the Authority's rules and regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or on furlough, including those in the military service, who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Train Dispatchers Association, AFL-CIO.

Issued, Washington, D.C., July 17, 1980

Ronald W. Haughton,
Ronald W. Haughton, Chairman

Henry B. Frazier III,
Henry B. Frazier III, Member

Leon B. Applewhaite,
Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION MEDICAL CENTER
(CANANDAIGUA, NEW YORK)

Respondent

and

Case Nos. 1-CA-47
1-CA-62
1-CA-123
1-CA-249
1-CA-257
1-CA-264

LOCAL 3306, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Charging Party

ORDER APPROVING FORMAL SETTLEMENT AGREEMENT

On April 10, 1980, Veterans Administration Medical Center, Canandaigua, New York (the Respondent), Local 3306, American Federation of Government Employees, AFL-CIO (the charging party and Union herein), and the General Counsel of the Federal Labor Relations Authority entered into a settlement stipulation (the Settlement Stipulation), subject to approval of the Authority, providing for the entry of a consent order by the Authority and a consent judgment by any appropriate United States Court of Appeals. The parties waived all further and other proceedings before the Authority to which they may be entitled under the Federal Service Labor-Management Relations Statute and the rules and regulations of the Authority. The Respondent waived its right to contest the entry of a consent judgment and to receive further notice of the application therefor.

The Settlement Stipulation is hereby approved and made a part of the record herein, and the proceeding is hereby transferred to and continued before the Authority in Washington, D.C., for the entry of an Order pursuant to the provisions of the subject Settlement Stipulation.1/

1/ In so approving the subject Settlement Stipulation, the Authority notes that the last sentence of Paragraph 9 thereof, in referring to the Stipulation's cease and desist and affirmative action provisions, inadvertently refers to Paragraph 7 of the Stipulation, rather than Paragraph 6, which latter paragraph contains those provisions.

Upon the entire record in this case, including the Settlement Stipulation, the Authority finds:

1. Veterans Administration Medical Center, Canandaigua, New York, the Respondent, is now and has been at all times material herein, an agency within the meaning of Section 7103(a)(3) of the Statute.

2. Local 3306, American Federation of Government Employees, AFL-CIO, the Union, is now and has been at all times material herein, a labor organization within the meaning of Section 7103(a)(4) of the Statute.

ORDER

Upon the basis of the above findings of fact, the Settlement Stipulation, and the entire record in the proceedings, and pursuant to Section 7105(a)(2)(G) of the Federal Service Labor-Managment Relations Statute, the Federal Labor Relations Authority hereby orders that the Respondent, Veterans Administration Medical Center, Canandaigua, New York shall:

1. Cease and desist from:

(a) Threatening occupational therapists or any other employees with unusual tours of duty, denial of annual leave, the imposition of new schedules, or any type of adverse action in order to discourage employees from engaging in Union activity or from filing unfair labor practice charges under the provisions of the Federal Service Labor-Management Relations Statute.

(b) Making statements disparaging and deprecating the representation of occupational therapists or any other employees by Union representatives.

(c) Ordering Union stewards to leave meetings between employees and members of management concerning unfair labor practices filed under the provisions of the Federal Service Labor-Management Relations Statute or which concern personnel policies and practices or general conditions of employment.

(d) Making statements to occupational therapists or any other employees that communications with the Union must go through a supervisor.

(e) Stating to occupational therapists or any other employees who seek the assistance of the Union that they are disloyal and should seek employment elsewhere.

(f) Discriminating against employees by removing work related materials of occupational therapists; engaging in surveillance of occupational therapists or any other employees, other than that required for normal supervision; and refusing to appoint occupational therapists as acting chiefs in order to discourage membership in or activities on behalf of the Union or any other labor organization or to discourage occupational therapists or any other employees from filing charges under the provisions of the Federal Service Labor-Management Relations Statute.

(g) Refusing to give notice to and consult, confer or negotiate in good faith with the American Federation of Government Employees, AFL-CIO, the exclusive representative of its professional employees, before eliminating the practice of appointing occupational therapists as acting chiefs, or making any change in the procedure of reviewing the work of occupational therapists.

(h) By-passing the American Federation of Government Employees, AFL-CIO, the exclusive representative of its professional employees, or any other exclusive representative, and dealing directly with occupational therapists or any other employees concerning personnel policies and practices or general conditions of employment.

(i) Conducting formal discussions between representatives of management and bargaining unit employees concerning grievances, unfair labor practice charges, personnel policies and practices, or other general conditions of employment without notifying and affording the American Federation of Government Employees, AFL-CIO, the opportunity to be represented at such discussions.

(j) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action which the Federal Labor Relations Authority finds will effectuate the policies of the Federal Service Labor-Management Relations Statute:

(a) Return all work related materials to occupational therapists taken from them on and after May 8, 1979.

(b) Reinstitute the method of reviewing the work of occupational therapists which existed on May 8, 1979.

(c) Resume the practice of appointing occupational therapists to the position of acting chief which existed prior to May 8, 1979.

(d) Post at its facilities at Canandaigua, New York, copies of the attached notice, marked "Appendix", on forms to be furnished by the Regional Director of the Federal Labor Relations Authority's regional office for Region I. Upon receipt, such form shall be signed and dated by the Director of the Medical Center and shall be posted and maintained by the Director for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material; and

(e) Notify the Regional Director of the Federal Labor Relations Authority's regional office for Region I in writing, within thirty (30) days from the date of this order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., July 10, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We Hereby Notify Our Employees That:

The Federal Service Labor-Management Relations Statute gives employees of this Agency the following rights:

To form, join, or assist any labor organization;

To act for a labor organization in the capacity of a representative;

To present the views of the labor organization, in said capacity, to heads of agencies and other officials of the executive branch of the Government, the Congress or other appropriate authorities;

To engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this Statute; or

To refrain from any of the activities set forth above, freely and without fear of penalty or reprisal.

This Agency will not violate any of these rights. More specifically,

WE WILL NOT threaten occupational therapists or any other employees with unusual tours of duty, denial of annual leave, the imposition of new schedules, or any type of adverse action in order to discourage employees from engaging in activity for or on behalf of the American Federation of Government Employees, AFL-CIO or from filing unfair labor practice charges under the provisions of the Federal Service Labor-Management Relations Statute.

WE WILL NOT make statements disparaging and deprecating the representation of occupational therapists or any other employees by union representatives.

WE WILL NOT order union stewards to leave meetings between employees and members of management concerning unfair labor practice charges filed under the the provisions of the Federal Service Labor-Management Relations Statute or which concern personnel policies and practices or general conditions of employment.

WE WILL NOT make statements to occupational therapists or any other employees that communications with a union must go through a supervisor.

WE WILL NOT make statements to occupational therapists or any other employees who seek the assistance of a union that they are disloyal and should seek employment elsewhere.

WE WILL NOT remove work related material from occupational therapists; engage in surveillance of occupational therapists, other than that required for normal supervision; refuse to appoint occupational therapists as acting chiefs, or discriminate in any way against occupational therapists or any other employees in order to discourage membership in or activities on behalf of the American Federation of Government Employees, AFL-CIO, or any other labor organization or in order to discourage occupational therapists or any other employees from filing charges under the provisions of the Federal Service Labor-Management Relations Statute.

WE WILL give notice to and consult, confer or negotiate in good faith with the American Federation of Government Employees, AFL-CIO, the exclusive representative of our professional employees, before eliminating the practice of appointing occupational therapists as acting chiefs, or making any change in the procedure of reviewing the work of occupational therapists.

WE WILL NOT by-pass the American Federation of Government Employees, AFL-CIO, the exclusive representative of our professional employees, or any other exclusive representative and deal directly with employees concerning personnel policies and practices or general conditions of employment.

WE WILL NOT conduct formal discussions between representatives of management and bargaining unit employees concerning grievances, unfair labor practice charges, personnel policies and practices, or other general conditions of employment without notifying and affording the American Federation of Government Employees, AFL-CIO, the opportunity to be represented at such discussions.

WE WILL return all work related materials to occupational therapists taken from them on or after May 8, 1979, as a result of our discrimination against them for engaging in union activity and for filing unfair labor practice charges under the Federal Service Labor-Management Relations Statute.

WE WILL reinstitute the procedure for reviewing the work of occupational therapists which existed on May 8, 1979, and WE WILL resume the practice of appointing occupational therapists to the position of acting chief which existed prior to May 8, 1979.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

_____
(Agency or Activity)

Dated_____ By _____
(Signature) (Title)

This Notice must remain posted for sixty (60) consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority whose address is: Federal Labor Relations Authority, Region I, 441 Stuart Street, 8th Floor, Boston, Massachusetts 02116, telephone number (617) 223-0920.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE,
JACKSONVILLE DISTRICT

Respondent

and

Case No. 4-CA-50(1)

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

DECISION AND ORDER

The Administrative Law Judge in the above-entitled proceeding issued his Recommended Decision and Order finding that Respondent had engaged in the unfair labor practice alleged in the complaint, and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

Therefore, pursuant to § 2423.29 of the Authority's rules and regulations (45 F.R. 3511, January 17, 1980) and § 7118 of the Federal Service Labor-Management Relations Statute (5 U.S.C. §§ 7101-7135), the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudical error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, including the Respondent's exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions, and recommendations.

ORDER

Pursuant to § 2423.29 of the Federal Labor Relations Authority's rules and regulations and § 7118 of the Statute, the Authority hereby orders that the Department of the Treasury, Internal Revenue Service, Jacksonville District shall:

1. Cease and desist from:

Instituting changes in the time schedules for the processing of cases by unit employees without notifing the National Treasury Employees Union, the exclusive representative of its employees, and affording it the opportunity to bargain concerning the implementation of such changes and their impact on adversely affected employees.

2. Take the following affirmative action:

(a) Upon request, meet and negotiate with the National Treasury Employees Union concerning the procedures to be utilized in implementing any changes in time schedules for the processing of cases and their impact on adversely affected employees.

(b) Post, at its Miami, Florida facility, copies of the attached Notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the District Director for the Jacksonville, Florida District, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where Notices are customarily posted. The District Director shall take reasonable steps to insure that such Notices are not altered, defaced or covered by any other material.

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., July 17, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute changes in time schedules for the processing of cases for unit employees without first notifing the National Treasury Employees Union, the exclusive bargaining representative of our employees, and affording it the opportunity to bargain concerning the implementation of such changes and their impact on adversely affected employees.

WE WILL, upon request, meet and negotiate with the National Treasury Employees Union concerning the procedures to be utilized in implementing any changes in time schedules for the processing of cases and their impact on adversely affected employees.

_____
(Agency or Activity)

Dated:_____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice, or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region 4, whose address is: Suite 501, North Wing, 1776 Peachtree Street, NW., Atlanta, Georgia 30309.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
DEPARTMENT OF TREASURY INTERNAL REVENUE SERVICE JACKSONVILLE DISTRICT Respondent	
and	Case No. 4-CA-50(1)
NATIONAL TREASURY EMPLOYEES UNION Charging Party	

Ms. Mathilde L. Genovese, Esquire
Office of the General Counsel
Federal Labor Relations Authority
Region IV, Suite 501, North Wing
1776 Peachtree Street, NW.
Atlanta, Georgia 30309
For the General Counsel

Forrest W. Hunter, Esquire
Office of Chief Counsel
Internal Revenue Service
Post Office Box 1070
Room 824, 275 Peachtree Street
Atlanta, Georgia 30301
For the Respondent

Timothy C. Welsh, Esquire
Assistant Counsel
National Treasury Employees Union
Suite 430, 2801 Buford Highway
Atlanta, Georgia 30329
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C.

Section 7101, et seq., and the Interim Rules and Regulations issued thereunder, Fed. Reg., Vol. 44, No. 147, July 30, 1979, 5 C.F.R. Chapter XIV, Part 2411, et seq.

Pursuant to an amended charge first filed on April 2, 1979, by the National Treasury Employees Union (hereinafter called the Union or Charging Party), a Complaint and Notice of Hearing was issued on October 11, 1979. The Complaint alleges that the Department of the Treasury, Internal Revenue Service, Jacksonville District (hereinafter called the Respondent or IRS) violated Sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (hereinafter called the Statute) by virtue of its actions in unilaterally adopting new time schedules for the processing of cases without giving prior notice to the Union and affording the Union an opportunity to consult or negotiate concerning the impact and/or implementation of the change.

A hearing was held in the captioned matter on January 7 and 8, 1979, in Coral Gables, Florida. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues herein. All parties submitted briefs which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact and conclusions.

Findings of Fact

IRS and the Union, which is the exclusive bargaining representative of the employees involved herein, are parties to a collective bargaining agreement covering the period January 31, 1977 through January 31, 1981. The contract is a multi-district agreement which includes Respondent's Jacksonville, Florida District. The Miami, Florida office of the Respondent falls within the Jacksonville District. The Union has five separate chapters in the State of Florida which compose the "Joint Council". Henry Coleas is the Chairman of the Joint Council and in such capacity is the chief spokesman for all the employees represented by the Union in IRS's Jacksonville District. According to the uncontested testimony of Mr. Coleas, he, as Chairman of the Joint Council, is the only Union representative authorized to receive notice of any proposed changes in working conditions. Mr. Coleas further testified, without contradiction, that he did not receive any notice from the Respondent concerning the alleged changes in working conditions which occurred in Branch VI of Respondent's Miami District Office.

The Miami office of the IRS is divided into a number of branches, among which is Examination Branch VI wherein the alleged unilateral changes underlying the instant complaint occurred. Examination Branch VI is further divided into eight groups, each of which is

under the supervision of a Group Manager, who in turn is answerable to the Chief of Examination Branch VI. 1/ At the time of the events herein, Mr. William Allen was the Chief of Examination Branch VI and Mr. Ed Kahn and Mr. David at various times held the position of Group Manager for the Estate and Gift Tax Group.

As indicated by the respective names of the groups, each group is responsible for checking the different types of tax returns filed with the Internal Revenue Service. Thus, some groups checked individual tax returns, while other groups were responsible for checking partnership, corporation or estate and gift tax returns. According to the record, the work of the Estate and Gift Tax Group is of a more time consuming nature than the work of the seven other groups since the information necessary to verify or check the estate returns was often not readily or immediately available because the decedent involved was not a Florida resident. In these circumstances, the attorneys in the Estate Tax Group would have to secure the decedents past tax records from other IRS Districts before they had sufficient information to proceed with the estate tax audit. The record indicates that obtaining copies of the past returns and other pertinent materials from other IRS Districts was a frustrating and time consuming activity. Accordingly, a final audit of an estate tax return by Estate and Gift Tax personnel, aside from other technical problems that might be involved, generally took much longer than the tax audits performed by the attorneys or auditors working in the other tax groups in Examination Branch VI.

In performing their day to day work, the attorneys working in the Estate and Gift Tax Group of Examination Branch VI were governed by, among other things, the "Audit Technique Handbook For Estate Tax Examiners" and the "Internal Revenue Manual For Estate And Gift Tax". Excerpts from both documents which appear in the record as General Counsel's Exhibits 3 & 4 speak of an "18 months cycle" for the completion of an estate tax audit.

The Group Managers of Examination Branch VI in performing their day to day supervisory duties were governed by the "Handbook For Audit Group Managers", "Handbook For Examination Branch Managers" and various supplemental memoranda issued by the IRS which clarified, expanded and emphasized various provisions, techniques and evaluation forms set forth in the handbooks. The aforementioned handbooks and supplemental memoranda, appearing in the record as Respondent's Exhibits 1-8, imposed upon the Group Managers the responsibility for conducting periodic "on-the-job-visits", "workload reviews" and "case reviews", all of which were designed to insure that the various cases

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1/ The groups comprising Examination Branch VI were as follows: Estate and Gift Tax Group, Special Enforcement Group, (4) Field Audit Groups and (2) Office Audit Groups.

assigned to the employees within the respective groups would be timely processed without any undue delays. The Group Managers were further charged with the responsibility of recording, on various forms supplied by the IRS, the substance of the periodic reviews as well as the case handling agreements or understandings reached therein. Additionally, the Group Managers were responsible for filling out various forms which evaluated the performance of the individual employees in a number of categories. 2/ The evaluations went from unsatisfactory to outstanding. Due to the different nature of the tax returns involved, i.e. individual, corporate, partnership, estate and gift tax, etc., the record indicates that the critical time elements for the processing the cases differed substantially among the tax groups in Examination Branch VI. 3/ According to the printed instructions, the Group Managers were to keep copies of the above described documentation and have the affected employee initial same. With respect to the required documentation, Respondent's Exhibit 1 states, among other things, that:

> 5. An outstanding performance reflected in writing would express management's appreciation for a job well done and could be used to support an employee performance evaluation.

With respect to the Group Managers' compliance with the Handbooks an supplemental memoranda, the record indicates that with the exception of the Estate and Gift Tax Group Manager, the Group Managers of the other groups within Examination Branch VI religiously followed the procedures and accepted the obligations and/or responsibilities set forth therein. Contrary to the practices followed by the other Group Managers in Examination Branch VI, Mr. Ed Kahn, who had been Group Manager of the Estate and Gift Tax Group for many years prior March 14, 1979, generally honored the established procedures more in the breach than observance. Thus, the record further indicates that Mr. Kahn seldom, if ever, conducted any formal workload or case reviews or formally filled out the required documentary reports. Rather, Mr. Kahn appears to have allowed the various employees within his group and under his supervision to handle their various assigned cases on their own and only interjected himself in their day to day work when faced with an inquiry on a particular case from an outside source or when an individual employee requested assistance, due to the advanced age of a particular case. As a general rule, Mr. Kahn did not periodically review his group's case load and attempt to

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2/ The categories included scheduling, examination techniques, utilization of time, cooperation, initiative, etc.

3/ The record indicates that in the Field Audit Group a case was considered overage when it reached 6 month. In the Office Audit Group the critical time was 120 days.

set any target dates for the completion of the cases being handled by the employees within the Estate and Gift Tax Group. Although not required by Mr. Kahn, a number of the employees within the Estate and Gift Tax Group, did on periodic basis, voluntarily submit informal reports of the status of their respective case loads.

Mr. Allen, who was the Chief of Examination Branch VI during the period June 1977 - August 1979, and Mr. Kahn's supervisor, became aware of Mr. Kahn's lax adherence to the IRS Handbooks and supplemental memoranda in the late spring of 1978 and thereafter unsuccessfuly attempted to correct Mr. Kahn's deficiencies in this regard.

Mr. Allen did not make a planned further operational review of Mr. Kahn's Estate and Gift Tax Group due to the fact that he had been notified that an analyst from the Jacksonville District Office had scheduled a similar review of the Estate and Gift Tax Group for the Fall of 1978. Such review occurred in November of 1978. The written report of the review, dated January 3, 1979, noted Mr. Kahn's deficiencies as set forth in detail above.

On March 14, 1979, Mr. Allen, Chief of Examination Branch VI, being concerned with the number of overage cases in Branch VI and in order to insure that his new group managers were monitoring the case loads in their respective groups, without any prior notice or consultation with the Union, issued a memorandum entitled "Time Span of Examination - Overage Cases". The memorandum, which was directed to "All Branch VI Group Managers" with copies to "All Branch VI Employees", provided that during workload reviews examiners establish estimated completion dates for all cases less than six months old and that Group Managers establish completion dates for all cases which had been in process for over six months. Additionally, with respect to the cases over six months old, the Group Managers was instructed to give "specific directions to facilitate appropriate closings of these examinations and your direction should be recorded by the examiner and maintained in the case file". Lastly, the March 14th memorandum went on to state as follows:

> 3. When a regular program case has been in process for twelve months ..... the case will be discussed with the Branch Chief. Each group manager should provide me with a list, at the beginning of each month, reflecting the cases which need to be discussed to facilitate scheduling this discussion. The examiner and the group manager should bring the following information to facilitate our discussion 4/

4/ The discussions with the Branch Chief were to begin during the month of May 1979.

Subsequent to March 14, the attorneys in the Estate and Gift Tax Group were subjected to periodic workload reviews during which completion dates were set for their respective cases. The record reveals, however, that as a general rule the completion dates were not hard and fast and that the attorneys had no problem extending the completion dates as the circumstances surrounding or underlying any particular case changed. The record further reveals that even though a number of the attorneys in the Estate and Gift Tax Group had cases in process for over 12 months, none of them were ever scheduled for a discussion with the Branch Chief concerning such cases.

According to Mr. Allen, the March 14, 1979, memorandum was designed to alleviate the existing case back log by making him aware of the problems holding up the overage cases and allowing him to utilize his power as Chief of the Branch to cut any red tape that might be involved. Additionally, Mr. Allen wanted to emphasize to several new group managers the obligations imposed upon them by the various IRS Group Manager handbooks. Mr. Allen further testified that he had no intention of having all cases over twelve months old discussed with him, just those that were being held up by some other Region, etc. Mr. Allen's intentions in the above respect were never conveyed to the employees.

As noted supra, Mr. Allen never gave any notice to the Union prior to the issuance of the March 14th memorandum. In fact the Union only learned of the March 14th memorandum when NTEU Chapter 77 President Paul Tannenbaum received a copy in his capacity as an attorney in the Estate and Gift Tax Group. He thereafter informed Mr. Henry Coleas, the chief spokesman and chairman of the Joint Council, who in turn approached Mr. Allen. Mr. Allen took the position that there had been no change in conditions of employment and that negotiations were not in order. Mr. Coleas then concluded that since Mr. Allen was the District Director's representative, further attempts to bargain over the matter would be futile.

In the normal course of events, following the completion of an audit in the Estate Tax Group by an attorney, the completed audit is then forwarded by the Group Manager to the Review Committee in Jacksonville, Florida. Should the Committee disagree with the manner and methods utilized by the audit attorney, it would then return the audit through the Group Manager for correction per their instructions. According to a number of Estate and Gift Tax attorneys, 5/ the added pressure of a decrease in the time allowed for the processing of their cases could lead to errors and omissions which in turn would increase the probabilities of having their audits returned by the Review Committee. If such a result occurred, they were concerned that it

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5/ Two other attorneys in the Branch testified that they did not feel any additional pressure from the March 14th memorandum and continued to process their cases as usual.

might well impact on their promotional possibilities.

Discussion and Conclusions

It is well settled that an employer may not change personnel policies, practices, or working conditions without first providing the collective bargaining representative with advance notice of the proposed changes and allowing the collective bargaining representative an opportunity to negotiate concerning the proposed changes and/or the impact and manner of implementations of such changes. Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87; National Labor Relations Board, A/SLMR No. 246; 78th Division (Training), Kilmar USAR Center, Edison, New Jersey, 1 FLRA 97. In National Labor Relations Board, supra, a change in time schedules for the processing of cases without giving the Union there involved an opportunity to bargain thereon was held to be violative of Sections 19(a)(6) and (1) of Executive Order 11491, as amended. Accordingly, the sole issue to be decided is whether or not there was in fact a change in the time allotted for the processing of cases in the Estate and Gift Tax Group. 6/

The record is clear that prior to March 14, 1979, the attorneys in the Estate and Gift Tax Group worked independently without any meaningful supervision in the area of timetables for the completion of cases. Their only deadlines for the processing of cases appeared in the Handbook For Estate Examiners and the IRS Manual for Estate and Gift Tax. Both the aforementioned documents speak of an 18 months cycle for the completion of cases. Accordingly, it appears that a case was not considered overage in the Estate and Gift Tax Group until it exceeded 18 months. This remained the practice until March 14, 1979, when each attorney received a copy of Mr. Allen's memorandum. Thereafter, the Group Manager, who was then Mr. David, established completion dates for all cases in process over six months. Additionally, all cases in process over 12 months were to be discussed with the Branch Chief.

6/ General Counsel in her post-hearing brief alludes to the institution of the work-load reviews as a change in past practice and appears to be urging that the undersigned Administrative Law Judge find a separate violation of Sections 7116(a)(1) and (5) predicated thereon. To the extent that this is General Counsel's position, I find such position to be procedurally defective. In support of this conclusion, it is noted that (1) the complaint specifically limited the unlawful unilateral change in working conditions to the adoption of new time schedules for the processing of cases, (2) General Counsel indicated at the hearing that the submission of evidence with respect to the work-load or case reviews was for purposes of establishing the implementation of the new time schedules, and (3) no motion was made during the hearing to amend the complaint to conform to the evidence. Accordingly, in view of the foregoing, my decision will be confined solely to the issue set forth in the complaint, i.e. alleged unilateral change in time schedules for processing cases.

Although the memorandum did not expressly state that the existing "18 months cycle" was being abandoned, it does implicitly indicate such a conclusion. Thus, it is noted that the optimum time for processing a case appears to be 12 months since an Estate and Gift Tax Attorney was now faced with the option of completing a case within such time frame or appearing before the Branch Chief and justifying the reasons for delay. Further support for this conclusion is found in the title of the memorandum, i.e. "Time Span of Examinations - Overage Cases" and the fact that the Group Manager did in fact set completion dates for all cases 6 months old.

Based upon the foregoing considerations, I find that the March 14, 1979, memorandum and subsequent actions of the Group Manager consistent therewith constituted a change in the existing time frame for the processing of cases in the Estate and Gift Tax Group. The fact that this might not have been the intent of Mr. Allen does not alter such conclusion, particularly in view of the fact that he did not see fit to convey to either the attorneys in the Group or the Group Manager his motives for the March 14th memorandum.

Similarly, I find the fact that the completion dates were easily changed and that none of the attorneys were subjected to meetings with the Chief of the Branch to be of no import. The absence of enforcement bears solely on remedy and not the change. It is the change without notice to the Union and an opportunity to bargain over impact and implementation which is in derogation of the Union's representational status.

Lastly, contrary to the contention of the Respondent, I find that a change in the time frame for the processing of cases does have a substantial impact on the employees working conditions. The absence of enforcement of same carries little weight in the absence of any statement from the supervisory hierarchy assuring continuance of such practice. In the absence of such a statement the affected employees have no way of knowing what the future holds with respect to adherence to the March 14th memorandum.

Under all the circumstances and for the reasons stated above, I find that Respondent's actions in changing the time frame for the processing of cases without giving the Union prior notification thereof and the opportunity to request bargaining with respect to impact and implementation constituted a violation of Sections 7116(a)(1) and (5) of the Statute.

ORDER

Pursuant to 5 U.S.C. §7118(a)(7) and Section 2423.26 of the Final Rules and Regulations, 45 Fed. Reg. 3482, 3510 (1980), it is hereby ORDERED that the Department of Treasury, Internal Revenue Service, Jacksonville District shall:

1. Cease and Desist from:

Instituting changes in the time schedules for the processing of cases by unit employees without notifying the National Treasury Employees Union, the exclusive representative of its employees, and affording it the opportunity to bargain concerning the implementation of such changes and their impact on adversely affected employees.

2. Take the following affirmative action:

(a) Upon request, meet and negotiate with the National Treasury Employees Union concerning the procedures to be utilized in implementing any changes in time schedules for the processing of cases and their impact on adversely affected employees.

(b) Post at its Miami, Florida facility, copies of the attached Notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the District Director for the Jacksonville, Florida District, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Burton S. Sternburg

BURTON S. STERNBURG
Administrative Law Judge

Dated: February 29, 1980
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

We hereby notify our employees that:

WE WILL NOT institute changes in time schedules for the processing of cases for unit employees without first notifying the National Treasury Employees Union and affording it the opportunity to bargain concerning the implementation of such changes and their impact on adversely affected employees.

WE WILL upon request by the National Treasury Employees Union meet and negotiate with the National Treasury Employees Union concerning the procedures to be utilized in implementing any changes in time schedules for the processing of cases and their impact on adversely affected employees.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice, or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region 4, whose address is: Suite 501, North Wing, 1776 Peachtree Street, NW., Atlanta, Georgia 30309.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2578

(Union)

and

Case No. 0-NG-166

GENERAL SERVICES ADMINISTRATION,
NATIONAL ARCHIVES AND RECORDS
SERVICE, WASHINGTON, D.C.

(Activity)

DECISION ON NEGOTIABILITY APPEAL

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. §7101 et seq.).

During contract negotiations, the union submitted the following proposal pertaining to the agency's plan for implementing the Federal Equal Opportunity Recruitment Program (FEORP), pursuant to 5 U.S.C. §7201, 1/ which Program is

1/ 5 U.S.C. §7201 provides in pertinent part:

§7201. Antidiscrimination policy; minority recruitment program

. . . . . .

(b) It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin. The President shall use his existing authority to carry out this policy.

(c) Not later than 180 days after the date of the enactment of the Civil Service Reform Act of 1978, the Office of Personnel Management shall, by regulation, implement a minority recruitment program which shall provide, to the maximum extent practicable --

(1) That each Executive agency conduct a continuing program for the recruitment of members of minorities for positions in the agency to carry out the anti-discrimination policy set forth in subsection (b) in a manner designed to eliminate underrepresentation of minorities in the various categories of civil service employment within the Federal service, with special efforts directed at recruiting in minority communities, in educational institutions, and from other sources from which minorities can be recruited; . . . .

designed to insure equal employment opportunity by eliminating "underrepresentation" of minority groups within the Federal civil service: 2/

Union Proposal

> The goal for women and for each minority group shall be the percentage that group constitutes in the local or national population, whichever is higher. Appendix A to the contract contains the goals developed in accordance with this definition. Either party may demand the renegotiation of the content of appendix A in response to new statistical data. The parties have as their goal the elimination, as expeditiously as possible, of all underrepresentation of women and minorities in any grade or occupational group.

Question Here Before the Authority

The question is whether the proposal is within the agency's duty to bargain under section 7117 of the Statute. 3/

Opinion

Conclusion: The proposal concerns a matter which is within the duty to bargain under the Statute. Accordingly, pursuant to section 2424.10 of the

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2/ "Underrepresentation" is defined in OPM's implementing regulations, 5 C.F.R. §720.202(a) (1979), as:

> [A] situation in which the number of women or members of a minority group within a category of civil service employment constitutes a lower percentage of the total number of employees within the employment category than the percentage women or the minority constitutes within the civilian labor force of the United States . . . .

3/ Section 7117(a)(1) of the Statute provides, in pertinent part:

> § 7117. Duty to bargain in good faith; compelling need; duty to consult
>
> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the

(Continued)

Authority's rules and regulations, 45 F.R. 3513 (1980), the agency's allegation that the disputed proposal is not within the duty to bargain must be set aside. 4/

Reasons: The agency contends that the union's proposal is inconsistent with OPM regulations contained in the Federal Personnel Manual (FPM) which implement the FEORP in that the proposal would require the use of national or local population statistics in determining underrepresentation while OPM regulations require the use of local or national civilian labor force data; and would require the use of a higher percentage in establishing goals for eliminating underrepresentation than mandated by OPM's implementing regulations. The agency further contends that the proposal violates section 7106(a)(2)(C) of the

(Continued)

subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

The term "matters" as used in section 7117(a)(1) is explained by reference to the definition of "collective bargaining" in section 7103(a)(12) and "conditions of employment" in section 7103(a)(14) of the Statute:

§ 7103. Definitions; application

(a) For the purpose of this chapter --

. . . . . .

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees . . . .

. . . . . .

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . .

4/ In so deciding that the subject proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

Statute 5/ by requiring the selection of an in-house candidate if that candidate is a member of a minority group.

As the instant proposal relates to the establishment and administration of the agency's FEORP plan, a matter related to discrimination in employment, it falls within the scope of the duty to bargain under section 7117 of the Statute. 6/ What remains to be determined is whether the proposal is in any way inconsistent with law or regulation or is violative of the Statute.

As stated above, the agency first contends that the proposal would require the use of local or national population statistics while OPM's implementing regulations specify the use of local or national civilian labor force data. In its response to the agency's statement of position filed with the Authority in accordance with section 7117(c)(4) of the Statute, the union expressly agreed with the agency's position that civilian labor force data are to be used in making underrepresentation determinations, and indicated that the intent of its proposal is that the phrase "national or local population" should be interpreted to mean "national or local population of the civilian labor force" as required by law. Accordingly, under the union's interpretation of its own proposal, which is adopted for purposes of this decision, the agency has failed to demonstrate that this portion of the disputed proposal is inconsistent with OPM's regulations implementing the FEORP, as alleged.

5/ Section 7106(a)(2)(C) of the Statute provides as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws--

. . . . . .

(C) with respect to filling positions, to make selections for appointments from--

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source . . . .

6/ See American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, Case No. 0-NG-40, 2 FLRA No. 77 (Jan. 31, 1980), at 13-14.

Next, the agency alleges that the proposal is inconsistent with OPM's implementing regulations by requiring the use of a higher percentage than permitted by such regulations in establishing goals for eliminating underrepresentation. The operative section of OPM's regulations provides as follows: 7/

> Where an agency or agency component is located in a geographical area where participation of a particular underrepresented group is significantly lower than its participation in the national labor force, the agency or component may, in consultation with the Office of Personnel Management, use the lower percentage in determining underrepresentation . . . .

Subsequent to the effective date of this regulation, OPM determined that, under certain circumstances, agencies would not be required to consult prior to using the lower percentage in determining underrepresentation. Specifically, Subchapter 2-2.c.(3) of Attachment 1 to FPM Ltr. 720-2 provides, in pertinent part, that:

> OPM hereby grants blanket authorization to use lower local percentages for all occupational groupings at GS grades 4 or below and for all regular non-supervisory prevailing wage positions at grade 4 or below . . . .

Thus, where an agency or agency component is located in a geographical area where participation of an underrepresented group is significantly lower than its participation in the national civilian labor force, agencies have the discretion to use the lower percentage in determining underrepresentation. That is, the regulations of the OPM do not mandate the use of the lower percentage but rather permit the agency to do so in certain instances as a limited exception to the requirement that agencies, "under OPM's regulations, must generally use the higher of the two percentages [national or local] in making each underrepresentation determination." 8/ As such determination is left to the discretion of the agency in these instances, the manner in which the agency will exercise that discretion is a matter subject to the duty to bargain. Accordingly, the agency's allegation that the use of the higher percentage as required by the union's proposal is inconsistent with OPM regulations cannot be sustained.

7/ 5 C.F.R. §720.205(d) (1979).

8/ Federal Personnel Manual Ltr. 720-2, Attachment 1, Subchapter 2-2.c.(3).

The agency further contends that the declared intent of the union's proposal is to require the selection of an in-house candidate if that candidate is a member of a minority group where underrepresentation is found to exist, and therefore violates section 7106(a)(2)(C) of the Statute. However, as the union states in response to the agency's contention, "the language of the union proposal says nothing about restricting management's ability to undertake external recruiting to fill a position in which it has been determined that minorities or women are underrepresented [and] . . . would not prohibit management from exercising its rights under section 7106(a)" of the Statute. Rather, the proposal merely sets forth a certain statistical goal for the elimination of underrepresentation, but does not require management to take or refrain from taking any specific action toward the achievement of that goal.

Accordingly, for the reasons set forth herein, we find that the union's proposal concerns a matter which is within the agency's duty to bargain under the Statute, and the agency's allegation to the contrary is set aside.

Issued, Washington, D.C., July 10, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES (NFFE), LOCAL 1332

Union

and

Case No. O-NG-155

HEADQUARTERS, U.S. ARMY MATERIEL
DEVELOPMENT AND READINESS COMMAND,
ALEXANDRIA, VIRGINIA

Activity

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 et seq.).

Union Proposal

SECTION K. In any realignment of the workforce, the Employer agrees to the following procedures:

1. The Employer will negotiate with the Union as to whether a freeze of all hiring from outside is necessary for the duration of the realignment or until personnel actions under the realignment have been completed and all Transfer of Function (TOF) and Reduction-in-Force (RIF) employees have had the opportunity to fill vacancies. Except as provided in subparagraph a, below, before any positions in the organization are filled from outside, all in-house employees will be satisfactorily placed.

a. If it is agreed that a freeze is necessary the Employer will establish a joint Union/Management freeze review board to review and approve any exceptions to the freeze, and to develop criteria for these exceptions.

b. No exceptions to the freeze will be processed without joint Union/Management freeze review board approval.

Question Here Before the Authority

The question is whether the union's proposal is within the duty to bargain under section 7106(b)(2) and (3) of the Statute[1/] or, is negotiable only at the election of the agency under section 7106(b)(1) of the Statute,[2/] as alleged by the agency.

Opinion

Conclusion: The proposal concerns a matter which is negotiable only at the election of the agency under section 7106(b)(1) of the Statute. Accordingly, since the agency has declined to negotiate on the proposal, pursuant to section 2424.10 of the Authority's rules and regulations, 45 Fed. Reg. 3513 (1980), the agency's allegation that the union's proposal is not within the duty to bargain is sustained.

Reasons: The clear meaning of section 7106(b)(1) of the Statute is to render proposals concerning, inter alia, the numbers and types of employees assigned to an organizational subdivision negotiable only at the election of the agency. Likewise a proposal which is directly and integrally related to the numbers and types of employees assigned to an organizational subdivision, and is thereby determinative of the numbers and types, would be negotiable only at the election of the agency.[3/]

1/ Section 7106(b)(2) and (3) of the Statute provide:

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating--
>
> . . . . . .
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

2/ Section 7106(b)(1) of the Statute provides:

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating--
>
> (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work[.] [Emphasis added.]

3/ See, National Treasury Employees Union Chapter 66 and Internal Revenue Service, Kansas City Service Center, Case No. O-NG-9, 1 FLRA 106 (Sept. 13, 1979).

For the reasons which follow, the instant proposal is directly and integrally related to the numbers and types of employees assigned to an organizational subdivision and, therefore, is negotiable only at the election of the agency. The first part of the proposal would require the agency to negotiate with the union on the imposition of a freeze on hiring from outside the bargaining unit during periods of realignment of the workforce within the bargaining unit. As stated by the proposal, there would be a freeze on hiring from outside sources until all unit employees affected by the realignment of the workforce were "satisfactorily placed," unless an exception to the freeze is granted by a joint union-management board established to review requests for exceptions and to develop criteria for approval of further requests. Thus, under the proposal, the agency would be precluded from hiring new employees of the requisite types, at the requisite grades, and in the necessary numbers to meet changes in mission requirements unless and until an exception to the freeze is granted by a board composed of both union and management members. The proposal would thereby require negotiation on a matter which is directly and integrally related to the numbers and types of personnel to be employed and conflicts with section 7106(b)(1) of the Statute under which, as already stated, negotiation on such matters can occur only at the election of the agency.

The union assertion that its proposal would merely provide, under section 7106(b)(3) of the Statute, appropriate arrangements for employees adversely affected by management's exercise of its right to realign the workforce and hence, is negotiable, cannot be sustained. The proposal as discussed above would alleviate the impact of the realignment on affected unit employees by requiring the agency to bargain on matters which, under the Statute, it has a right to elect not to bargain. Similarly, the proposal is not within the duty to bargain under section 7106(b)(2) of the Statute as a procedure management officials will observe in excercising a reserved management right under section 7106 of the Statute.

In summary, since the union proposal would require bargaining on matters negotiable only at the election of the agency under section 7106(b)(1) of the Statute and, pursuant to that section, the agency has elected not to bargain on the proposal, the agency's allegation that the proposal is nonnegotiable must be sustained.

Issued, Washington, D.C., July 10, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF COMMERCE,
NATIONAL BUREAU OF STANDARDS,
WASHINGTON, D.C.

Activity

and

Case No. 0-AR-6

AFGE LOCAL 2186, BOULDER,
COLORADO

Union

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator Fred L. Rockwell filed by the agency under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)).

According to the record before the Authority, the activity posted a vacancy announcement for a position at the WG-6 level. The five applicants for the position included three merit promotion candidates (one of whom was the grievant), a reassignment candidate, and an applicant from outside the agency who was eligible for reinstatement. These latter two candidates were eligible for the position noncompetitively. The reinstatement eligible candidate was selected for the position and a grievance was filed which claimed that the selection violated the parties' negotiated agreement.

The grievance was ultimately submitted to arbitration with the arbitrator stating the issues before him as follows:

1. Did the National Bureau of Standards violate the negotiated agreement in non selecting the grievant for promotion to the position of Tool and Parts Attendant?

2. If violation occurred, what remedy is appropriate?

As to the first issue, the arbitrator determined that the activity's selection was defective because it did not conform to the negotiated agreement. He found in this regard that the activity had failed to identify any effort to utilize to the maximum the skills and talents of its employees, in this case the grievant, as required by the agreement. The arbitrator had cited Article XIV, Section 1 of the parties' negotiated agreement as follows:

> It is agreed that Management will make every reasonable effort to utilize to the maximum the skills and talents of its employees in order to achieve

> the resulting benefits of higher morale and reduced turnover. Primary consideration, therefore, will be given to filling vacant positions through the promotion of present employees. The Union agrees that, consistent with the concept of the merit system, the agency has an obligation to select from among the best qualified individuals available.

Likewise, the arbitrator found that no effort had been made to provide the grievant with primary consideration as required by the agreement. Therefore, the arbitrator held that the activity had violated the agreement when it did not select the grievant and he sustained the grievance.

As to the second issue before him, the arbitrator acknowledged that remedies under the Back Pay Act of 1966 (5 U.S.C. §5596) are not available unless it is established that but for the wrongful action the withdrawal of pay would not have occurred. On the basis of testimony at the hearing, the arbitrator found:

> [T]he grievant would not have received the assignment even though an unwarranted personnel action took place. Accordingly, the grievant does not meet the "but for" criteria as outlined by the provisions of the Back Pay Act and is not entitled to any back pay.

Therefore, the arbitrator ruled that the grievant was entitled to the position but was not entitled to backpay. Accordingly, he made the following award:

> The grievance is sustained. The grievant will be assigned to the position of Tool and Parts Attendant WG-6 not later than thirty days after the receipt of this award. The grievant will receive no back pay.

As previously stated, the agency filed a petition for review of the arbitrator's award. The rules of procedure set forth in 5 C.F.R. part 2411 (1978), as amended by section 2400.5 of the Authority's transition rules, 44 F.R. 44741, remain operative with respect to this case to the extent that they are consistent with the provisions of section 7122(a) of the Statute (5 U.S.C. §7122(a)).

Under section 2411.32 of these rules as amended, the Authority accepted the agency's petition for review insofar as it related to the agency's exception that the arbitrator's award violates appropriate regulation, specifically the Federal Personnel Manual. The Authority also granted the agency's request for a stay of the award. Thereafter, in accordance with the provisions of section 7105(i) of the Statute (5 U.S.C. §7105(i)), the Authority requested an advisory opinion from the Office of Personnel Management concerning the proper interpretation of relevant provisions of the Federal Personnel Manual as they may pertain to the arbitrator's award in this case.

In its response to the Authority's request, the Office of Personnel Management advised that management's right to select or not to select a particular candidate for a position cannot be abridged unless a competent authority determines that there is a direct causal connection between an agency's unwarranted action and the failure to select a specific employee. The Office of Personnel Management is of the opinion that there is no evidence in this case of the required "but for" relationship. It notes in this respect

the arbitrator acknowledged the grievant would not have been selected even if the activity's unwarranted personnel action had not occurred. It concludes that without the necessary "but for" finding, the arbitrator's award violates civil service rules and regulations and is therefore unenforceable. The advisory opinion of the Office of Personnel Management is that "implementation of the arbitrator's award in this case would contravene binding OPM directives." A copy of this response of the Office of Personnel Management was sent to the parties to afford them an opportunity to file comments on the response for the Authority's consideration prior to reaching a final decision in this matter. Neither party filed comments.

The question before the Authority is whether the arbitrator's award is deficient because it is contrary to civil service rules and regulations. As noted previously with respect to the relevant civil service rules and regulations, the Office of Personnel Management interprets these directives to require that an arbitrator must find a direct causal connection between an agency's violation of its collective bargaining agreement and its failure to select a particular employee for promotion before the arbitrator can properly order that employee selected. In this case the arbitrator specifically found and expressly acknowledged that the grievant would not in any event have been selected for the position. The interpretation of the applicable regulations by the Office of Personnel Management as to when an agency may properly be constrained to select a particular employee for a position is not challenged by the parties and no other basis for disagreement with such interpretation is apparent in this case. Therefore, the Authority finds the arbitrator's award is deficient as contrary to civil service rules and regulations[2/] to the extent that the award orders the grievant assigned to the position of Tool and Parts Attendant, WG-6.

Pursuant to section 2411.37(a) of the amended rules, the award is accordingly modified by striking the second and third sentences of the award. As so modified, the award is sustained and the stay is vacated.

Issued, Washington, D.C., July 10, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In its response the Office of Personnel Management specifically cites Federal Personnel Manual chapter 335, subchapter 2, Requirement 6 (which sets forth management's right to select), Rule 7.1 of the Civil Service Rules from which that right is derived, and Federal Personnel Manual chapter 335, subchapter 3-7c as they were in effect at the time of the action giving rise to the grievance and the arbitrator's award in this case.

3 FLRA No. 101

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL NO. 1122, AFL-CIO

(Union)

and

Case No. 0-AR-112

WESTERN PROGRAM SERVICE CENTER,
SOCIAL SECURITY ADMINISTRATION,
DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE

(Activity)

ORDER DISMISSING EXCEPTIONS

On June 17, 1980, Local 1122, American Federation of Government Employees, AFL-CIO (the union), filed exceptions to the award of Arbitrator Armon Barsamian in the instant case with the Authority, pursuant to section 2425.1 of the Authority's regulations (5 C.F.R. § 2425.1 (1980)). For the reasons indicated below, it has been determined that the subject exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the Authority's regulations (5 C.F.R. § 2425.1(b) (1980)) provides:

> The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in the union's submission, is dated May 16, 1980. Therefore, under section 2425.1(b) of the Authority's regulations, the union's exceptions were due in the office of the Authority no later than June 16, 1980. However, as stated above, the subject exceptions were not filed with the Authority until June 17, 1980. In this regard, the Authority is not empowered to extend or waive the time limit for filing exceptions to arbitrators' awards.

Accordingly, as the union's exceptions were untimely filed, and apart from other considerations, the union's appeal is hereby dismissed.

For the Authority.

Issued, Washington, D.C., July 10, 1980

for Samuel A. Chaitovitz, Executive Director

3 FLRA No. 102

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, SOCIAL SECURITY LOCAL #1760

(Union)

and

Case No. 0-AR-115

SOCIAL SECURITY ADMINISTRATION,
NORTHEASTERN PROGRAM SERVICE CENTER,
FLUSHING, NEW YORK

(Activity)

ORDER DISMISSING EXCEPTIONS

On June 24, 1980, Local 1760, American Federation of Government Employees, AFL-CIO (the union), filed exceptions to the award of Arbitrator Jesse Simons in the instant case with the Authority, pursuant to section 2425.1 of the Authority's regulations (5 C.F.R. § 2425.1 (1980)). For the reasons indicated below, it has been determined that the subject exceptions were untimely filed and cannot be accepted for review.

Section 2425.1(b) of the Authority's regulations (5 C.F.R. § 2425.1(b) (1980)) provides:

> The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date of the award.

The subject arbitration award, as included in the union's submission, is dated May 22, 1980. Therefore, under section 2425.1(b) of the Authority's regulations, the union's exceptions were due in the office of the Authority no later than June 20, 1980. However, as stated above, the subject exceptions were not filed with the Authority until June 24, 1980. In this regard, the Authority is not empowered to extend or waive the time limit for filing exceptions to arbitrators' awards.

Accordingly, as the union's exceptions were untimely filed, and apart from other considerations, the union's appeal is hereby dismissed.

For the Authority.

Issued, Washington, D.C., July 10, 1980

by Harold D. Kessler
Samuel A. Chaitovitz, Executive Director

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. O-PS-13

DECISION ON REQUEST FOR GENERAL STATEMENT
OF POLICY OR GUIDANCE

The Authority received a request from the National Treasury Employees Union that the Authority issue a major policy determination on the following question:

> How will the parties to a collective bargaining agreement achieve enforcement of a binding arbitration award under the Civil Service Reform Act, Pub. L. 95-454, 5 U.S.C. Section 7121(b)(3)(C)? Specifically, will (must) the Federal Labor Relations Authority entertain petitions for such enforcement pursuant to the broad grant of powers to the Authority under 5 U.S.C. Section 7105(a)(1), (2) and issue a final order based upon such petition which is enforceable in federal court under 5 U.S.C. Section 7123(b)?

The Authority has carefully considered this request and has determined that it does not satisfy the standards governing the issuance of general statements of policy and guidance set forth in section 2427.5 of the rules of the Federal Labor Relations Authority, 45 Fed. Reg. 3516 (1980), which provides in pertinent part:

> § 2427.5 Standards governing issuance of general statements of policy and guidance.
>
> In deciding whether to issue a general statement of policy or guidance, the Authority shall consider:
>
> (a) Whether the question presented can more appropriately be resolved by other means[.]

The question presented in this request for a major policy determination can be more appropriately resolved by other means. In this regard, the Authority considered a substantially identical matter in Headquarters, U.S. Army Communications Command, et al., Fort Huachuca Arizona and American Federation of Government Employees, Local 1662, Case No. O-MC-1, 2 FLRA No. 101 (Mar. 7, 1980) and concluded as follows:

> [T]he Authority finds that the legislative history of the Statute relied upon by the union fails to support the union's assertion that an arbitration award to which no exception has been filed becomes an "order" of the Authority within the meaning of 5 U.S.C. § 7123(b). On the contrary, the legislative history of section 7123 of the Statute supports the conclusion that an arbitration award to which no exception has been filed does not constitute an "order of the Authority" under section

7123(b) upon which enforcement action may be predicated before a United States court for appeals.

The Authority further notes that it appears from the record that the parties are primarily disputing whether the activity has complied with the arbitrator's award. There are ready means available under the Statute for resolving this type of dispute. If a question of clarification or interpretation of the arbitrator's award arises in connection with compliance therewith, the parties may jointly request a clarification or interpretation of the award from the arbitrator or the parties may jointly submit the question of compliance to arbitration for resolution. In addition, where appropriate, the unfair labor practice procedures under section 7116 of the Statute may be used when there is a dispute concerning an alleged failure of a party to abide by a final and binding arbitration award. Indeed, the foregoing proceedings are particularly equipped to resolve compliance disputes such as here involved since those disputes frequently require credibility and other factual determinations dependent upon the taking of testimony in such hearings.

Accordingly, the request for a major policy determination is denied.

Issued, Washington, D.C., July 10, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhite, Member

FEDERAL LABOR RELATIONS AUTHORITY

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 47 REPORT OF CASE DECISIONS August 28, 1980

REPRESENTATION CASE

3 FLRA No. 114 (July 23, 1980)

Federal Aviation Administration, Southern Region, Balboa, Canal Zone, Airway Facilities Branch, Case No. 2-RO-1; and Federal Aviation Administration, Case No. 2-CU-1. In Case No. 2-RO-1, the Professional Airways Systems Specialists (PASS), filed a petition seeking to represent a unit of American citizen employees in Panama; and the Federal Aviation Science and Technology Association (FASTA) was granted permission to intervene. FASTA also filed a clarification of unit petition (Case No. 2-CU-1), seeking to clarify the status of the same employees to include them in a nationwide unit for which FASTA was the exclusive representative. The Authority found that the employees involved were appropriately a part of and should be included in the nationwide unit represented by FASTA. Consequently, the Authority dismissed the petition filed by PASS and ordered that the nationwide unit represented by FASTA be clarified to include the employees. (Decision and Order attached.)

UNFAIR LABOR PRACTICE CASES

3 FLRA No. 106 (July 17, 1980)

Department of Treasury, Internal Revenue Service, Cleveland, Ohio, Case No. 5-CA-165. Upon a complaint issed by the Regional Director, the ALJ determined that the activity had effectively prohibited a past practice of allowing the union (NTEU Chapter 44) to use Government-owned office equipment for union business and had not violated the Statute by its actions in prohibiting such use at the particular duty location and times here involved; and recommended that the complaint be dismissed. The Authority adopted the ALJ's findings, in pertinent part, and conclusions and recommendation, and dismissed the complaint. (Decision and Order attached.)

3 FLRA No. 115 (July 23, 1980)

American Federation of Government Employees, AFL-CIO, Local 987, Assistant Secretary Case No. 40-9386(CO). Upon a complaint filed by the individual (Nedra T. Bradley) under E.O. 11491, which alleged that the union had failed or refused to elevate her grievance to Step 5 of the negotiated grievance procedure, and failed to timely advise her of its decision not to do so, because she had supported union candidates opposed to the incumbent local union president, the ALJ found that the evidence established at most an innocent mistake by the union involving a relatively minor matter and that even assuming that the union's conduct precluded further consideration of the complainant's grievance, there was no breach of the union's duty of fair representation. The ALJ therefore concluded that the union had not violated the Order as alleged, and recommended that the complaint be dismissed. The Authority adopted the ALJ's findings, conclusions and recommendation and, accordingly, dismissed the complaint. (Decision and Order attached.)

NEGOTIABILITY CASES

3 FLRA No. 107 (July 17, 1980)

National Association of Government Employees, Local R14-62 and United States Army, Dugway Proving Ground, Dugway, Utah, Case No. 0-NG-151. The dispute involved a request by the union to negotiate on the removal of specific items from an activity regulation and on other additional changes to the regulation. The union filed an unfair labor practice charge against the activity alleging that the activity had failed to respond in a timely fashion to the union's request to negotiate changes in the regulation and the instant petition for review of negotiability issues with the Authority; and subsequently submitted to the activity proposals to amend the parties' agreement pursuant to a reopening provision. The Authority concluded that the circumstances in the instant appeal did not give rise to a negotibility dispute at this time pursuant to section 7117 of the Statute. In that regard, the Authority found that the parties appeared to disagree principally on the interpretation and application of the reopening provision in their agreement, and that the proper forum in which to resolve that dispute would be pursuant to whatever procedures the parties had adopted for such purposes in their agreement. Additionally, the Authority found that to the extent the union contended that the activity had engaged in bad faith bargaining, the proper forum would be an unfair labor practice proceeding pursuant to section 7118 of the Statute. Accordingly, the Authority denied the union's petition without prejudice to the further processing of its pending unfair labor practice charge. (Decision attached.)

3 FLRA No. 110 (July 18 1980)

Association of Civilian Technicians and State of Georgia, Department of Defense, Military Division, Atlanta, Georgia, Case No. 0-NG-251. The dispute involved the union's proposal relating to the wearing of standard civilian work attire as an alternative to the military uniform, which the union asserted the agency had alleged to be nonnegotiable during the course of Federal Service Impasses Panel proceedings. In its statement of position, the agency stated that neither the activity nor the agency had alleged that the issue was nonnegotiable. The Authority found that based upon the agency's disclaimer that there was any dispute as to whether the union's proposal was within the duty to bargain under the Statute, the case had been rendered moot. Accordingly, the Authority dismissed the union's appeal as moot without prejudice to resubmit the matter to the Authority at some later time should the agency allege the matter is nonnegotiable. (Order attached.)

3 FLRA No. 112 (July 23, 1980)

National Treasury Employees Union and Internal Revenue Service, Case No. 0-NG-82. The dispute involved three union proposals. The first proposal concerned outside employment. The Authority held that the proposal was within the duty to bargain and did not conflict with section 7106(a) of the Statute; and, set aside the agency's allegation to the contrary. The second and third proposals would incorporate the "prohibited personnel practices" and "merit system principles" provisions of the Civil Service Reform Act of 1978 into the parties' agreement. The Authority held that both proposals were within the duty to bargain under the Statute; and, therefore, also set aside the agency's allegations as to those two proposals. (Decision attached.)

Appeals Withdrawn:

Case No.	Date
0-NG-253	July 10, 1980
0-NG-304	July 10, 1980

ARBITRATION CASES

3 FLRA No. 108 (July 18, 1980)

Overseas Education Association and Department of Defense Dependents Schools, (Klaus, Arbitrator), Case No. 0-AR-19. The arbitrator found the term "official time" in the parties' agreement referred to that period of time established as the "school workday for teachers"; and that the activity had

violated the agreement when it refused to grant teachers serving on a curriculum advisory committee "release time" (release with pay of a teacher from the completion of th eacher's classroom duties) to attend such committee meetings at e school. As a remedy, the arbitrator directed that the teachers be compensated for the extra duty time they had spent in attending the meetings outside their workday. The agency filed a petition for review of the arbitrator's award contending that the award violated law and regulation. The Authority denied the petition because it failed to meet the requirements for acceptance of a petition for review of an arbitrator's award under the applicable provision in the regulations. (Decision attached.)

3 FLRA No. 109 (July 18, 1980)

Northern Division, Naval Facilities Engineering Command, Philadelphia, Pennsylvania and National Federation of Federal Employees, Local 1430, (Gomber, Arbitrator), Case No. 0-AR-69. The arbitrator denied the union's grievance concerning the selection of a candidate other than the grievant to file the position involved; and the union filed an exception to the award with the Authority. The Authority found that the union's exception constituted disagreement with the arbitrator's findings of fact and, consequently, did not establish a basis for finding the award deficient. The Authority therefore sustained the arbitrator's award. (Decision attached.)

3 FLRA No. 111 (July 18, 1980)

Federal Correctional Institution and American Federation of Government Employees, AFL-CIO, Local 1286, (Render, Arbitrator), Case No. 0-AR-71. The grievance involved the activity's decision to suspend the grievant (who was also the local union president) for 21 days for eight alleged incidents of misconduct. The arbitrator found that the union had established that some of the action taken against the grievant involved discrimination, but concluded that the grievant had been guilty of misconduct with regard to five of the eight charges and reduced the suspension from 21 to 7 days with a written warning for one of the charges. The union filed exceptions to the arbitrator's award, contending that the arbitrator exceeded his authority and that the arbitrator's award fails to draw its essence from the parties' agreement. The Authority found that the union failed to demonstrate either that the arbitrator exceeded his authority or that the award did not draw its essence from the parties' agreement. The Authority therefore sustained the arbitrator's award. (Decision attached.)

3 FLRA No 113 (July 23, 1980)

Headquarters, U.S. Army Communications Command, et al., Fort Huachuca, Arizona and American Federation of Government Employees, Local 1662, (Draznin, Arbitrator), Case No. 0-AR-27. The dispute arose when the activity issued a notice changing the qualification for persons receiving environmental differential pay while engaged in water and sewage plant operations. The arbitrator first found that although two gases resulting from biological and bacteriological activity in the sewage and waste material areas were toxic and poisonous, there was no evidence that the parties had agreed to include them within the meaning of the term "poisons (toxic chemicals)" in their submission statement or collective bargaining agreement. The arbitrator further found that the safety hazards had been practically eliminated, and that no environmental pay was warranted beyond that which the activity was already paying. The arbitrator therefore denied the union's grievance; and the union filed a petition for review of the award, contending that the arbitrator's findings of fact were totally unsupported by the evidence and that the arbitrator incorrectly interpreted the parties' agreement. The Authority held that the union's exceptions provided no basis for acceptance of its petition under the applicable rules of procedure. The Authority therefore denied the union's petition because if failed to meet the requirements for review. (Decision attached.)

Attachments (10)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL AVIATION ADMINISTRATION,
SOUTHERN REGION, BALBOA, CANAL ZONE,
AIRWAY FACILITIES BRANCH[1/]

Activity

and

Case No. 2-RO-1[2/]

PROFESSIONAL AIRWAYS SYSTEMS
SPECIALISTS NATIONAL

Petitioner

and

FEDERAL AVIATION SCIENCE AND
TECHNOLOGICAL ASSOCIATION

Intervenor

FEDERAL AVIATION ADMINISTRATION

Activity

and

Case No. 2-CU-1[3/]

FEDERAL AVIATION SCIENCE AND
TECHNOLOGICAL ASSOCIATION

Petitioner

DECISION AND ORDER

Upon petitions filed with the Federal Labor Relations Authority under § 7111(b) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135, a consolidated hearing was held before a hearing officer of the Authority. The Authority has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

1/ The name of this activity appears as amended at the hearing.

2/ This case has been transferred from the New York Regional Office to the Dallas Regional Office and has been assigned the Case Number 6-RO-22.

3/ This case has been transferred from the New York Regional Office to the Dallas Regional Office and has been assigned the Case Number 6-CU-6.

Upon the entire record in this case, including briefs filed by the Activity (FAA) and Federal Aviation Science and Technological Association (FASTA) the Authority finds:

The labor organizations involved claim to represent certain employees of the Activity. In its petition in Case No. 2-RO-1, the Professional Airways Systems Specialists National (PASS) seeks an election in a unit consisting of all American citizens who are non-professional employees of the Canal Zone Airway Facilities Sector, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, local hires, confidential employees and supervisors.

FASTA sought, and was granted, intervention on the petition filed by PASS. FASTA also filed a clarification of unit (CU) petition in Case No. 2-CU-1 seeking to clarify the status of the same employees with respect to a nationwide unit for which FASTA holds exclusive recognition. The FASTA unit is described as follows:

Included: All employees of the Airway Facility Division located in the regions of the Federal Aviation Administration.

Excluded: Professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards, supervisors as defined in Executive Order 11491, as amended, Airway Facility employees assigned to the Washington Headquarters, the National Aeronautical Facilities Experimental Center, Atlantic City, New Jersey, the Aeronautical Center, Oklahoma City, Oklahoma, and the Airways Facilities Division employees represented exclusively at the following locations: the St. Paul, Minnesota Airway Facilities Sector, the Farmington, Minnesota Airway Facilities Sector, the Minneapolis, Minnesota Airway Facilities Sector, Chicago O'Hare Airway Facilities Sector, the Longmont, Colorado Airway Facilities Sector, the Tampa, Florida Airway Facilities Sector, the Oakland, California Airway Facilities, the McClellan Air Force Base Airway Facilities Sector, the Albuquerque, New Mexico Maintenance Engineering Field Office, the Oklahoma City, Oklahoma Airway Facilities Sector, the Tulsa, Oklahoma Field Maintenance Party, the Eastern Region Headquarters, the Pacific-Asian Region, the Tulsa, Oklahoma Airway Facilities Sector, the Denver, Colorado Airway Facilities Sector; the Albuquerque, New Mexico Airway Facilities Sector, the Atlanta, Georgia Airway Facilities Sector 18200, Atlanta Municipal Airport and the Alaskan Region.

Citing Federal Aviation Administration (FAA) and Federal Aviation Administration, Eastern Region, 5 A/SLMR 776, A/SLMR No. 600 (1975), the FAA takes the position that the employees involved in the petitions are part of the nationwide unit represented by FASTA inasmuch as that unit was established as a residual unit of all unrepresented Airway Facilities Division employees in the regions of FAA. Thus, FAA argues that there could be no remaining unrepresented non-professional Airway Facilities employees in its regions following establishment of the nationwide residual unit. FAA maintains that the unit petitioned for by PASS is inappropriate in that the employees of the Balboa, Canal Zone, Airway Facilities Branch do not possess a community of interest which is separate and distinct from that of employees in the existing FASTA unit. Moreover, FAA argues

that the unit proposed by PASS would not promote effective dealings or efficiency of agency operations.

FASTA makes, essentially, the same argument as FAA and moves that the petition filed by PASS be dismissed.

PASS's position, as stated at the hearing, is that the employees in the unit for which it petitions share a community of interest and that units of similar scope as that petitioned for exist within the Airway Facilities Division of FAA.

Pursuant to § 3(c) of Executive Order 11491, as amended,[4/] the Department of Transportation determined that the Order would not apply to employees assigned to Departmental activities in the Panama Canal Zone. As a result of this exclusion the employees at issue were not included in FASTA's nationwide unit, or any other unit of exclusive recognition. There is no provision comparable to § 3(c) in the Federal Service Labor-Management Relations Statute (Statute).

The Airway Facilities Branch located in Balboa, Canal Zone, is composed of the following: the Environmental Support Unit, Logistics Staff, Technical Staff, Developmental Relief Staff, Communications Navaids Unit, and Radar Unit. The Branch along with two other organizational elements (Center/Radar Approach Control and International Flight Service Station) constitute the Balboa Area Office. The Balboa Area Office is part of the Southern Region of FAA. The Airway Facilities Branch is headed by a Branch Chief who reports to the Area Manager, Balboa Area Office, who, in turn, reports to the Regional Director of the Southern Region. Based on evidence submitted, it appears that the organization of the Balboa Airway Facilities Branch is similar to that of the Airway Facilities Sectors throughout the Southern Region.

The mission and function of the Branch are, primarily, maintenance of equipment and facilities and assurance that operations are in accordance with established standards. The record reveals that there are approximately 49 employees assigned to the Airway Facilities Branch. The majority are Electronic Technicians and the rest are, principally, clerical support staff and mechanics. The primary duties of Electronic Technicians are the performance of corrective and preventive maintenance on equipment and assurance that equipment is operating according to standards. The record reveals that their duties are the same as those of other Electronic Technicians throughout the Airway Facilities Division of the FAA and that they utilize the same handbooks and attend the same training center (the Aeronautical Center located in Oklahoma City, Oklahoma). According to the unrefuted testimony most of the Branch employees come from the Southern

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4/ § 3(c) of the Order provides as follows:

(c) The head of an agency may, in his sole judgment, suspend any provision of this Order (except section 22) with respect to any agency, installation or activity located outside the United States, when he determines that this is necessary in the national interest, subject to the conditions he prescribes.

Region. Upon selection for a position in the Balboa Branch, an employee must sign an agreement consenting to fulfill a two year contract with FAA in Balboa. Upon expiration of the two years, the employee may opt to remain in Balboa or return to the United States. If the employee chooses the latter, the receiving region must relocate him/her. The Personnel Management Division of the Southern Region is responsible for providing services in the areas of personnel, training, labor relations and occupational safety to the Balboa Branch.

According to undisputed testimony, the vast majority (estimated at 80% to 90%) of the eligible Airway Facilities employees are in the nationwide FASTA unit. The remainder are in units which are varied in scope - some are region-wide, some are sector-wide and some consist of organizational elements smaller than sectors.

The record also revealed that in 1979 FAA embarked on a program to phase out its operations in Panama over a five year period. Thus by October 1984 the FAA will have "transitioned out" of Balboa. In the interim, the FAA is training Panamanians to take over the facilities there. Thus, during the transition period the character of the staff will change as Panamanians are trained and certified to take over the functions and are used to supplement the workforce. Those employees who are relieved by Panamanians will apparently be returning to Airway Facilities Division activities which are covered by existing recognitions.

Based on the fact that the employees of the Balboa Airway Facilities Branch share a common mission, function, job classifications and duties with other employees of the Airway Facilities Division, the bulk of whom are in the nationwide FASTA unit, the Authority concludes that a community of interest exists between the employees of the Balboa Branch and those of the nationwide FASTA unit. Further, noting especially the transitional nature of that Branch, the Authority concludes that their inclusion in the nationwide unit will reduce fragmentation and promote effective dealings and efficiency of agency operations. Thus, under the particular circumstances involved, and noting that there is no pre-existing unit established pursuant to a unit determination made by the Assistant Secretary of Labor for Labor-Management Relations, the Authority finds that those employees of the Balboa Airway Facilities Branch, who were previously excluded from coverage under E.O. 11491, as amended, because of the Department of Transportation's determination made pursuant to § 3(c) of E.O. 11491, as amended, are appropriately a part of, and should be included in, the nationwide unit represented by FASTA. In view of this and the fact that an agreement covering that unit became effective on December 1, 1977, for a period of two years, the petition filed by PASS in Case No. 2-RO-1 is untimely and shall be dismissed.

At the hearing the representative of PASS requested that the Authority take notice of, as if the files were incorporated into the record, the proceedings in ten other representation cases apparently relating to several units for

which PASS holds exclusive recognition in the Airway Facilities Division. The hearing officer did not rule on the request. In its brief, FASTA objected to the motion. The motion is hereby denied. The record before the Authority is sufficient upon which to base our decision herein.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 2-RO-1 be, and it hereby is, dismissed.

IT IS HEREBY ORDERED that the consolidated unit for which the Federal Aviation Science and Technological Association was certified on April 27, 1977, be, and it hereby is, clarified by including the employees of the Airway Facilities Branch, Balboa Area Office, Southern Region, Federal Aviation Administration.

Issued, Washington, D.C., July 23, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF TREASURY
INTERNAL REVENUE SERVICE
CLEVELAND, OHIO

Respondent

and

Case No. 5-CA-165

NATIONAL TREASURY EMPLOYEES UNION
AND NATIONAL TREASURY EMPLOYEES
UNION CHAPTER 44

Labor Organization

DECISION AND ORDER

The Administrative Law Judge in the above-entitled proceeding, issued his Recommended Decision and Order finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel of the Federal Labor Relations Authority filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order, and the Respondent filed an answering brief thereto.

Pursuant to § 2423.29 of the Authority's rules and regulations [5 C.F.R. § 2423.29 (1980)] and § 7118 of the Federal Service Labor-Management Relations Statute (5 U.S.C. §§ 7101-7135), the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, including the General Counsel's exceptions and supporting brief and the Respondent's answering brief, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendations.

The Administrative Law Judge determined that the evidence established that the past practice of allowing the Union officials use of Respondent's typewriters and photocopying equipment had been effectively prohibited by the Respondent at the Toledo post of duty. In so finding, the Administrative Law Judge relied upon several incidents which occurred at and involved individuals from both the Toledo post of duty and the Cleveland District Office. In its exceptions, the General Counsel contends that the Administrative Law Judge erred in relying upon any incidents which occurred outside the Toledo post of duty.

The Authority agrees that the record supports the Administrative Law Judge's findings concerning the past practice, but relies only on the incidents which occurred at or involved individuals in the Toledo post of duty.

ORDER

Pursuant to § 2423.29 of the Federal Labor Relations Authority's rules and regulations and § 7118 of the Statute, the Authority hereby orders that the complaint in Case No. 5-CA-165 be, and it hereby is, dismissed.

Issued, Washington, D.C., July 17, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
CLEVELAND, OHIO

Respondent

and

NATIONAL TREASURY EMPLOYEES UNION
AND NATIONAL TREASURY EMPLOYEES
UNION CHAPTER 44

Charging Party

Case No. 5-CA-165

Brenda M. Robinson, Esquire
Sandra LeBold, Esquire
Office of the General Counsel
Federal Labor Relations Authority
Region V, 219 S. Dearborn Street
Room 1638
Chicago, Illinois 60604
For the General Counsel

William T. Lyons, Esquire
James E. Rogers, Esquire
Office of the Regional Counsel
Internal Revenue Service
Central Region
P.O. Box 2059
Cincinnati, Ohio 45201
For the Respondent

James R. Lawrence, Esquire
National Field Representative
National Treasury Employees Union
1730 K Street, N.W.
Washington, D.C. 20006
For the Charging Party

Before: LOUIS SCALZO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arose as an unfair labor practice proceeding under the provisions of the Federal Service Labor-Management Relations Statute, 92 Stat 1191, 5 U.S.C. §7101 et seq., and the rules and regulations issued thereunder.

On September 12, 1979, a complaint was filed by the Regional Director, Region V, Federal Labor Relations Authority, Chicago, Illinois, against the Department of the Treasury, Internal Revenue Service, Cleveland, Ohio (hereinafter called Respondent or management). The complaint alleged that on or about March 8 and 16, 1979, the Respondent violated 5 U.S.C. §§7116(a)(1) and (5) by unilaterally changing existing conditions of employment at the Respondent's Toledo, Ohio post of duty 1/ without furnishing the National Treasury Employees Union and National Treasury Employees Union Chapter 44 (Union), notice and/or opportunity to bargain concerning such changes. 2/ It was alleged that the Respondent withdrew the Union's permission to use certain office equipment at the Toledo post of duty, and that such permission had been extended to the Union at the facility over a period of many years prior to such withdrawal.

The specific Union activity prohibited on March 8 and 16, 1979, involved the utilization of a typewriter and other office equipment not specifically identified in the collective bargaining agreement as being authorized for Union use. 3/ It is this blanket prohibition which the unfair labor practice complaint condemns based upon an alleged previously established policy of allowing the Union to utilize such typewriters and other office equipment at the Toledo post of duty.

The Respondent denies the allegations and asserts that an obligation to bargain did not arise because the Respondent did not effectuate a unilateral change in the terms and conditions of employment; that the General Counsel has failed to establish by a preponderance of the evidence that the Respondent did in fact make a unilateral change in the terms and conditions of employment; that the Union waived any rights that it might have had to negotiate concerning the change; that if a unilateral change did occur, an unfair labor practice

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1/ The Cleveland District of Internal Revenue Service includes the Toledo, Ohio post of duty.

2/ Although the complaint identifies the National Treasury Employees Union as a charging party, counsel representing the General Counsel asserted that the obligation to bargain was owed to the National Treasury Employees Union Chapter 44 (Tr. 168).

3/ In addition to typewriters, counsel representing the General Counsel identified photocopy machines, adding machines and pencil sharpeners as being involved (Brief submitted by counsel for General Counsel at pg. 3).

charge based on such change would be barred by the six-month period of limitation set out in Section 7118(a)(4)(A) of Title 5 United States Code; and that if an obligation to bargain existed, such obligation, under the terms of the collective bargaining agreement, would have been owed to the national level of the National Treasury Employees Union or to the National Treasury Employees Union Joint Council of Chapters in the Cleveland District, rather than to Chapter 44 as a separate entity. 4/

A hearing was held before the undersigned in Toledo, Ohio. All parties were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, and examine and cross-examine witnesses. Post-hearing briefs were received from counsel for the General Counsel, Federal Labor Relations Authority, and the Respondent. These have been duly considered. 5/ Based upon the entire record herein, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, and the briefs, I make the following findings of fact, conclusions and recommendation.

Findings of Fact

At all times herein material the parties were governed by a Multi-District Agreement entered into by the Internal Revenue Service and the National Treasury Employees Union (Respondent Exhibit 3). Article 14 of this agreement

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4/ The last argument was not specifically pursued in Respondent's post-hearing brief.

5/ Under authority provided in Section 2423.19(r) of the regulations, 5 C.F.R. §2423.19(r), the following corrections are made in the hearing transcript:

Page	Line	Change	To
22	25	constrains	constraints
100	11	Le Bold	Scalzo
143	6	entailment	curtailment
144	6	reflect	refresh
155	7	indicate	indicated
173	8	sequest	sequester
256	14 & 16	contact	context
314	6	stare	stay
356	10	inappropriate	appropriate
407	21	anonymous	omnibus

and similar provisions in two earlier collective bargaining agreements (Respondent Exhibits 1 and 2), made provision for the Respondent to supply certain facilities and services to the Union. The Union's use of typewriters was not provided for in the current collective bargaining agreement, or the two earlier agreements. 6/

The pattern of events leading to the filing of this unfair labor practice charge commenced on March 8, 1979, when William Gillespie, President of Chapter 44, asked Rosemary Harrison, the Chapter 44 Secretary, to type a letter for the Union during working hours on a government owned typewriter. William Gillespie was a revenue officer assigned to the Toledo post of duty. The letter in question dealt with the subject of contributions to a Treasury Employees Political Action Committee, and was addressed to the President of the National Treasury Employees Union. Rosemary Harrison was then working as a clerk stenographer for one of two groups of revenue officers employed by the Collection Division of the Internal Revenue Service at the Toledo location.

At about 3:30 p.m. on March 8th, Ronald Zielinski, a supervisory revenue officer and Group Manager in charge of the group to which Harrison and Gillespie were assigned, noticed that the stationery in Harrison's typewriter carried the National Treasury Employees letterhead. After discussing the subject with Robert Smith, a supervisor and Group Manager in charge of a second group of Collection Division revenue officers at the Toledo post of duty, Zielinski returned to Harrison and instructed her to stop typing immediately. He told her that she could not type the document on government equipment or time because it was "union business." Harrison requested permission to continue in order to complete the project, but Zielinski refused. She removed the letter from the typewriter and immediately went over to discuss the issue with William Gillespie.

Shortly thereafter Gillespie entered Zielinski's office and advised that he had requested Harrison to type the letter, that she had spent about ten minutes on the project, that if Zielinski wanted to "dock" Harrison for the time he could do so, and that the Union would reimburse Harrison for her time. Gillespie also explained that he felt it was improper for Zielinski to deny the Union the right to use an Internal Revenue Service typewriter, and that to do so was an unfair labor practice. Zielinski explained that it was not improper and that the issue had been resolved against the Union the previous year (Respondent Exhibit 12). Gillespie promised to "get back" to Zielinski later. On the same day Gillespie left a letter on Zielinski's desk explaining that the use of the typewriter to type Union communications constituted an established practice and that the right should not have been denied (General Counsel Exhibit 2).

Zielinski replied to Gillespie's letter on March 16, 1979, after obtaining advice from John Gallagher, a Branch Chief in charge of the Zielinski and

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6/ Article 14 of the current collective bargaining agreement did provide for the use of telephones, bulletin boards, file cabinets, space, and certain materials, publications and services. However, these are not in any way involved in this litigation.

Smith groups, and Thomas A. Cozzens, Labor Relations Specialist, and representative of the District Director in the Cleveland District Office. The reply referred to facilities and services in the collective bargaining agreement as the only ones that Respondent was obligated to provide; noted that the use of government typewriters was not provided for therein; and that such use for Union business was prohibited. 7/ The reply also noted that, "Group Manager Robert Smith specifically discussed this issue with your Union Steward, Robert Wekwert on June 14, 1978" (General Counsel Exhibit 3). 8/

With respect to the June 14, 1978 discussion between Smith and Wekwert, the record revealed that prior to the discussion Zielinski brought to Smith's attention a memorandum typed in script on Union stationery. The document had been posted on a Union bulletin board. Zielinski and Smith concluded that the memorandum had been typed on a new typewriter obtained for use by Rosemary Harrison at the Toledo post of duty. After discussing the issue with Zielinski, and receiving instruction from Branch Chief John Gallagher, Smith called in Wekwert and because of his position as Union Steward, advised him that the use of the typewriter for Union business was not provided for in the collective bargaining agreement, and that the practice was prohibited (Respondent Exhibit 14). 9/ Wekwert advised Smith that Smith was correct and that the practice would not be repeated in the future (Tr. 338-339). 10/

7/ It is again noted that the gravamen of the complaint relates solely to Respondent's blanket prohibition against the use of certain equipment at the Toledo post of duty, and not to the prohibition relating to the use of such equipment on government time. In light of the official time provision in the Federal Service Labor-Management Relations Statute (5 U.S.C. §7131) it is understandable why the latter facet of administrative action taken by Zielinski was not questioned by the Union.

8/ On March 30, 1979, Zielinski again advised Harrison of the restriction relating to performance of Union business during working hours and with respect to the unauthorized use of office equipment (Respondent Exhibit 13).

9/ A second topic of conversation raised by Smith during this meeting dealt with the Union's placement of a ballot box in a restricted area without permission, and the terms of Article 14 of the collective bargaining agreement with respect to the Respondent's obligation to supply space for ballot boxes used in connection with Chapter elections. As a result of this portion of the conversation the ballot box was moved out of the restricted area by the Union.

Gallagher testified that he instructed Smith to make Respondent's position clear on both issues discussed with Wekwert (Tr. 423-424).

10/ Wekwert's version of the meeting coincides with Smith's account in large measure. Wekwert testified, "I may have nodded or said okay or something like that." (Tr. 130). There was no indication of disagreemnet on Wekwert's part when faced with Smith's position on the issue. In fact Wekwert did not thereafter use typewriters himself (Tr. 455-456). Thus the record indicates acquiescence as described by Smith.

Wekwert was appointed to the position of Steward in October of 1977. Chapter 44 has only one steward serving the membership at the Toledo post of duty (Tr. 163). Management officials dealt with Wekwert on a wide range of local labor-management issues (Tr. 324, 329, 362-364, 434-435, 460-461). In fact, Wekwert was a focal point for dealings with the Union in Toledo (Tr. 330). Dealings with the Chapter president were not customary unless the Chapter president was acting as the steward during vacation periods (Tr. 362-363). The Respondent acknowledged that it preferred to dispose of labor management problems at the lowest level (Tr. 228). There was also clear indication in the record that all stewards were actually representatives of the Joint Council of Chapters in the Cleveland District (Tr. 240). 11/

The record disclosed that the National Treasury Employees Union was known as the National Association of Internal Revenue Employees at the time the parties herein executed their first collective bargaining agreement in 1972 (Respondent Exhibit 1), and that prior to the execution of the first agreement, it was the practice of management at the Toledo post of duty to allow the use of office equipment by representatives of the National Association of Internal Revenue Employees (Tr. 391-392, 394).

After the execution of the first collective bargaining agreement, the Respondent's policy was governed by contractual provisions relating to the subject. As noted, with minor exceptions, not relevent here, the use of office equipment by the Union has not been countenanced by the provisions in the series of collective bargaining agreements executed by the parties since 1972.

Policing of the restrictive provisions in these collective bargaining agreements was considered to be a significant problem throughout the Cleveland District. Management relied upon a series of training sessions to instruct managers concerning the specific facilities and services which might be made available to the Union under the terms of the collective bargaining agreements (Tr. 186-187, 191-192). With respect to policing the system initiated by the collective bargaining agreements, management took the position that the Union was aware of the limitations approved by the parties and incorporated in the collective bargaining agreements, and that all Cleveland District managers should enforce the policy. However, it was felt that compliance with the restrictive provisions in the agreements, rather than suspicion and distrust, should be anticipated (Tr. 224-225). Managers were not given authority to

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11 Counsel for the Respondent admitted that the current collective bargaining agreement reflected ambiguity with respect to the relative authority of the Joint Council and Chapter 44 concerning the right to negotiate with the Respondent (Tr. 467). However, as noted the practice of the parties clearly indicates a bargaining history with Chapter representatives at the Cleveland post of duty.

Although the record reflects very little or no evidence to support the Respondent's contention that Respondent does not owe Chapter 44 any bargaining obligation under the terms of the collective bargaining agreement, the grounds selected for disposition of this litigation make it unnecessary to decide this precise question.

modify the collective bargaining agreement (Tr. 225). It was disclosed that management sought to avoid "gestapo type" tactics in efforts to enforce the provisions of the collective bargaining agreements (Tr. 301-302). The method used was described as follows by Group Manager Robert Smith:

> Q. Do you remember how in your training,... you were to police such things?
>
> A. Yes. It was more like to keep an eye out for it. Whenever you see it occur, do not let it go by (Tr. 348).

The record reflects that the Union continued to use typewriters, photocopying equipment and perhaps other office equipment not authorized by the collective bargaining agreement, at the Toledo post of duty during the years following execution of the first collective bargaining agreement, despite the limitations imposed by the contractual provisions and management policy. This fact was established by a number of witnesses called on behalf of the Union. The Union relies heavily upon such actual use, circumstantial evidence tending to indicate that Toledo post of duty managers would have been in a position to observe such use, and some evidence of limited approval of the practice during the period before and after execution of the first collective bargaining agreement.

Through the testimony of Alphonse Jachimiak, a retired Collection Division Group Manager, the Union did introduce evidence of permissive use for a period of time at the Toledo post of duty. Jachimiak preceded Zielinski as Group Manager and retired in July of 1977. He allowed Chapter 44 Secretaries to utilize typewriters at the Toledo post of duty provided such use did not interfere with work activity. 12/ He related that such use occurred upon request while he was serving as Group Manager over a fourteen year period, and that he and other group managers approved the practice (Tr. 83-86). 13/ Jachimiak testified that his consent was based upon a liberal policy established by management in the Cleveland District during the period 1948 to 1950.

Myron Tuteliano, a contemporary of Jachimiak's during a period prior to Tuteliano's transfer out of Toledo in the first week of 1977, held a similar management position for a period of years prior to his transfer. Although Tuteliano admitted that such a practice had in fact existed prior to the effective date of the first collective bargaining agreement in 1972, he stated that he was under the impression the Union's use of such equipment terminated with the execution of the first collective bargaining agreement (Tr. 387-391,

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12/ There was also some indication that Jachimiak authorized the use of copying equipment.

13/ Jachimiak's testimony was vague and non-specific as to any period of permissive use allowed by others.

394). He testified that he did not observe the practice thereafter at the Toledo post of duty. 14/

In addition to Jachimiak's testimony, Michael Kilcourse, a former officer of Chapter 44 testified that he attended a 1973 or 1974 labor management meeting in the Cleveland District Office, and that Alvin Kelley, the then District Director was advised of the fact that Union representatives were utilizing the photocopying machine for Union related work. Kilcourse reported that Kelley took the position that if the privilege were not abused the Union could continue to use such equipment in the Cleveland District (Tr. 68-70).

Respondent Exhibit 9, a copy of a Freedom of Information Act request addressed to the Respondent by the National Treasury Employees Union, and the response thereto, reflects copies of minutes of meetings held while Alvin Kelley was Cleveland District Director and Michael Kilcourse was Chapter 44 President. This exhibit reflects that the only meeting wherein these individuals were present occurred on March 13, 1973. However, the minutes reflect no reference to District Director Kelley's authorization to use photocopying equipment. The minutes of such meetings were deemed to be accurate in the absence of objection from Union members present. The record disclosed no evidence of objection to the minutes of the March 13, 1973, meeting nor amendment thereof.

The record revealed that Alvin Kelley served as the District Director of the Cleveland District from December of 1973 until December of 1974 (Tr. 190), and that all District Directors expressed the view that the Union was entitled only to that which had been negotiated and spelled out in collective bargaining agreements (Tr. 423).

In addition to the position taken by management on March 8 and 16, 1979, and June 14, 1978, evidence established that the issue was raised at the District Director's level on March 1, 1978 in a conversation between Thomas Cozzens and Michael A. Sweeney, Chief Steward for the Cleveland District Joint Council of Chapters (Tr. 208-214, 238-239). On this date handwritten letters relating to Union business were given to Cozzens by Sweeney. Upon being chided by Cozzens concerning the use of handwritten letters to communicate with management at the District Director's level (Respondent Exhibits 5 and 6), Sweeney responded that communications would be typed if the Cleveland District allowed the Union to use typewriters.

In February of 1978, the issue was raised during a discussion relating to a grievance. Robert Smith and Thomas Cozzens participated on behalf of the Respondent at the Toledo Post of Duty, and William Gillespie and Robert Wekwert represented Chapter 44 (Tr. 336-337). 15/ At this meeting Gillespie alluded

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14/ Tuteliano's testimony contradicted Jachimiak's testimony to the effect that Tuteliano allowed the practice after 1972.

15/ The named individuals were identified by Cozzens. Wilbur Jones, a fifth individual was included in Smith's account of the meeting.

to a decision wherein it was established that the National Treasury Employees Union had, in an unfair labor practice proceeding, established the right to use government equipment in a case involving a past practice. Cozzens replied that the case was inapplicable to the Cleveland District, that such a practice had never existed in the Cleveland District, that there was no practice of allowing the Union to utilize government equipment, and further that such use was prohibited (Tr. 207-209, 336-337).

During another encounter on August 20, 1976, Thomas Cozzens suggested to Hayward C. Reed an assistant counsel of the National Treasury Employees Union that a handwritten request to negotiate the impact of a reorganization was not appropriate. Cozzens related the following regarding Reed's response:

> "if we let him use the typewriters, if we let the people use the typewriters they would be happy to type it." (Tr. 217 and Respondent Exhibit 7).

The record also disclosed that in April of 1976, Thomas Cozzens and one Don Heidler, representing Cleveland District Management, had a discussion with one Stan Fox who was the Chairman of the Joint Council of Chapters in the Cleveland District, to exchange information concerning a proposed reorganization. During the meeting Fox was given a four page document outlining the changes that were to be made. A few days later Cozzens learned that about seventy employees had copies of the document and that the paper used reflected that the Respondent's Xerox machine had been utilized to reproduce the copies. Cozzens advised Stan Fox of his findings and obtained an apology from Fox. Cozzens advised Fox that as Chairman of the Joint Council it was Fox's obligation to inform all of the stewards and other Union officials in the Cleveland District that they were not entitled to use facilities other than those specifically negotiated (Tr. 221). Fox explained that the use of the Xerox machine was due to the actions of an untrained steward (Tr. 221).

Discussion and Conclusions

It is well established that the use of agency facilities and equipment by a union is a privilege and not a right, but that once granted such privilege becomes, in effect, an established term and condition of employment which may not thereafter be unilaterally changed. Arkansas Army National Guard, Assistant Secretary Case No. 64-4120 (CA), 1 FLRA No. 100 (August 15, 1979), Report No. 15; Internal Revenue Service, Southwest Region, Appellate Branch Office, New Orleans, Louisiana, A/SLMR No. 1153 (1978); U.S. Department of the Treasury, Internal Revenue Service, New Orleans District, New Orleans, Louisiana, A/SLMR No. 1034 (1978); Veterans Administration, Veterans Administration Regional Office, New York Region, A/SLMR No. 694 (1976); Internal Revenue Service, Office of the Regional Commissioner, Western Region, A/SLMR No. 473 (1975); Los Angeles Air Route Traffic Control Center, Federal Aviation Administration, A/SLMR No. 283 (1973).

As noted in authorities cited the use of agency facilities and equipment is a privilege and not a right. Unless the privilege or right to utilize agency facilities and services exists in the first instance, an unfair labor practice cannot be predicated upon a management effort to prevent or prohibit the use of agency facilities and services. Headquarters, 2750th Air Base Wing, U.S. Air Force, Wright-Patterson Air Force Base, Ohio, Assistant Secretary Case No. 53-10533 (CA), 1 FLRA No. 99 (August 15, 1979), Report No. 14. The essence of the contentions and arguments of the parties in this case relates principally to whether, under the particular circumstances presented here, a past practice existed with respect to the use of typewriters and other office equipment (not specifically authorized in the collective bargaining agreement), and if so, whether the Respondent unilaterally terminated the past practice without providing the Union an opportunity to bargain concerning the issue of whether or not the practice should be discontinued. 16/

Here the use of typewriters and photocopying equipment was permitted at the Toledo post of duty by Alphonse Jachimiak and perhaps others prior to Jachimiak's retirement in July of 1977. 17/ However, at the meeting in February of 1978, Thomas Cozzens, representing the District Director, advised Chapter 44 officers William Gillespie and Robert Wekwert that the use of facilities and services not identified in the collective bargaining agreement, was prohibited, and further that a past practice in this regard did not exist. In a subsequent March 1, 1978 meeting between Cozzens and Micheal A. Sweeney, Chief Steward for the Cleveland District of Chapters, Sweeney acknowledged the existence of the prohibition against the Union's use of typewriters in the Cleveland District. A still clearer expression of a termination of any existing past practice occurred on June 14, 1978, at which time Robert Smith outlined Respondent's position regarding the prohibition against the use of a Collection Division typewriter, and in so doing effectively related the use of such equipment to the specific provisions of the collective bargaining agreement. 18/ It thus clearly appears, that if the practice was condoned at the Toledo post of duty, it was condoned in a limited way only. Moreover, if condoned it was effectively terminated by higher management as early as February of 1978, and certainly by June 14, 1978.

16/ The fact that the collective bargaining agreement does not refer specifically to the practice of using equipment referred to in the complaint would not, standing alone, support a waiver of rights to continue an established past practice regarding the use of such equipment. U.S. Department of the Treasury, Internal Revenue Service, New Orleans District, New Orleans, Louisiana, supra.

17/ Evidence of condonation of the practice after Jachimiak's retirement was vague and inconclusive.

18/ Notice to the steward in this case was appropriate since he was the focal point for labor-management relations at the Toledo post of duty. See Internal Revenue Service and IRS Richmond District Office, Assistant Secretary Case No. 22-09462 (CA), 2 FLRA No. 43 (Dec. 31, 1979), Report No .

Under the provisions of Section 2423.18 of regulations implementing the Federal Service Labor-Management Relations Statute, 5 C.F.R. §2423.18, the General Counsel has "the burden of proving the allegations of the complaint by a preponderance of the evidence." In order to impose a bargaining obligation in this case, it would first be necessary for the General Counsel to establish that the prohibition articulated on March 8 and 16, 1979, represented a change in a previously existing practice at the Toledo post of duty. Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, Assistant Secretary Case No. 30-08551 (CA), 1 FLRA No. 88 (July 31, 1979), Report No. 13. The evidence establishes that on the mentioned dates, and for many months prior thereto, the practice had been effectively prohibited by the Respondent at the Toledo post of duty. There was no evidence that it was known and permitted or even tacitly condoned on the dates specified in the complaint; nor was there any convincing evidence introduced to show that it was ever observed following the prohibition in February, 1978 or June 14, 1978. District level and Toledo post of duty representatives of the Respondent dealt directly and specifically with the practice in February of 1978 and on June 14, 1978.

The record does reflect that use did in fact exist after February 1978. However, it was not open to view by management because those using the equipment regularly used such as part of their official duties, and because management relied heavily upon voluntary compliance. These factors, coupled with a reluctance to implement a management investigative effort into Union activity, led management to rely upon a policy of implementing corrective action only upon observation of the practice. Under these circumstances it cannot be said that the practice was approved or that it was open to view by management.

In fact, it would be more logical to assume that the Union was in fact responding to management's request to discontinue use. There is no indication that the Union disagreed with management's February 1978, or June 14, 1978, pronouncements. The record indicates that management expected voluntary compliance. It might also be concluded that the absence of Union objection to management pronouncements on the issue, lulled management into a belief that the Union was voluntarily complying at the Toledo post of duty. Finally, in addition to the fact that the record evidences no showing of actual awareness of the practice after February of 1978, or June 14, 1978, there was no showing of circumstances which reasonably would have led to awareness. It would not have been unusual, based upon the facts brought out, for management to have remained ignorant of the practice after the February 1978 and June 14, 1978 admonitions to the Union.

Evidence that individual managers would have developed such knowledge had they been more observant, and/or inquired more thoroughly into the nature of Union activity, would not provide a basis for a finding that such managers were in fact aware of the practice.

Counsel for the General Counsel cites languge used by Administrative Law Judge Devaney in Internal Revenue Service Southwest Region, Appellate Branch Office, New Orleans, Louisiana, supra, for the position that an open an notorious practice itself may constitute further notice of the existence of a past practice. However, the mentioned case is clearly distinguishable since it reflects that actual knowledge of the practice was established. Also, the practice presented here was not open and notorious.

It is also concluded that U.S. Department of Treasury, Internal Revenue Service, New Orleans District, New Orleans, Louisiana, supra, also cited by counsel for the General Counsel, is inapposite because factually distinguishable.

The actions of Zielinski in stopping the typing of Union business on Respondent's typewriter was but a reaffirmation of the existing policy within the Cleveland District Office. The reaffirmatin of an existing policy is not a change in the conditions of employment. Department of the Navy, Mare Allen Naval Shipyard, Vallejo, California, A/SLMR No. 736 (1976); Alabama National Guard, Montgomery, Alabama, A/SLMR No. 895 (1977). The Union's failure to comply with Respondent's expression of policy may not, without more, be used as a basis for proof of the existence of a past practice justifying use of facilities on March 8 and 16, 1979. Although a possible basis for an unfair labor practice charge may have existed in February of 1978 or perhaps on June 14, 1978, the Union did not pursue this remedy. 19/

In the light of the foregoing it is unnecessary to address other issues raised in defense by the Respondent.

Recommendation

In view of the findings and conclusions outlined herein it is recommended that the complaint be dismissed in its entirety.

LOUIS SCALZO
Administrative Law Judge

Dated: February 5, 1980
Washington, D.C.

19/ It is noted that Section 7118(a)(4)(A) of Title 5 United States Code would be applicable to bar prosecution. This provision provides: "Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued based on any alleged unfair labor pracice which occurred more than 6 months before the filing of the charge with the Authority."

3 FLRA No. 115

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 987

Respondent

and

Assistant Secretary
Case No. 40-9386 (CO)

NEDRA T. BRADLEY

Complainant

DECISION AND ORDER

On November 30, 1979, Administrative Law Judge John H. Fenton issued his recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the authority under section 304 of Reorganization Plan No. 2 of 1978 (43 Fed. Reg. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (45 Fed. Reg. 3487, January 17, 1980). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation.*/

*/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Assistant Secretary Case No. 40-9386(CO) be, and it hereby is, dismissed.

Issued, Washington, D.C., July 23, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 987, AFL-CIO Respondent	
and	Case No. 40-9386(CO)
NEDRA T. BRADLEY Complainant	

PETER BROIDA, Esquire
Assistant General Counsel
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

For the Respondent

JOHN C. LEGGETTE
206 Todd Circle
Warner Robins, Georgia

JAMES GIBBS
Post Office Box 601
Rochelle, Georgia

For the Complainant

Before: JOHN H. FENTON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arose under Executive Order 11491, upon an unfair labor practice complaint which alleged that Local 987 failed or refused to elevate Complainant's grievance to Step 5 of the negotiated grievance procedure, and failed to timely advise her of its decision not to do so, because she had supported candidates opposed to the incumbent president.

Findings of Fact

Local 987 is the exclusive representative of approximately 12,800

employees at Warner Robins Air Logistics Center, Warner Robins, Georgia. Edward Maddox has been its president for over six years. Complainant has been active in Union affairs as a shop steward or division steward, and as recording secretary, since 1973. In the elections held in October, 1977, she supported James Gibbs for Local president. In the November run-off between Maddox and Brooks, she supported Brooks.

According to Complainant and Mr. Gibbs, the only witnesses, Article 9 of the collective bargaining agreement was intended to permit an employee to get a change in rest days as a matter of personal convenience. Complainant testified that such adjustments were made as a matter of practice or policy, and proved that Division Chief Julian Fussell had, in December 1977, approved her request to exchange a Saturday rest day for a Monday "in accordance with Section f, Article 9, Supplement 1". Complainant worked from Monday through Friday. It became necessary for her to attend a State court proceeding on Friday, May 19, 1978. She therefore decided to request an exchange of the following Saturday for that workday. Notwithstanding her clear conviction that both the contract and the activity's past practice would support such a request, she testified that she first solicited the opinion of Mr. Larry Franks, a consultant to Local 987, that she did so without disclosing the name of the potential grievant, and that he expressed the view that the contract would support a grievance should such a request be denied.

On May 9 she requested the change, citing Section i, Article 9 of the collective bargaining agreement. On the same day her supervisor denied the request, citing Section e of the same Article 1/. On May 15 Complainant grieved at the second, or Branch level, and appointed Raleigh J. Gibbs as her Union representative. On May 16 her Branch Chief denied her request on the ground that Section i of Article 9 was intended to afford employees an opportunity to request split rest days at the time shifts and tours of duty are posted, but not to permit employees to change rest days in lieu of using annual leave for matters of personal convenience. Complainant was then required to use LWOP on Friday, May 19, and she or her representative elevated the grievance to the third, or Division, step. On June 1 her Division Chief rejected the grievance on the ground that none of the employees regularly assigned to work on Saturady, May 20, was scheduled to be on leave and that her presence of that day would have resulted in an excess of personnel on duty.

On June 2 the grievance was elevated to the fourth, or Directorate level. Complainant and her new Union representative, Mr. Donald Randall, met with Mr. Gerald Tompkins, Deputy Directorate Chief.

1/ Neither the contract nor many other documents relevant to this controversy were introduced into evidence.

According to Complainant, Mr. Tompkins agreed that she was entitled to the requested exchange of rest days, and stated that he would arrange for his labor relations officer to meet with Mr. Randall, resolve the grievance and forward her a copy of the resolution. On June 23 Complainant received an unsigned copy of a letter from Tompkins to Randall, which she described as first indicating that the grievance was meritorious and then denying the requested relief -- an acknowledgement that the policy was to permit such an exchange of rest days and compensation for eight hours LWOP. 2/ Complainant became suspicious because this disposition was a total reversal of her understanding of the oral resolution made by Tompkins and because the letter was addressed to Randall rather than to her. Until that point, all such correspondence had been addressed to her, with a copy to her union representative. She was also, apparently, suspicious of the fact that she never received a copy of the letter elevating the grievance to the fourth step. In the absence of Division Steward Randall, she called Executive Vice-President Jerre Harvard, told him that she wished to pursue the grievance to the Command level, and informed him that the copy of the Tompkins letter was not official because it was unsigned. Harvard replied that he would contact Randall and they would look into the matter and take the necessary action. At some point in time there was a conversation with Randall in which he promised to secure a signed copy of the Tompkins letter and was made aware of Complainant's desire to elevate the grievance. 3/

The contract provided 10 working days in which to elevate the grievance. If the unsigned letter addressed to her representative rather than her was sufficient to trigger the running of that time, and if weekends and July 4 are excluded, her time expired on July 10. Between June 23 and July 10, Complainant inquired about the status of her grievance on at least several occasions. She was told it was under consideration. On July 11 or 12 she received a letter addressed to Randall and her, from Franks, dated July 10. In essence he concluded that no provision of Article 9 requires management to change an employee's rest day when it is for the employee's personal benefit, and that there was no basis for pursuing the grievance unless there was a regular and extended practice to the contrary. Complainant, who calculated the 10-day period as expiring on July 7, took no further

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2/ This document is not in evidence.

3/ Complainant testified on direct that on the day Randall delivered a signed copy of the letter to her, she asked him "to please review the case and have it elevated or, you know, researched ...", and that he promised to get together with Larry Franks and Jerre Harvard and take the necessary action. (T. 25 & 26). On cross she set the date of such delivery and conversation as July 13, after the Union had rejected the grievance. (T. 70). Obviously earlier communication had taken place.

steps. She had the right, as an individual, to invoke the fifth step, but did not advance to management the argument that her grievance was not "Officially" resolved at the fourth step until she received a signed copy of Tompkin's letter. Thus the Activity had no occasion to reject as untimely an effort to secure resolution of the grievance by the Base Commander.

Complainant presented no evidence of Union animosity against supporters of political rivals of the current regime. Rather she argues that the events described have no satisfactory explanation except that President Maddox must have instructed Franks deliberately to misconstrue the contract and, presumably, to allow the appeal time to elapse. Yet her representative, a political opponent of Maddox, gave testimony which rather clearly undermines any such assumption. With respect to the merits of the grievance, Complainant admitted that her request for the change in rest days was the first one she had made since her Branch Chief distributed to supervisors a memo stating that no more exchanges granted to employees and she further admitted that, on the basis of conversations with various supervisors, this may have been the reason her request was turned down. In short, Complainant's case is based on speculation and surmise. There is no hard evidence that any official of Local 987 deliberately mishandled her grievance because she opposed the candidacy of its current president. In response to a motion to dismiss, I indicated that I would dismiss on the ground that Complainant had come forward with nothing more than suspicious and conjecture, had established nothing more than an innocent mistake, and that an innocent mistake does not constitute a violation of the duty of fair representation. Respondent chose to call no witnesses, although invited to do so.

Conclusions and Recommendation

A union must represent employees in a bargaining unit "without discrimination, fairly, impartially, and in good faith", 4/ and with "honesty of purpose". 5/ That obligation is violated where there is "substantial evidence of fraud, deceitful action or dishonest conduct", 6/ or where a union is shown to have "arbitrarily ignored a meritorious grievance or processed it in a perfunctory manner". 7/

As noted by the former General Counsel of the National Labor

4/ Steele v. Louisville and Nashville Railroad, 323 U.S. 192 (1944).

5/ Ford Motor Company v. Hoffman, 345 U.S. 330, 338 (1953).

6/ Humphrey v. Moore, 375 U.S. 335, 348 (1964).

7/ Vaca v. Sipes, 386 U.S. 171 (1967).

Relations Board, 8/ courts and the Board have elaborated on this theme, and particularly the elastic concept of "unfairness", to the point where some courts have virtually imposed upon unions the obligations that attend the attorney-client relationship. I totally subscribe to his view that the duty must be more narrowly defined, and that no breach should be predicated merely upon proof that a union was "inept, negligent, unwise, insensitive or ineffectual". Rather, such breaches should be found only where the union's conduct was improperly motivated by Section 1(a) considerations or by irrelevant or invidious considerations such as sex, race or personal animosity, or where it was wholly arbitrary or grossly negligent. A broader, more comprehensive rule permitting the Authority and the courts continually to second-guess a union's exercise of its discretion or to review and remedy its admitted mistakes in the handling of grievances would, I think, be destructive of good bargaining relationships, of responsible representation and even, sometimes, of the organization itself. In IBEW v. Foust, 99 U.S. 2121, 101 LRRM 2365 (1979), the Supreme Court, in barring punitive damages in a fair representation suit, repeatedly indicated the need to protect the union' financial resources and thereby its effectiveness. This factor acquires even greater weight in the federal sector where labor organizations cannot compel the payment of dues or service fees and where they often represent units which dwarf their dues-paying membership.

Here, the evidence establishes at most an innocent mistake which may have terminated a meritorious grievance. Viewed most favorably to Complainant, the facts are not unlike those of Foust, except that there the consequence was loss of a job as opposed to a day's pay here. As noted, it isn't even clear that the Activity would have rejected the grievance as time-barred at the fifth step, had Complainant presented it. It is difficult to conclude that she has been harmed where she has failed to make the effort to avoid that harm. On that ground alone, I would recommend that the complaint be dismissed. However, even assuming that the Union's conduct precluded consideration of the grievance at the fifth step, I would find no breach of the duty to fairly represent. There is no evidence that the mistake was other than innocent, and until that point Complainant had received representation at three steps and consideration by a salaried consultant. The weight of authority holds that mere negligence will not support a finding that the duty has been breached. 9/ While I might find a similar oversight to constitute gross and therefore actionable

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8/ See his Memorandum 79-55, from which this analysis draws very heavily.

9/ Great Western Unifeight System, 209 NLRB 446; Cf. Robesky v. General Motors Corp., 573 F.2d 1082 (9th Cir. 1978).

negligence if it had very serious career consequences, I cannot conclude that this mistake, involving as it did a relatively minor matter, violated the duty to fairly represent.

RECOMMENDED ORDER

Having concluded that no violation of Section 19(b)(1) of Executive Order occurred, it is recommended that the complaint be dismissed.

John H. Fenton

JOHN H. FENTON
Administrative Law Judge

Dated: November 30, 1979
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES,
LOCAL R14-62

Union

and

Case No. O-NG-151

UNITED STATES ARMY, DUGWAY PROVING GROUND,
DUGWAY, UTAH

Activity

DECISION ON NEGOTIABILITY APPEAL

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(D) of the Federal Service Labor-Management Relations Statute (the Statute)(5 U.S.C. § 7101 et seq.).

The basic facts, as set forth in the record before the Authority, show that the union and the activity are parties to a collective bargaining agreement renewed on March 26, 1978, for two years. Article XXII, Section 3 of the parties' agreement provides as follows:

> In the event amendments to this agreement are required, because of laws or regulations, the parties shall meet on the anniversary of this effective date for the purpose of making such changes. At any time in the life of the agreement, either party may give the other party written notice of its desire to supplement or amend the agreement. If no response or a response agreeing to the change is received within (30) days, the supplement or amendment will become a part of the agreement. If a negative response is received within (30) days, the change will be negotiated in a manner mutually agreed upon. Proposals to amend the agreement will not apply to the terminal date of the agreement.

On May 9, 1979, the union received proposed changes to Dugway Proving Ground Regulation (DPGR) 690-7, the activity's merit promotion and internal placement program, and following negotiations with the activity entered into, in effect, a memorandum of agreement on May 25, 1979, covering the changes. Additionally, this memorandum of agreement referred to the union's disagreement with the restrictions created by Department of the Army Civilian Personnel Regulation (CPR) 950-1, Career Management-Basic Policies and Requirements, and Department of the Army, Skills, Knowledge, Ability and Personal Characteristics (SKAP) System and the union's wish to challenge these regulations on the basis of compelling need.

On June 12, 1979, the union referred to its earlier disagreement with CPR 950-1 and SKAP System and requested negotiations on the removal of specific items from DPGR 690-7, and, on June 20, 1979, proposed additional changes to DPGR 690-7. Subsequently, the activity requested a copy of the union's proposals concerning DPGR 690-7, which was delivered to the activity on July 27, 1979. On August 8, 1979, the union filed an unfair labor practice charge (Case No. 7-CA-205) against the activity alleging that the activity had failed to respond in a timely fashion to a request to negotiate changes to DPGR 690-7. The union's petition for review in the instant case was filed with the Authority on August 20, 1979, and on September 17, 1979, the union submitted to the activity proposals to amend the March 26, 1978, agreement pursuant to the aforementioned reopening procedure.

The agency in its statement of position asserts that the reopening procedure of the March 26, 1978, agreement was not properly invoked until September 17, 1979, at which time, the agency claims, the union did submit a specific request to amend the agreement in accordance with the reopening procedure. In this connection, the agency argues that there was no obligation on the activity's part to negotiate with the union prior to September 17, 1979, and that, in any event, by virtue of Article III, Section 6 of the March 26, 1978, agreement, the union's proposals concerning CPR 950-1, and other regulations, are not subjects appropriate for local negotiations because they are not within the discretion of the activity. Article III, Section 6 provides, in essence, that matters appropriate for consultation and negotiations between the parties are policies and procedures relating to working conditions which are within the discretion of the activity. Additionally, the agency argues that while the negotiations to amend the March 26, 1978, agreement are in process, it would be premature to rule on the union's petition for review.

The union contends that the reopening procedure permits the agreement to be reopened at any time, and, contrary to the agency's assertions, the union made a request to negotiate on July 27, 1979. The union disputes also the agency's

contention that the agreement does not permit reopening for the express purpose of negotiating regulations, which, it argues, as here, relate to conditions of employment. In addition, the union insists that the activity has not bargained on DPGR 690-7, even though it opened the door to do so, and that it has engaged in delaying and nonresponsive tactics.

The circumstances herein do not give rise to a negotiability dispute which the Authority may properly review at this time pursuant to section 7117 of the Statute. That is, the activity and the union appear to principally disagree as to the manner in which Article XXII, Section 3, permits their agreement to be reopened, what constitutes a proper request to do so, and whether their agreement permits bargaining over those regulations that the union seeks to negotiate upon. Thus, to the extent that such matters involve disputes over contract interpretation, the proper forum in which to resolve these disputes would be pursuant to whatever procedures the parties themselves have adopted for such purposes through their agreement. See American Federation of Government Employees, AFL-CIO, Local 1931 and Department of the Navy, Naval Weapons Station, Concord, California, Case No. O-NG-55, 2 FLRA No. 19 (December 5, 1979); American Federation of Government Employees, AFL-CIO, Local 1661 and Department of Justice, Bureau of Prisons, Federal Correctional Institution, Danbury, Connecticut, Case No. O-NG-43, 2 FLRA No. 56 (January 9, 1980); and American Federation of Government Employees, AFL-CIO, Local 2879 and Social Security Administration, San Diego, California, Case No. O-NG-208, 2 FLRA No. 93 (February 29, 1980).

Additionally, to the extent that the union's contentions focus on whether the activity has engaged in bad faith bargaining, i.e., delaying and nonresponsive tactics, and the activity's defense that it had met its bargaining obligation, the proper forum in which to raise these issues is not a negotiability appeal, but would be an unfair labor practice proceeding pursuant to section 7118 of the Statute. See National Federation of Federal Employees, Local 1141 and Department of the Interior, Bureau of Mines, Albany Metallurgy Research Center, Albany, Oregon, Case No. O-NG-80, 2 FLRA No. 28 (December 13, 1979); National Federation of Federal Employees, Local 1363 and Headquarters, U.S. Army Garrison, Yongsan, Korea, Case No. O-NG-94, 2 FLRA No. 50 (December 31, 1979); and Tidewater Virginia Federal Employees Metal Trades Council and Norfolk Naval Shipyard, Portsmouth, Virginia, Case No. O-NG-256, 2 FLRA No. 108 (March 14, 1980).

Based on the foregoing, the union's appeal does not present issues that the Authority can appropriately resolve at this time under section 7117 of the

Statute and Part 2424 of its rules and regulations, 5 C.F.R. § 2424.1 et seq.. Accordingly, the appeal is hereby denied without prejudice to the further processing of the union's pending unfair labor practice charge.

Issued, Washington, D.C., July 17, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

3 FLRA No. 110

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ASSOCIATION OF CIVILIAN TECHNICIANS,

Union

and

Case No. 0-NG-251

STATE OF GEORGIA, DEPARTMENT OF
DEFENSE, MILITARY DIVISION, ATLANTA,
GEORGIA,

Activity

ORDER

The Association of Civilian Technicians (the union) filed a petition for review of negotiability issues, and the National Guard Bureau, on behalf of the Department of Defense (the agency), filed a statement in response to the union's petition.

In its petition the union asserts that the agency, during the course of Federal Service Impasses Panel proceedings (Case No. 79 FSIP 107), alleged that a union proposal related to the wearing of standard civilian work attire as an alternative to the military uniform was nonnegotiable.

In its submission, the agency states that neither the Bureau nor the Georgia Department of Defense ever alleged that "the issue of standard civilian work attire, as an alternative to the military uniform was nonnegotiable".

Based upon the agency's disclaimer that there is any dispute as to whether the union's proposal is within the duty to bargain under the Statute, the case before the Authority has been rendered moot.

Accordingly, the union's petition is hereby dismissed without prejudice to resubmit the matter to the Authority at some later time should the agency allege the matter nonnegotiable.

For the Authority.

Issued, Washington, D.C., July 18, 1980

Samuel A. Chaitovitz, Executive Director

CORRECTED COPY

3 FLRA No. 112

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES UNION

(Union)

and

Case No. 0-NG-82

INTERNAL REVENUE SERVICE

(Agency)

DECISION ON NEGOTIABILITY ISSUES

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.).

Union Proposal I

Article 3 - Section 5

B. The employer agrees that employees may obtain outside employment where such employment does not create:

1. interference with the performance of their official duties;

2. bring discredit on or cause unfavorable and justifiable criticism of the Government; or

3. result in a conflict, or apparent conflict of interest, with their official duties.

C. Applications for outside employment which have been approved will not be subsequently denied.

Question Here Before The Authority

The question is whether Union Proposal I, concerning outside employment, is outside the scope of the duty to bargain under section 7117 of the Statute[1/] and conflicts with retained management rights under section 7106(a) of the Statute,[2/] as alleged by the agency.

1/ Section 7117(a)(1) of the Statute provides as follows:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

The term "matters" as used in section 7117(a)(1) is explained by reference to the definition of "collective bargaining" in section 7103(a)(12) and "conditions of employment" in section 7103(a)(14) of the Statute:

§ 7103. Definitions: application

(a) For the purpose of this chapter--

. . . . . .

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees . . . .

. . . . . .

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . .

2/ Section 7106(a) of the Statute provides, in relevant part, as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(1) to determine the . . . internal security practices of the agency; and

Opinion

Conclusion: Union Proposal I is within the duty to bargain under the Statute and does not conflict with section 7106(a) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, 45 Fed. Reg. 3513 (1980), the agency's allegation that the proposal is not within the duty to bargain is set aside. In so deciding that the subject proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

Reasons: Union Proposal I essentially seeks to establish the criteria to be used in determining whether to approve or disapprove applications for outside employment submitted by IRS employees. The agency takes the position that the matter of outside employment is not a condition of employment affecting unit employees within the meaning of the Statute because it does not directly concern the employment relationship but instead relates to matters arising outside the work area and normal duty hours of IRS employees.

In the circumstances of the present case, the matter of outside employment does affect the work situation and employment relationship. Specifically, the matter of outside employment by IRS employees is covered by an agency regulation entitled "Handbook of Employee Responsibilities and Conduct," IRM 0735.1. The regulation sets forth agency policy concerning "[e]mployee [o]bligations with respect to [o]utside [e]mployment and [b]usiness [a]ctivities" that is determinative of whether a unit employee may be eligible for certain positions within the agency or may continue to be employed by the agency at all.

Accordingly, it is concluded that the establishment of criteria for management's approval of outside employment applications submitted by IRS employees is a condition of employment. It is directly related to the personnel policies, practices, and matters affecting working conditions of unit employees and is within the scope of bargaining under section 7117 of the Statute.

The agency asserts, further, that Union Proposal I violates management's reserved rights under section 7106(a)(2)(A) of the Statute to direct and discipline its employees and under section 7106(a)(1) of the Statute to determine the internal security practices of the agency. Such assertions are unsupported by the record herein and appear to be based upon a misinterpretation by the agency of the disputed proposal. Thus, nothing contained in the language of the proposal would restrict the agency's right to discipline or deny a security clearance to a unit employee who either failed to apply for or to obtain permission to hold outside employment consistent with the established criteria. Moreover, contrary to the agency's assertion, neither the language nor the stated intent of the proposal would prevent management from directing an employee to discontinue outside employment for which permission had been granted but which is deemed no longer consistent with the established criteria

---

(Continued)

(2) in accordance with applicable laws - -

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or pay, or take other disciplinary action against such employees; . . .

or preclude disciplinary action against an employee who refused to terminate such outside employment. Similarly, the record fails to establish, and it does not otherwise appear, that the subject proposal conflicts with other reserved management rights under section 7106(a) of the Statute. However, even if management's rights are involved in some of the decisions which management makes, the instant proposal involves a procedural aspect and it is a mandatory subject of bargaining under section 7106(b)(2) of the Statute. Accordingly, noting that no compelling need was raised by the agency for the regulation herein, Union Proposal I is a matter within the agency's duty to bargain under the Statute; and the agency's allegation that the proposal is not within the duty to bargain is set aside.

Union Proposal II

Article 3 - Section 8

Section 8 incorporates the provisions of 5 U.S.C. § 2302(b) (Prohibited personnel practices) into the negotiated agreement. [The proposal is set forth in its entirety in Appendix A.]

Union Proposal III

Article 3 - Section 9

Section 9 incorporates the provisions of 5 U.S.C. § 2301(b) (Merit system principles) into the negotiated agreement. [The proposal is set forth in its entirety in Appendix B.]

Question Here Before The Authority

The question is whether Union Proposals II and III, embodying the prohibited personnel practices and the merit system principles contained in 5 U.S.C. § 2301 and 5 U.S.C. § 2302, respectively, are within the duty to bargain under the Statute.

Opinion

Conclusion: Union Proposals II and III are within the duty to bargain under the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, 45 Fed. Reg. 3513, the agency's allegation that the proposals are not within the duty to bargain is set aside. In so deciding that the subject proposals are within the duty to bargain, the Authority makes no judgment as to the merits of the proposals.

Reasons: Union Proposals II and III are essentially restatements of sections 2301(b) (Merit system principles) and 2302(b) (Prohibited personnel practices) of the Civil Service Reform Act of 1978 (5 U.S.C. §§ 2301 and 2302). The union's stated intent is to incorporate these two provisions of law into the negotiated agreement and to enforce them through the negotiated grievance procedure. The agency contends that the portions of Union Proposals II and III

which deal with "recruitment" and "applicants for employment" are outside the duty to bargain because "such matters do not relate to personnel policies, practices and matters affecting the working conditions of bargaining unit employees [but]. . . relate to the rights of persons outside the bargaining unit." The agency further asserts that "some subsections [of the proposals] deal with management's right to take or refrain from taking any personnel action" and therefore violate management's reserved rights contained in section 7106(a)(2)(A) of the Statute (supra note 2). For the reasons stated below, the agency's contention that the union's proposals are not within the duty to bargain cannot be sustained.

As previously stated, the union seeks to "enforce" the merit system principles and prohibited personnel practices through the parties' negotiated grievance procedure by incorporating those provisions of law into the agreement. In American Federation of Government Employees Local 3669, AFL-CIO and Veterans Administration Medical Center, Minneapolis, Minnesota, Case No. 0-NG-32, 3 FLRA No. 48 (May 30, 1980), the Authority, relying upon the definition of "grievance" in section 7103(a)(9) of the Statute[3/] as well as the language of section 7121 of the Statute[4/] and the legislative history of that section in its

3/ Section 7103(a)(9) of the Statute provides:

> (a) For the purpose of this chapter --
>
> (9) "grievance" means any complaint-
>
> (A) by any employee concerning any matter relating to the employment of the employee;
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
> (C) by any employee, labor organization, or agency concerning-
> (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
> (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

4/ Section 7121 of the Statute provides, in relevant part, as follows:

> (a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.
>
> (2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

. . . . . .

entirety, 5/ concluded that:

> Congress clearly intended that the scope and coverage of a negotiated grievance procedure shall extend to all matters which "under the provisions of law" could be covered unless the parties agreed through the collective bargaining process to a procedure having a narrower coverage. . . [S]ection 7121, as explained by the Committee on Conference, . . . provides that negotiated grievance procedures cover, at a maximum, matters which under the provisions of law could be submitted to the procedures.

Nothing in the language or the legislative history of the Civil Service Reform Act of 1978 indicates that Congress intended to exclude matters concerning the merit system principles and prohibited personnel practices from the coverage of a negotiated grievance procedure. On the contrary, while section 7121(c) of the Statute specifically excludes certain matters from coverage thereunder (note 4, supra), matters concerning the merit system principles and prohibited personnel practices are not so excluded. Rather, such matters are clearly encompassed within the definition of "grievance" contained in section 7103 (a)(9) of the Statute. As previously set forth (note 3, supra), "grievance" is defined to include, among others, "any complaint by any employee, labor organization, or agency concerning . . . any claimed violation, misinterpretation, or misapplication of any law . . . affecting conditions of employment." Therefore, since the matters in dispute are laws affecting conditions of employment they are within the scope of a negotiated procedure "for the settlement of grievances" under section 7121 (supra note 4) unless the parties exclude them through the collective bargaining process as previously discussed in connection with the Veterans Administration Medical Center case. This conclusion is further supported by the reference in section 7121(d) of the Statute to "[a]n aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure . . . ." 6/

(Continued)

> (c) The preceding subsections of this section shall not apply with respect to any grievance concerning --
>
> (1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);
> (2) retirement, life insurance, or health insurance;
> (3) a suspension or removal under section 7532 of this title;
> (4) any examination, certification, or appointment; or
> (5) the classification of any position which does not result in the reduction in grade or pay of an employee.

5/ S. REP. No. 95-1272, 95th Cong., 2d Sess. 157 (1978).

6/ See also section 1201.3(b)(1) of the final regulations of the Merit Systems Protection Board, 5 C.F.R. § 1201.3(b)(1) (1979), which provides:

> (1) Where an employee is covered by a collective bargaining agreement which provides

Finally, the agency's contentions that, in essence, Union Proposals II and III are not within the duty to bargain because they may be interpreted as applicable to persons outside the bargaining unit (including applicants who are not "employees" within the meaning of the Statute) or in a manner that would violate management's reserved rights under section 7106(a)(2)(A) of the Statute, cannot be sustained. In this regard, as the Authority stated in Veterans Administration Medical Center, Case No. O-NG-32, supra:

> If the agency believes that, as a matter of law, certain matters are nongrievable and nonarbitrable, grievances which might be filed with respect to them may be challenged by the agency as nongrievable or nonarbitrable, in the context of specific factual circumstances. In this regard, section 7121(a) of the Statute requires the parties to "provide procedures for the settlement of grievances, including questions of arbitrability . . . . " [Emphasis added.] Furthermore, . . . the agency would have an opportunity to challenge [an arbitrator's] award by filing exceptions thereto with the Authority pursuant to section 7122 of the Statute (92 Stat. 1212) on the basis that the award is "contrary to any law, rule or regulation."

For the foregoing reasons, Union Proposals II and III are matters within the duty to bargain, and the agency's allegation that the proposals are not within the duty to bargain is set aside.

Issued, Washington, D.C., July 23, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

(Continued)

> exclusive negotiated grievance procedures for specific matters under 5 U.S.C. 7121, the employee may not appeal those matters to the Board.

APPENDIX A

Union Proposal II

Article 3 - Section 8

Any employee of the Internal Revenue Service who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority -

(1) discriminate for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of -

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulations to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position, any individual who is a relative of such employee if such position is in the agency in which such employee is serving as a public official or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for -

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences -

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law or if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences -

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States; or

(11) take or fail to take any personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the Merit System Principles contained in Section 2301 of this title.

APPENDIX B

Union Proposal III

Article 3 - Section 9

A. The Internal Revenue Service recognizes and agrees to abide by the Merit System Principles set forth in the Civil Service Reform Act of 1978.

B. In this regard the Employer agrees:

(1) Recruitment will be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment will receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay will be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees will maintain high standards of intergrity, conduct, and concern for [the] public interest.

(5) The Federal work force will be used efficiently and effectively.

(6) Employees will be retained on the basis of adequacy of their performance, inadequate performance will be corrected, and employees will be separated who cannot or will not improve their performance to meet required standards.

(7) Employees will be provided effective education and training in cases [in] which such education and training will result in better organizational and individual performance.

(8) Employees will be -

(a) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(b) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees will be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences -

(a) a violation of law, rule, or regulation, or

(b) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

OVERSEAS EDUCATION ASSOCIATION

Union

and

Case No. 0-AR-19

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS

Activity

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator Ida Klaus filed by the agency under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)).

According to the arbitrator's award, this matter involved meetings of the Advisory Committee for Curriculum Review of the agency's elementary school in Augsburg, Germany. Meetings of this committee were held monthly during the school year. The committee meetings commenced after the close of the "school workday for teachers," as that term is defined in Article 38, Section 1 of the parties' negotiated agreement, and they lasted for approximately an hour.

According to the arbitrator, Article 38, Section 1 pertinently provides:

> The school workday for teachers . . . shall commence not more than twenty minutes before and terminate not more than thirty minutes after the instructional day.

The parties' negotiated agreement defines the instructional day to be the "number of hours in the workday in which classroom instruction takes place." At Augsburg Elementary School the instructional day concluded at 2:50 p.m. and the school workday for teachers concluded at 3:20 p.m. Thus, it appears that the committee meetings commenced at approximately 3:20 p.m. and lasted until approximately 4:20 p.m.

At the start of the 1977-78 school year, a teacher on the committee, who was also a union representative, complained to the school's principal that pursuant to the agreement, the committee meetings were to be on "official time," in accordance with the provisions of Article 31, Section 4 of the agreement, which provides:

> Members serving on an Advisory Committee for Curriculum Review shall be on official time during meetings of such committees. Members serving on such committees at the District and Regional level shall receive travel and per diem in accordance with the JTR.

It was asserted that the term "official time" as used in that agreement provision meant "duty time." The union representative therefore requested on September 13, 1977, that the committee meetings be held during the school workday for teachers and that the committee members be granted one hour of "release time" to attend the committee meetings. It was observed in the award that it is commonly understood that the term "release time" refers to the release with pay of a teacher from the completion of the teacher's classroom duties, either by early dismissal of the teacher's class or by use of a substitute teacher.

The principal denied the request and a grievance was filed which claimed that pursuant to the parties' negotiated agreement, "official time" is the same as the school workday for teachers. The grievance sought the grant of release time for the committee members to attend the committee meetings. The dispute ultimately was submitted to arbitration with the parties unable to agree on the issues. Therefore, the arbitrator stated the issues to be resolved as follows:

1. Whether the term "official time" as used in Article 31, Section 4 is to be construed as meaning that period of time established in Article 38, Section 1 as "the school workday for teachers."

2. Whether the Principal of the Augsburg Elementary School violated Article 31, Section 4 by refusing to allow release time for teachers to attend Advisory Curriculum Review Committee meetings.

In resolving the first issue, the arbitrator observed that both the committee and its meeting time were exclusively derived from and governed by the terms of the parties' negotiated agreement. It was the arbitrator's finding and award that the intent of the parties in that agreement was that

> [t]he term "official time" as used in Article 31, Section 4 of the Agreement refers to that period of time established in Article 38, Section 1 as the "school workday for teachers."

As to the second issue, the arbitrator particularly noted that the activity conceded that it granted release time to teachers to attend the committee meetings at the area and regional levels. The arbitrator concluded in this respect that the parties' negotiated agreement did not permit disparate treatment of the committee meetings at the school level. Accordingly, the arbitrator found in her award that the activity violated Article 31, Section 4 of the agreement by refusing to grant committee members release time to allow them to attend the committee meetings at the school level. To remedy this violation of the negotiated agreement, the arbitrator ordered in paragraph 4 of her award as follows:

4. Members of the Augsburg Elementary School Committee shall be paid "extra duty" compensation for the time they have spent since September 13, 1977, outside the workday as defined by Article 38, Section 1 in attendance at Committee meetings.

The agency filed a petition for review of the arbitrator's award pursuant to the rules of procedure set forth in 5 C.F.R. part 2411 (1978), which, to the extent consistent with the provisions of section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. §7122(a)) and as amended by section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority, 44 F.R. 44741, remain operative with respect to this case. The agency requests that the Authority accept its petition for review of paragraph 4 of the arbitrator's award on the basis of its exception which is discussed below. The union did not file an opposition.

In its exception to the award, the agency contends that paragraph 4 of the arbitrator's award is contrary to law and regulation. In support of its exception, the agency explains that Department of Defense teachers located in overseas areas are covered by the Defense Department Overseas Teachers Pay and Personnel Practices Act [Overseas Teachers Pay Act], 20 U.S.C. §§901-907 (1976). The agency argues that no provision of this law requires the payment of overtime for time required by management and spent by teachers outside the instructional day. The agency further argues that the implementing regulation to this Act, DoD Directive 1400.13, likewise makes no provision for the payment of overtime. The agency states that this regulation does provide for appropriate additional compensation for certain extra-duty assignments which has been accomplished by a pay schedule for "Other Compensation" which allows additional compensation, but only when 40 or more hours in extra-curricular duty time is required in a single school year. Here, the agency maintains, the teachers are not entitled to such additional compensation because the committee meeting time did not exceed 40 hours and the duty performed in this case was curricular in nature rather than extra-curricular. The agency also makes a derivative argument that because there is no extra compensation authorized in this case, compliance with paragraph 4 of the award would violate the Back Pay Act of 1966.*/

Pursuant to section 2411.32 of the amended rules and section 7122(a) of the Statute, the Authority will grant a petition for review of an arbitration award where it appears, based on the facts and circumstances described in the petition, that an exception presents the ground that the award violates law or regulation.

In this case, however, the agency's petition fails to describe the facts and circumstances necessary to support its exception that paragraph 4 of the arbitrator's award, ordering the payment of additional compensation for the time spent in attendance at the committee meetings outside the teachers' workday, is contrary to law or regulation. Although the agency contends that the compensation ordered in paragraph 4 of the award is contrary to law and regulation, the substance of its supporting argument is solely that "there is no provision for payment of compensation in the circumstances involved herein." However, the law, the regulation, and the compensation schedule cited by the agency do not demonstrate that paragraph 4 of the award violates law or regulation, but rather demonstrate only that the particular law, regulation, and compensation schedule cited by the agency do not expressly address the circumstances of this case--compensation for the performance of additional

*/ 5 U.S.C. §5596 (1976), as amended by Civil Service Reform Act of 1978, Pub. L. No. 95-454, §702, 92 Stat. 1216.

curricular activities. In this regard the Overseas Teachers Pay Act provides, in pertinent part, as follows:

> §902. Regulations of Secretary of Defense
>
> (a) . . . the Secretary of Defense shall prescribe and issue regulations to carry out the purposes of this chapter. Such regulations shall govern--
>
> . . . . . .
>
> (3) the entitlement of teachers to compensation;
> (4) the payment of compensation to teachers;
>
> . . . . . .
>
> (10) such other matters as may be relevant and appropriate to the purposes of this chapter.
>
> §903. Administration -- Employment and salary practices
>
> (a) The secretary of each military department in the Department of Defense shall conduct the employment and salary practices applicable to teachers and teaching positions in his military department in accordance with this chapter, other applicable law, and the regulations prescribed and issued by the Secretary of Defense under section 902 of this title.
>
> . . . . . .
>
> (d) the Secretary of each military department may prescribe and issue such regulations as he deems appropriate to carry out his functions under this chapter.

Similarly, DoD Directive 1400.13 provides, in pertinent part, as follows:

> V. <u>RESPONSIBILITIES</u>
>
> A. The Assistant Secretary of Defense . . . shall:
>
> . . . . . .
>
> 2. Develop, adopt, and from time to time adjust, as appropriate, a single uniform compensation schedule, consistent with the following:
>
> . . . . . .
>
> d. Provide for appropriate additional compensation for certain extra-duty assignments normally associated with elementary and secondary school programs.

Likewise, the schedule for "Other Compensation" by its own terms, as indicated by the agency, deals not with curricular activities but rather with extra-curricular activities. The Authority notes that the Overseas Teachers Pay Act and DoD Directive 1400.13 both grant broad discretion to the agency in the provision of compensation for teachers. In terms of this case, the Authority also notes that the grievance submitted to arbitration questioned the propriety of the activity's scheduling of the curriculum committee meetings outside the school workday for teachers. Finding such scheduling a violation of the parties' negotiated agreement, the arbitrator ordered as a remedy that the teachers be compensated for the extra-duty time spent in attendance at these meetings. In view of the broad discretion given the agency to grant compensation, and since, as indicated, nothing in law or regulation expressly precludes granting the compensation ordered by the arbitrator in the circumstances of this case, the Authority finds no basis for acceptance of the agency's petition for review under section 2411.32 of the amended rules.

Therefore, the agency's petition for review is denied because it fails to meet the requirements of section 2411.32 of the amended rules for acceptance by the Authority of a petition for review of an arbitrator's award. The agency's request for a stay of the award is also denied.

Issued, Washington, D.C., July 18, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NORTHERN DIVISION, NAVAL
FACILITIES ENGINEERING
COMMAND, PHILADELPHIA, PENNSYLVANIA

Activity

and

Case No. 0-AR-69

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, LOCAL
1430

Union

DECISION

This matter is before the Authority on an exception to the award of Arbitrator William Gomberg filed by the union under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7122(a)).

According to the arbitrator, the dispute in this matter arose in 1979 when a candidate other than the grievant was selected for the position of General Engineer, GS-13. In 1976 a predecessor position, entitled "Value Engineer," had been vacated following an unsuccessful attempt to upgrade it from a GS-12 to a GS-13. Consequently, the decision was made to leave the position vacant and to incorporate its functions into other positions. In 1978 a determination was made to restore into one position the functions of Value Engineer, and the resulting new position was classified as General Engineer, GS-13. This new position was advertised and filled in 1979. The candidate selected for the General Engineer position was an employee who had been voluntarily performing some of the functions of the old Value Engineer position (described as duties of the new position), in addition to his regularly assigned work, since 1977.

The union filed a grievance over the filling of the General Engineer position, alleging that the selection process had been tainted because the selected employee had been performing some of the duties of the new position since 1977 and that the transfer of duties in 1977 should have been subject to competitive bidding under the agency's merit promotion plan since the transfer led to the creation of a position of a higher classification. Unable to reach a settlement, the parties ultimately submitted the grievance to arbitration.

The arbitrator denied the grievance. He concluded that the union's contentions were without merit, finding that there was no basis for the activity to have been aware of a possible promotional opportunity when the duties were transferred in 1977.

The union filed an exception to the arbitrator's award under section 7122(a) of the Federal Service Labor-Management Relations Statute */ and part 2425 of the Authority's interim rules and regulations, 44 F.R. 44766. The agency did not file an opposition.

The question before the Authority is whether, on the basis of the union's exception, the arbitrator's award is deficient because it is contrary to any law, rule, or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its exception the union contends the arbitrator incorrectly concluded that the government functionaries were not aware of the promotional opportunities of the position in question in 1977. The union, to support this contention, argues that a supervisory memo dated November 27, 1974, clearly indicated that the position had potential for a higher classification. Consequently, the union asserts, management was well aware of the promotional opportunities.

The union's exception constitutes disagreement with the arbitrator's findings of fact. This does not establish a basis for finding an award deficient. United States Army Missile Material Readiness Command (USAMIRCOM) and American Federation of Goverment Employees, Local 1858, AFL-CIO, Case No. 0-AR-7, 2 FLRA No. 60 (Jan. 17, 1980). Therefore, the union's exception provides no basis for finding the award deficient under 5 U.S.C. § 7122(a) and section 2425.3 of the Authority's interim rules and regulations.

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*/ 5 U.S.C. § 7122(a) provides:

> (a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient--
>
> (1) because it is contrary to any law, rule, or regulation;
>
> (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;
>
> the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

For the foregoing reasons, and pursuant to section 2425.4 of the Authority's interim rules and regulations, we hereby sustain the arbitrator's award.

Issued, Washington, D.C., July 18, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL CORRECTIONAL INSTITUTION

Activity

and

Case No. O-AR-71

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1286

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Edwin R. Render filed by the union under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7122(a)).

According to the arbitrator, the grievance involved the activity's decision to suspend the grievant (who was also the local union President) for 21 days because of eight alleged incidents of misconduct. The arbitrator stated that the general issue in the case was "whether the discipline was imposed for just and sufficient cause . . . " within the meaning of the parties' collective bargaining agreement. The arbitrator also noted that he had to address the union's argument that the activity had discriminated against the grievant because of his union activity, and that the activity's entire course of conduct was evidence of such discrimination.

The arbitrator determined that since the case involved eight different incidents, it was necessary for him to review each of the eight allegations and to make a finding as to each. Thereafter he discussed the evidence with respect to each incident and made separate findings of fact and conclusions on each one. The arbitrator found ". . . that the Grievant was guilty of misconduct with regard to . . ." five of the eight charges and reduced the total suspension from 21 days to 7 days with a written warning for one of the charges.

In reaching his conclusion the arbitrator stated that he:

> . . . believes that the Union has established that some of the action which was taken against the Grievant involved discrimination . . . . However, the finding that the Employer's action was motivated by reasons other than those stated in the formal charges against the Grievant does not in and of itself preclude an arbitrator from imposing discipline where the Grievant has engaged in misconduct.

The union filed exceptions to the arbitrator's award under section 7122(a) of the Federal Service Labor-Management Relations Statute */ and part 2425 of the Authority's rules and regulations, 45 F.R. 3513.

The question before the Authority is whether, on the basis of the union's exceptions, the arbitrator's award is deficient because it is contrary to any law, rule, or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its first exception the union contends that the award is deficient because the arbitrator exceeded his authority by separating the charges and imposing individual disciplinary suspensions for individual charges. It is the union's position that because the agency imposed one "inseparable disciplinary action" for all eight charges, the arbitrator cannot alter that penalty without violating Article 30, Section f of the contract, which provides:

ARTICLE 30 - ARBITRATION

Section f. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award with the Federal Labor Relations Council. The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of (1) this Agreement or (2) published Federal Prison System policies or regulations.

The union's first exception states a ground on which the Authority will find an award deficient under section 7122(a)(2) of the Statute. That is, the Authority will find an award deficient where it appears, on the basis of the exception, that the arbitrator exceeded his or her authority by rendering an award in disregard of a plain and specific limitation on that authority. Department of the Air Force, McGuire Air Force Base and Local 1778, American Federation of Government Employees, Case No. O-AR-3, 3 FLRA No. 38 (May 23, 1980). However, in this case the union has failed to demonstrate that the arbitrator exceeded his authority. The union has not demonstrated that the

*/ 5 U.S.C. § 7122(a) provides:

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient--

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

arbitrator in any manner exceeded his authority when, in order to answer the question before him of whether the discipline imposed on the grievant was for just cause, he examined each of the individual charges and thereafter, finding just cause for some charges but not for others, as a remedy adjusted accordingly the discipline imposed by the activity. The union cites no contract provision or other restriction which would prevent the arbitrator from approaching the case in this manner or from fashioning the remedy he did. Further, the union does not demonstrate how the arbitrator, in arriving at his award, in any manner added to, subtracted from, disregarded, altered, or modified any of the terms of the collective bargaining agreement. Therefore, the union's first exception provides no basis for finding an award deficient under 5 U.S.C. § 7122(a) and section 2425.3 of the Authority's rules and regulations.

In its second exception the union contends that the award does not draw its essence from the collective bargaining agreement. In support of this exception the union asserts that the grievant ". . . was disciplined and treated unequally as regards other employees who were similarly situated because he was active in Union affairs and because he became the President of the local Union." The union argues that since the arbitrator found some anti-union discrimination he was prohibited by the contract from imposing any disciplinary sanctions against the employee and by doing so he "violate[d] the requirements of just and 'sufficient cause'."

The union's second exception states a ground on which the Authority will find an award deficient under section 7122(a)(2) of the Statute. United States Army Missile Materiel Readiness Command (USAMIRCOM) and American Federation of Government Employees, Local 1858, AFL-CIO, Case No. O-AR-7, 2 FLRA No. 60 (Jan. 17, 1980). However, the union does not demonstrate in its exception that this award fails to draw its essence from the contract. The union has not demonstrated that the arbitrator's award cannot in any rational way be derived from the contract; or is so unfounded in reason and fact, so unconnected with the wording and purpose of the contract as to manifest an infidelity to the obligation of the arbitrator; or that it evidences a manifest disregard of the contract; or that, on its face, the award does not present a plausible interpretation of the contract. See United States Army Missile Materiel Readiness Command, supra, and private sector cases cited therein. Instead, the union's arguments in support of this exception constitute disagreement with the reasoning employed by the arbitrator in reaching his award on the merits that some of the discipline imposed on the grievant was for just cause and thereafter fashioning a remedy accordingly. The Authority will not find an award deficient where it appears from the exception that the appealing party is disagreeing with the reasoning employed by the arbitrator on the merits of the issue before him. American Federation of Government Employees, AFL-CIO, Local 2094 and Veterans Administration Hospital, Case No. O-AR-24, 2 FLRA No. 88 (Feb. 22, 1980). Therefore, the union's second exception provides no basis for finding the award deficient under 5 U.S.C. § 7122(a) and section 2425.3 of the Authority's rules and regulations.

For the foregoing reasons, and pursuant to section 2425.4 of the Authority's rules and regulations, we hereby sustain the arbitrator's award.

Issued, Washington, D.C., July 18, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HEADQUARTERS, U.S. ARMY
COMMUNICATIONS COMMAND,
ET AL., FORT HUACHUCA,
ARIZONA

Activity

and

Case No. 0-AR-27

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1662

Union

DECISION

This matter is before the Authority on a petition for review of the award of Arbitrator Julius N. Draznin filed by the union under section 7122(a) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7122(a)).

According to the arbitrator, the dispute in this matter arose when the activity issued a notice changing the "qualification for persons receiving environmental differential pay while engaged in the Water and Sewage Plant operations." The notice apparently resulted in a reduction in the number of persons who qualified for differential pay and the circumstances under which such pay would be given. The union, disagreeing with this reduction, filed a grievance. The parties were unable to resolve the question and it was submitted to arbitration.

Although a submission statement was given to the arbitrator, the parties were in disagreement as to the language framing the issue. Therefore, the parties agreed to allow the arbitrator to formulate it. The arbitrator found that there were two issues. The first was the one submitted by the parties:

> Have the safety hazards pertaining to poisons (toxic chemicals) in the sewer and water treatment plants been 'practically eliminated by safety devices and procedures' as provided in Article 21 of the negotiated agreement so as to eliminate Environmental Differential Pay except in those instances set forth in [the agency notice], attached hereto.

The second issue was whether the term "poisons (toxic chemicals)" used in the first issue "include by definition of the terms themselves and the evidence presented at this hearing, hydrogen sulfide gas and methane gas, each of which is the result of biological and bacteriological activity in the sewage and waste materials areas of the Fort?"

In addressing the second issue first, the arbitrator concluded that both methane and hydrogen sulfide were toxic and poisonous. However, he found no evidence that the parties had agreed "in any way at any time that the language of the [submission] and of Article 21 of the Contract was meant to include these two dangerous gases." He, therefore, found no basis for the union's contention that the gases should be included in the scope of the terms they used.

With regard to the first issue, the arbitrator held that the safety hazards had been "practically eliminated." Finding no probative evidence to sustain the union's contention, the arbitrator dismissed the grievance, stating that "[n]o environmental hazard pay is called for beyond that which employees are now being compensated for by the Employer in accordance with the labor-management Agreement."

The union filed a petition for review of the arbitrator's award pursuant to the rules of procedure set forth in 5 C.F.R. part 2411 (1978), which, to the extent consistent with the provisions of section 7122(a) of the Statute (5 U.S.C. § 7122(a)) and as amended by section 2400.5 of the transition rules and regulations of the Federal Labor Relations Authority, 44 F.R. 44741, remain operative with respect to this case. The union seeks Authority acceptance of its petition on the basis of the exceptions discussed below. The agency did not file an opposition.

Pursuant to section 2411.32 of the amended rules and section 7122(a) of the Statute, the Authority will grant a petition for review of an arbitrator's award where it appears, based upon the facts and circumstances described in the petition, that the award is deficient because it is contrary to law or regulation, or on other grounds similar to those applied by Federal courts in private sector labor-management relations cases.

In its first exception, the union contends the arbitrator's findings of fact are totally unsupported by the evidence. In support of its contention the union argues that the safety hazards have not been eliminated. Rather, the union asserts, the activity is furnishing its employees with inadequate equipment, and storing the poisons in hazardous locations. The union states that it presented evidence to this effect at the arbitration hearing, and therefore contends that any finding of the arbitrator to the contrary is unsupported.

The union's first exception constitutes mere disagreement with the arbitrator's findings of fact, which does not constitute a basis for reviewing arbitration awards. United States Army Missile Materiel Readiness Command (USAMIRCOM) and American Federation of Government Employees, Local 1858, AFL-CIO, Case No. 0-AR-7, 2 FLRA No. 60 (Jan. 17, 1980). Therefore, this exception provides no basis for acceptance of the union's petition for review under section 2411.32 of the amended rules.

In its second exception the union contends the arbitrator incorrectly interpreted the contract as excluding methane gas and hydrogen sulfide from its coverage. To support its exception, the union asserts that under the contract,

the activity and the union are governed by "existing or future laws and regulations of appropriate agencies, including policies set forth in the Federal Personnel Manual," and that the applicable sections of the FPM state that "methane gas and hydrogen sulfide are hazardous." Thus, the union concludes, these gases should be included in the contract's coverage of hazardous gases for the purpose of environmental differential pay.

The union's second exception constitutes disagreement with the arbitrator's interpretation and application of the provision of the collective bargaining agreement before him. This assertion does not form a basis for reviewing an arbitrator's award. United States Army Missile Materiel Readiness Command, supra. Therefore, the union's second exception provides no basis for acceptance of its petition under section 2411.32 of the amended rules.

For the foregoing reasons, the union's petition for review of the arbitrator's award is denied because it fails to meet the requirements of section 2411.32 of the amended rules for acceptance by the Authority of a petition for review of an arbitrator's award.

Issued, Washington, D.C., July 23, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 48 REPORT OF CASE DECISIONS September 9, 1980

UNFAIR LABOR PRACTICE CASE

3 FLRA No. 116 (July 24, 1980)

United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Chicago, Illinois, Case No. 5-CA-152. Upon a complaint issued by the Regional Director, the ALJ found that the activity violated the Statute by the conduct of a supervisor in making certain statements to a grievant, which statements were found to be intimidating and threatening in nature and discouraged or interfered with the grievant's right to file and process grievances under the collective bargaining agreement between the activity and the union (NTEU and NTEU Chapter 94). The Authority, noting the absence of exceptions, adopted the findings, conclusions and recommendations of the ALJ and, accordingly, issued an appropriate remedial order. (Decision and Order attached.)

NEGOTIABILITY CASES

3 FLRA No. 117 (July 30, 1980)

Congressional Research Employees Association and the Library of Congress, Case No. 0-NG-66. The dispute involved a multisection union proposal concerning a reorganization of the American Law Division of the Congressional Research Service of the Library of Congress. The first section required the agency to create four work sections instead of two within the Division and mandated that each work section be assigned a Section Coordinator. The Authority found that this section of the union's proposal violated section 7106(a)(1) of the Statute, as it would interfere with management's right to determine its organization. The second section of the union's proposal sought to establish that the work Section Coordinators would not be supervisors within the meaning of section 7103(a)(10) of the Statute. The Authority held that this section of the proposal was not properly before the Authority at this time, because such matters should be addressed in the context of a clarification of unit petition. Nine other sections of the union's proposal

involved the applicability of merit pay to Section Coordinators; the duties of and selection procedures for Section Coordinators; relief from Section Coordinator duties; and other matters relating to that proposed position. The Authority found that the disputed sections did not present issues that it could appropriately resolve at this time, because they were dependent in substance on a determination of whether Section Coordinators are supervisors within the meaning of the Statute. The last disputed section of the union's proposal considered by the Authority provided that researchers were to be free to accept assignments from all sections of the American Law Division and that the agency assign the responsibility to resolve conflicts in assignments from all sections of the American Law Division Chief. The Authority found that this proposal violated the agency's right to assign work under section 7106(a)(2)(B) of the Statute. Accordingly, the Authority sustained the agency's allegation that the first and last disputed sections of the union's proposal considered by the Authority (those found to be violative of the Statute) were outside the duty to bargain. As to the remaining sections, the Authority denied the union's petition for review without passing on the merits and without prejudice to filing a petition for review of any negotiability issue which might remain after the question of whether the Section Coordinators are supervisors within the meaning of the Statute is resolved. (Decision attached.)

3 FLRA No. 118 (July 30, 1980)

National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, Case No. 0-NG-11. The dispute involved a union proposal that pre-paid parking spaces for bargaining unit employees' private vehicles at several posts of duty would not be released to the General Services Administration. The Authority held that insofar as the proposal required the agency to retain the disputed parking spaces, it was consistent with applicable Government-wide regulations (the Federal Property Management Regulations) under section 7117(a) of the Statute; did not concern a matter which may be negotiated only at the election of the agency within the meaning of section 7106(b)(1) of the Statute; and did not violate the agency's rights under section 7106(a)(1) of the Statute. However, the Authority further held that to the extent that the proposal implicitly required the agency to provide the parking spaces so retained free of charge to employees, it was inconsistent with applicable Government-wide regulations under section 7117(a) of the Statute. Accordingly, the Authority set aside in part and sustained in part the agency's allegation that the proposal was not within the duty to bargain. (Decision attached.)

3 FLRA No. 119 (July 31, 1980)

National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, Case No. 0-NG-56. The dispute involved a two-part proposal that would establish a minimum performance standard for employees to meet in order to continue in the employment of the agency (subsection A); and to receive within-grade pay increases (subsection B). For the reasons fully detailed in its decision, the Authority concluded that subsection A of the union's proposal was not within the duty to bargain because it was within the framework of management's right to direct and assign work under section 7106(a), and was not a procedure or an appropriate arrangement within the meaning of section 7106(b)(2) and (3) of the Statute. As to subsection B of the union's proposal, the Authority concluded that insofar as it provided for a performance level for the granting of within-grade increases which did not exceed the standard for job retention in the circumstances of this case, it was inconsistent with Government-wide regulation and, therefore, outside the duty to bargain under the Statute. Accordingly, the Authority sustained the agency's allegation. (Decision attached)

Appeals Withdrawn:

Case No.	Date
0-NG-305	July 29, 1980
0-NG-311	July 29, 1980
0-NG-185	July 31, 1980
0-NG-261	July 31, 1980

Attachments (4)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
CHICAGO, ILLINOIS

Respondent

and

Case No. 5-CA-152

NATIONAL TREASURY EMPLOYEES UNION AND
NATIONAL TREASURY EMPLOYEES UNION
CHAPTER 94

Labor Organization

DECISION AND ORDER

The Administrative Law Judge in the above-entitled proceeding issued his Recommended Decision and Order finding that the Respondent had engaged in an unfair labor practice as alleged in the complaint, and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

Therefore, pursuant to section 2423.29 of the Authority's rules and regulations, 45 Fed. Reg. 3511 (1980), and section 7118 of the Federal Service Labor-Management Relations Statute (5 U.S.C. section 7101 et seq.), the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudical error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, and noting particularly the absence of exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's rules and regulations and section 7118 of the Statute, the Authority hereby orders that the United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Chicago, Illinois shall:

1. Cease and desist from:

(a) Interfering with, or discouraging, by implied threats, or otherwise, Barbara J. Jacobs, or any other employee, from exercising the right to file and process grievances under the negotiated grievance procedure, freely and without fear of penalty or reprisal.

(b) In any like or related manner interfering with, restraining, or coercing any employee in the exercise by the employee of any right under the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities in Chicago, Illinois, copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Area Supervisor, Bureau of Alcohol, Tobacco and Firearms, Chicago, Illinois, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Area Supervisor shall take reasonable steps to insure that said notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 2423.30 of the Authority's rules and regulations, notify the Regional Director of Region 5, Room 1638, Dirksen Federal Building, 219 South Dearborn Street, Chicago, Illinois, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., July 24, 1980

Ronald W. Haughton
Ronald W. Haughton, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Leon B. Applewhaite
Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, or discourage, by implied threats, or otherwise, Barbara J. Jacobs, or any other employee, from exercising the right to file and process grievances under the negotiated grievance procedure, freely and without fear of penalty or reprisal.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employee in the exercise by the employee of any right under the Statute.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If any employees have any questions concerning this Notice, or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 5, whose address is: Room 1638, Dirksen Federal Building, 219 South Dearborn Street, Chicago, Illinois 60604, and whose telephone number is: (312) 353-6746.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
UNITED STATES DEPARTMENT OF TREASURY BUREAU OF ALCOHOL, TOBACCO AND FIREARMS CHICAGO, ILLINOIS Respondent	
and	Case No. 5-CA-152
NATIONAL TREASURY EMPLOYEES UNION AND NATIONAL TREASURY EMPLOYEES UNION CHAPTER 94 Charging Party	

John A. Chevrier, Esquire
Phyllis Pollack, Esquire
Office of the Chief Counsel
Bureau of Alcohol, Tobacco and Firearms
Federal Building
Washington, D.C. 20226

For the Respondent

Brenda M. Robinson, Esquire
Regional Attorney
Gregory A. Miksa, Esquire
Attorney
Federal Labor Relations Authority
Room 1638
219 S. Dearborn Street
Chicago, Illinois 60604

For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C.

Section 7101, et seq., and the Interim Rules and Regulations issued thereunder, Fed. Reg., Vol. 44, No. 147, July 30, 1979, 5 C.F.R. Chapter XIV, Part 2411, et seq.

The charge was filed on June 27, 1979, and a complaint, alleging a violation of 5 U.S.C. Section 7116(a)(1) of the Act 1/ and a Notice of Hearing were issued by the Regional Director on August 21, 1979, pursuant to which a hearing was duly held on October 4, 1979, in Chicago, Illinois, before the undersigned.

Paragraph IV of the Complaint asserted that on, or about, June 6, 1979, Respondent, by a supervisor and agent, warned a bargaining unit employee that her career with Respondent would not go much farther because of her filing grievances, which conduct violated Section 16(a)(1) of the Statute. Paragraph V of the Complaint reasserted that by the acts described in Paragraph IV Respondent did engage in, and is engaging in, unfair labor practices in violation of Section 16(a)(1) of the Statute. Respondent filed a timely answer on September 6, 1979, admitting all allegations contained in Paragraphs I, II and III of the Complaint but denying the allegations set forth in Paragraphs IV and V of the Complaint.

Findings

There is little disagreement as to the facts. Barbara J. Jacobs is, and had been for over three years, employed by Respondent as an inspector. She is a member of the bargaining unit represented by the National Treasury Employees Union (hereinafter, also referred to as "NTEU"). As an inspector, Ms. Jacobs works about half the time under the supervision of Mr. Robert E. Rogowski, Area Supervisor; and about half the time under the supervision of Mr. Arthur J. Jehli, Officer-in-Charge of distilled spirits plant. Mr. Jehli is also under the supervision of the Area Supervisor, Mr. Rogowski.

Ms. Jacobs responded to a vacancy notice announcing the position of Management Analyst sometime prior to May 8, 1979 (the date of her response was not shown and is not material) and on May 8, 1979, Ms. Jacobs received a performance (promotion) evaluation, for the Analyst job for which she had applied, which had been prepared by Mr. Rogowski. Ms. Jacobs was dissatisfied with the evaluation and met with Mr. Rogowski the following day, May 9, 1979, and discussed the evaluation. Remaining dissatisfied, on May 21, 1979, Ms. Jacobs prepared a memorandum authorizing Mr. Robert N. Forgeron, NTEU Steward,

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1/ Hereinafter, for convenience of reference, sections of the statute are also referred to without inclusion of the initial "71" portion of the statute reference. For example, Section 7116(a)(1) simply as "16(a)(1)"; however, unless otherwise specifically indicated, all such references refer to Chapter 71 of the Statute.

as her representative and authorizing Mr. Forgeron to have access "to any written documents that may have a bearing on my grievance." (G.C. Exh. 2). Ms. Jacobs and Mr. Forgeron met with Mr. Rogowski on May 21, 1979, at which time the memorandum (G.C. Exh. 2) was submitted to Mr. Rogowski, the problems Ms. Jacobs had with the evaluation were discussed point by point, and Mr. Rogowski was informed that the evaluation violated Article 8, Section 1, and Article 9, Sections 4C and 4D of NTEU's agreement with Respondent, dated September 19, 1977. The meeting of May 21 was continued the following morning, May 22. Ms. Jacobs testified that, in the course of the May 21-22 meeting, Mr. Rogowski agreed to get information she had requested to support the evaluation, basically information concerning assignments on which Ms. Jacobs had worked, and that there was some mention of changing some aspect of the evaluation. Not having received any response, on June 1, 1979, Ms. Jacobs submitted a memorandum to Mr. Rogowski, "Subject: Informal Grievance" in which she requested that "the response to the informal grievance, outlined below, and discussed with you on 5/21 and 5/22/79, be submitted in writing." (G.C. Exh. 3). The June 1, 1979, memorandum also outlined the relief requested and cited Article 8, Section 1 and Article 9, Sections 4C & 4D of the NTEU agreement. Mr. Rogowski testified that he had informed Ms. Jacobs both on May 9 and at the May 21-22 meeting that he couldn't make any changes in the evaluation itself; but "did indicate that should she apply for another position in the future, I would prepare a new evaluation." Mr. Rogowski also testified that he did not consider the meeting of May 21-22 to be the second step in the grievance procedure, but, rather "just a discussion of her performance evaluation." (Tr. 49). Otherwise, Mr. Rogowski did not dispute, or disagree, with Ms. Jacob's testimony concerning the meetings of May 9, 21 and 22.

On June 7, 1979, in response to Ms. Jacobs' memorandum of June 1, 1979, Mr. Rogowski stated:

> "...I find that I cannot consider your grievance because it was not timely filed in accordance with Article 34, Section 7 of the 'Agreement between BATF and NTEU', dated September 19, 1977." (G.C. Exh. 4).

On June 7, 1979, Ms. Jacobs delivered a letter to Mr. John K. Hauschildt, Chief of Field Operations for the Midwest Region, together with a detailed "Description of Grievances: Performance Evaluation (ATF F 2430.1)" (G.C. Exh. 6); and by letter dated June 14, 1979, Mr. Hauschildt stated:

> "Your grievance of your performance evaluation was denied because it was not timely filed ... for this reason, I cannot consider your grievance

or grant the remedies you request." (G.C. Exh. 5). 2/

The violation charged in the Complaint concerns the statements made by Mr. Jehli to Ms. Jacobs on June 6, 1979. Ms. Jacobs testified that Mr. Jehli, after discussing other matters, said that he would like to discuss something with her "off the record" and then, inter alia, stated that he recommended that she "drop the whole thing" by which, he stated, he meant her grievance; that she could proceed with the grievance, as she was doing, but, although Mr. Rogowski would change the evaluation, she would not really gain anything in the long run; and that Mr. Jehli further states that "should I acquire a reputation as a 'bitcher' or a complainer, that my career really wouldn't go much further." (Tr. 23, 24-25; see, also, Tr. 34, 35). Mr. Jehli did not deny, or dispute, that he made the "bitcher" or "complainer" remark and, while he testified that he did not recall using the word "drop", readily admitted that he told Ms. Jacobs that he "didn't think the pursuance of this thing to get an evaluation changed was worth all the trouble she was going through" and that he "couldn't see how she could benefit even if she had some of the wording changed" (Tr. 42). I found Ms. Jacobs to be a wholly credible witness; her testimony, in all significant respects, was either entirely unchallenged or was fully confirmed by the testimony of Mr. Jehli; and, accordingly, I credit her testimony and find that Mr. Jehli did recommend that she drop her grievance; that if she proceeded with the grievance and succeeded in having the evaluation changed she would not really gain anything in the long run; and that Mr. Jehli stated that should she acquire a reputation as a "bitcher" or a "complainer" her career really wouldn't go much further.

Conclusions

It is elemental that protected activity flowing from exclusive representation by a labor organization includes the processing of grievances. In one of the early cases decided under Executive Order 11491 it was held that any interference with the right to file grievances tended to discourage exercise of the freedom of employees to form, join, or assist labor organizations, rights which were guaranteed by Section 1(a) of Executive Order 11491. Department of Defense, Arkansas National Guard, A/SLMR No. 53, 1 A/SLMR 274 (1971) (Agency grievance procedure), see, also, United States Army School/ Training Center, Fort McClellan, Alabama, A/SLMR No. 42, 1 A/SLMR 225 (1971)(Implicitly promising grievant more favorable and expeditious action by direct discussions with management). In National Labor Relations Board, Region 17, and National Labor Relations Board,

---

2/ Subsequently, in July or August, Mr. Rogowski did prepare an amended evaluation which was given to Ms. Jacobs in a meeting with Mr. Hauschildt, Mr. Rogowski and Miss Alice Wilson, personnel representative.

A/SLMR No. 295, 3 A/SLMR 427 (1973), if there, were any possible doubt that the right to file grievances, articulated in the Arkansas National Guard case, supra, which had, of course, involved an agency grievance procedure, applied with at least equal, if not greater, force to utilization of a negotiated grievance procedure, the Assistant Secretary stated, "... an action by an agency or activity to discourage or interfere with an employee's filing of grievances pursuant to a negotiated agreement would be inherently destructive of the rights assured employees in Section 1(a) of the Executive Order '---- freely and without fear of penalty or reprisal, to form, join, and assist a labor organization ---.' See, in this regard, Department of Defense, Arkansas National Guard, A/SLMR No. 53." (3 A/SLMR at p. 429, n. 3). To like effect, see, for example, Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, A/SLMR No. 582, 5 A/SLMR 699 (1975); Department of Transportation, Federal Aviation Administration, Airway Facilities Sector, Tampa, Florida, A/SLMR No. 725, 6 A/SLMR 521 (1976); Federal Aviation Administration, Air Traffic Control Tower, Greater Pittsburgh Airport, Pittsburgh, Pennsylvania, A/SLMR No. 920, 7 A/SLMR 907 (1977); United States Department of the Army, Fort Polk, Louisiana, A/SLMR No. 1100, 8 A/SLMR 880 (1978); U.S. Department of the Navy, Portsmouth Naval Shipyard, Case No. 31-11732(CA)(Decision of Administrative Law Judge, November 2, 1979). Section 2 of the Statute, as had Section 1(a) of the Executive Order, assures that "Each employee shall have the right to form, join, or assist any labor organization ... freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right ...." (5 U.S.C. Section 7102). There can be no question that the right to file and process grievances under a negotiated grievance procedure falls within the ambit of Section 2 of the Statute. As noted, Section 1(a) of the Executive Order assured such right and Section 2 of the Statute assures precisely the same right, "freely and without fear of penalty or reprisal" to "form, join, or assist any labor organization" and that "each employee shall be protected in the exercise of such right".

Accordingly, supervisor Jehli's statement to Ms. Jacobs that he recommended that she "drop", or not proceed with, her grievance; and that, even if she succeeded in having the evaluation changed, she would not really gain anything in the long run, was, alone, a coercive or intimidating statement by agency management implying adverse consequences "in the long run" if she did not do so; and when coupled with the further comment that, should the grievant acquires a reputation as a "bitcher" or a "complainer", her career "wouldn't go much further" was a further direct, implied threat, if not a lightly vieled promise, that the career of any employee who processed grievances, or complaints, would suffer. Any interference with the right of an employee to file and process grievances under a negotiated agreement, by any implied threats of adverse consequences, is inherently destructive of the right of each employee, assured by Section 2 of the Statute, "to form, join, or assist any labor organization ... freely and without fear of penalt

or reprisal ....", and violates Section 16(a)(1) of the Statute. 3/

Respondent's contentions have been carefully considered and have been found wholly lacking in merit. Thus, for example, Respondent contends that, because the evaluation was for a job outside the bargaining unit, it was not grievable under the negotiated grievance procedure, notwithstanding that Respondent denied the grievance because it was not timely filed in accordance with Article 34, Section 7 of the Agreement (G.C. Exh. 4) which was, in effect, thereafter affirmed (G.C. Exh 5). Such contention begs the question and ignores the rights assured by Section 2 of the Statute, which includes the right of every employee, freely and without fear of penalty or reprisal, to file and to process grievances under a negotiated agreement. Assuredly, the right to file and process grievances, assured by Section 2 of the Statute, is not conditioned on, or limited to, grievances in which the grievant prevails. Whether the evaluation was grievable, in fact, under the negotiated procedure is beside the point. Even if wrong, Ms. Jacobs had the absolute right of free access to the grievance procedure to present her contention. It is immaterial whether Mr. Jehli "knew" Ms. Jacobs had a "grievance" since he conceded that he knew "by talking to Mr. Rogowski -- that she had a complaint or just some dissatsifaction with an evaluation report ... and that she was discussing this with Mr. Rogowski" (Tr. 40). Section 3(a)(9) of the Statute provides, in part, that:

> "(9) 'grievance' means any complaint --
> (A) by any employee concerning any matter relating to the employment of the employee;"

Characterization of the matter as a "complaint", itself, under Section (3)(a)(9) also means "grievance". In any event, Mr. Rogowski's knowledge is imputed to Mr. Jehli and the record shows, beyond any possible doubt, that Mr. Rogowski was fully advised that Ms. Jacobs was asserting a grievance under the NTEU agreement, shown, inter alia, by designation of representative (G.C. Exh. 2), the discussions of May 21 and 22, the written grievance of June 1, 1979 (G.C. Exh. 3), and by Mr. Rogowski's dismissal of the grievance as not timely filed (G.C. Exh. 4).

3/ "(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency --

> "(1) to interfere with, restrain, or coerce any employee in the exercise of any right under this chapter;" (5 U.S.C. Section 7116 (a)(1)).

Finally, it is immaterial as to whether Mr. Jehli's statement to Ms. Jacobs did, or did not, have a chilling effect on other employees insofar as the violation as to Ms. Jacobs is concerned. Section 2 of the Statute protects the rights of each employee, mandates that each employee shall be protected in the exercise of such rights, and Section 16(a)(1) makes it an unfair labor practice for an agency to interefer with, restrain, or coerce, "any employee in the exercise by the employee of any right under this chapter". Consequently, the statement to Ms. Jacobs, which I have found discouraged or interfered with her right, freely and without fear of penalty or reprisal, to file and process a grievance under the agreement, constituted, without more, a violation of Section 16(a)(1) of the Statute. Moreover, Mr. Jehli's statement to Ms. Jacobs, even if not overheard, was so phrased that it implied that the career of any employee who complained of management action by processing grievances would suffer, which I deem sufficient basis to warrant a broad remedial order.

ORDER

Pursuant to Section 18(a)(7) of the Statute, 5 U.S.C. Section 7118 (a)(7), and Section 2423.25 of the Interim Rules and Regulations, Fed. Reg., Vol. 44, No. 147, July 30, 1979 (5 C.F.R. Section 2423.25), the Authority hereby orders that United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Chicago, Illinois shall:

1. Cease and desist from:

(a) Interfering with, or discouraging, by implied threats, or otherwise, Barbara J. Jacobs, or any other employee, from exercising the right to file and process grievances under the negotiated grievance procedure, freely and without fear of penalty or reprisal.

(b) In any like or related manner interfering with, restraining, or coercing any employee in the exercise by the employee of any right under the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities in Chicago, Illinois, copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Area Supervisor, Bureau of Alcohol, Tobacco and Firearms, Chicago, Illinois, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Area Supervisor shall take reasonable steps to insure that said notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 2423.29 of the Interim Rules and Regulations, notify the Regional Director of Region 5, Room 1638, Dirksen Federal Building, 219 South Dearborn Street, Chicago, Illinois, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

William B Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 20, 1979
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

We hereby notify our employees that:

WE WILL NOT interfere with, or discourage, by implied threats, or otherwise, Barbara J. Jacobs, or any other employee, from exercising the right to file and process grievances under the negotiated grievance procedure, freely and without fear of penalty or reprisal.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employee in the exercise by the employee of any right under the Statute.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice, or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region 5, who address is: Room 1638, Dirksen Federal Building, 219 South Dearborn Street, Chicago, Illinois 60604.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

CONGRESSIONAL RESEARCH EMPLOYEES ASSOCIATION

Union

and

Case No. O-NG-66

THE LIBRARY OF CONGRESS

Agency

DECISION ON NEGOTIABILITY ISSUES

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 et seq.). The union submitted a multisection proposal to the agency concerning a reorganization of the American Law Division of the Congressional Research Service of the Library of Congress which is reprinted in its entirety in Appendix A.

Section 1 of the Union Proposal

Section 1 of the union's proposal requires the agency to create four sections instead of two in its American Law Division and mandates that each section be assigned a Section Coordinator.

Question Here Before the Authority

The question is whether Section 1 of the union's proposal violates the right of the agency to determine its organization under section 7106(a)(1) of the Statute,[1/] as alleged by the agency.

1/ Section 7106(a)(1) of the Statute provides, in pertinent part, as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(1) to determine the . . . organization . . . of the agency[.]

Opinion

Conclusion: Section 1 of the union's proposal violates management's right to determine its organization under section 7106(a)(1) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 5 C.F.R. § 2424.10 (1980), the agency's allegation that Section 1 of the union's proposal is not within the duty to bargain is sustained.

Reasons: Section 1 of the union's proposal states that "[t]he following organizational changes shall take place in the American Law Division . . . " and, that "[f]our sections for attorneys will be created in place of the present two." Thereafter, Section 1 would establish what sections will be part of the American Law Division and each section's substantive area of responsibility. Section 1 concludes by providing that "[e]ach section will have assigned to it a Section Coordinator."

The plain language of Section 1 would require the agency to adopt a certain organizational structure. Section 7106(a)(1), however, expressly reserves to management officials of any agency the right to determine the organization of the agency. Thus, Section 1 of the union's proposal clearly violates the agency's right under section 7106(a)(1) of the Statute to determine the "organization" of the agency. Hence, the agency's allegation that Section 1 of the union's proposal is not within the duty to bargain is sustained.

Section 2 of the Union Proposal

Section 2 of the union's proposal seeks to establish that Section Coordinators are not supervisors within the meaning of section 7103(a)(10) of the Statute.[2/]

Question Here Before the Authority

The question is whether Section 2 of the union's proposal is properly before the Authority at this time.

2/ Section 7103(a)(10) of the Statute provides, in pertinent part, as follows:

> "supervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment . . . [.]

Opinion

Conclusion: Section 2 of the union's proposal is not properly before the Authority at this time because it seeks to resolve a dispute as to whether Section Coordinators are supervisors within the meaning of section 7103(a)(10) of the Statute. Such matters should properly be addressed in the context of a clarification of unit (CU) petition,[3/] rather than a negotiability appeal. Accordingly, Section 2 of the union's proposal is denied without passing on the merits and without prejudice to the filing of a petition for review of any negotiability issue which may remain after the question as to whether Section Coordinators are supervisors is resolved through a CU petition.

Reasons: The record before the Authority in this case establishes that Section 2 of the union's proposal seeks to settle a factual disagreement between the union and the agency concerning whether Section Coordinators are supervisors. In this connection, the language of the union's proposal states categorically that Section Coordinators are not supervisors within the meaning of the Statute because they lack authority and responsibility under existing job descriptions to hire, fire, direct, promote, reward, transfer, furlough, layoff, recall, suspend, discipline or remove employees. The agency, on the other hand, asserts that Section Coordinators are supervisors within the meaning of the Statute because of certain duties they perform. Under these circumstances, the appropriate mechanism whereby an agency or a labor organization can seek an independent determination on such matters would be a CU petition filed pursuant to section 2422.2(c) of the Authority's rules and regulations, 5 C.F.R. § 2422.2(c)(1980).

Sections 3 to 12 of the Union Proposal (Apart from Section 8)

Sections 3 to 12 of the union's proposal, apart from Section 8, which is addressed separately herein, concern the applicability of merit pay to Section Coordinators; the duties of Section Coordinators; selection procedures for Section Coordinators; relief from Section Coordinator duties; and other matters regarding Section Coordinators.

3/ Section 2422.2(c) of the Authority's rules and regulations, 5 C.F.R. § 2422.2(c)(1980), provides, in pertinent part, as follows:

> (c) Petition for clarification of unit . . . A petition for clarification of unit . . . shall be submitted on a form prescribed by the Authority and shall contain . . .
>
> (1) A description of the present unit and the date of recognition or certification;
>
> (2) The proposed clarification . . .; and
>
> (3) A statement of reasons why the proposed clarification . . . is requested.

Question Here Before the Authority

The question is whether these sections of the union's proposal are properly before the Authority at this time.

Opinion

Conclusion: Sections 3 to 12 of the union's proposal, apart from Section 8, are dependent in substance on a determination of whether Section Coordinators are supervisors, under procedures established by the Authority in section 2422.2(c) of its rules and regulations, 5 C.F.R. § 2422.2(c)(1980).[4/] Accordingly, that portion of the union's appeal relating to these sections does not present issues that the Authority can appropriately resolve at this time under section 7117 of the Statute and Part 2424 of its rules and regulations. Therefore, the appeal as to these sections is denied without passing on the merits and without prejudice to the filing of a petition for review of any negotiability issue which may remain after the question of whether the Section Coordinators are supervisors is resolved through the appropriate procedures as previously discussed in connection with Section 2 of the union's proposal.

Reasons: The record indicates that Sections 3 to 12 of the union's proposal, apart from the aforementioned Section 8, are derivative of Section 2, previously discussed, herein, and all assume that Section Coordinators are not supervisors as provided by Section 2. Until the question of whether Section Coordinators are supervisors or not is resolved under procedures established by the Authority in section 2422.2(c) of its rules and regulations, 5 C.F.R. § 2422.2(c)(1980), the Authority will not decide any negotiability issues which would be presented if it were determined that Section Coordinators are not supervisors under the Statute. Furthermore, with respect to Section 3 of the proposal, concerned with "merit pay," it is noted that the Authority determined on April 1, 1980, that an interpretation of the Statute was warranted on the following:

> What is the impact, if any, of an agency determination that an employee is a supervisor or management official for purposes of coverage under the "merit pay" provisions of the Civil Service Reform Act of 1978 (92 Stat. 1179) on such employee's inclusion in a unit of exclusive recognition under section 7112 of the Statute (92 Stat. 1200)?

In view of the pendency of this matter, issuance of its interpretation by the Authority would be an additional prerequisite to the consideration of the union's proposal concerning the applicability of merit pay to Section Coordinators. That is, the Authority finds that the union's appeal is prematurely filed, and thus, the conditions for review of the issues sought to be presented, pursuant to section 7117 of the Statute and Part 2424 of the

4/ See note 3, supra.

Authority's rules and regulations, have not been met. There are sound policy reasons for so finding. The resolution of the matter of the supervisory status of Section Coordinators could result in a determination which would render moot the negotiability issues herein and avoid an unwarranted proliferation of cases before the Authority. On the other hand, were the Authority to decide that Sections 3 to 12, excluding Section 8, are negotiable while the question of the supervisory status of Section Coordinators remained to be resolved, such Authority decision would lack finality.[5/] In this regard, section 2429.10 of the Authority's rules and regulations, 5 C.F.R. § 2429.10 (1980), provides that "the Authority . . . will not issue advisory opinions."

Accordingly, that portion of the union's appeal relating to Sections 3 to 12 of the union's proposal, excluding Section 8, is hereby denied, without prejudice to the renewal of the union's appeal under the Statute, in a petition filed with the Authority, after the question of the supervisory status of the Section Coordinators herein is resolved under applicable procedures of the Authority's rules and regulations.

Section 8 of the Union Proposal

Section 8 of the union's proposal provides that researchers will be free to accept assignments from all sections of the American Law Division and assigns the responsibility to resolve conflicts in assignments and workload to the Assistant Division Chief.

Question Here Before the Authority

The question is whether Section 8 of the union's proposal violates the right of the agency to assign work under section 7106(a)(2)(B) of the Statute,[6/] as alleged by the agency.

5/ American Federation of Government Employees, AFL-CIO, Local 1661 and Department of Justice, Bureau of Prisons, Federal Correctional Institution, Danbury, Connecticut, Case No. 0-NG-43, 2 FLRA No. 56 (January 9, 1980).

6/ Section 7106(a)(2)(B) of the Statute provides, in pertinent part, as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws—

. . . . . .

(B) to assign work . . . [.]

Opinion

Conclusion: Section 8 of the union's proposal violates the right of the agency to assign work under section 7106(a)(2)(B) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 5 C.F.R. § 2424.10 (1980), the agency's allegation that Section 8 of the union's proposal is not within the duty to bargain is sustained.

Reasons: The record indicates that Section 8 of the union's proposal would expressly condition management's assignment of work by providing that any researcher will be free to accept assignments from sections of the American Law Division other than the section to which the researcher has been assigned. Further, it would compel the Assistant Division Chief to resolve conflicts in assignments and workload as may arise in the assignment of work. The agency retains the right under section 7106(a)(2)(B) of the Statute to assign work to employees.7/ Section 8 of the union's proposal, however, would establish conditions (researchers are free to accept assignments from all sections and conflicts arising in connection therewith will be resolved by the Assistant Division Chief) upon which management's ability to assign the work involved would be contingent. Section 8 of the union's proposal thereby would eliminate the discretion inherent in management's right to assign work, i.e., which researcher will be assigned what work, as well as prescribing a named position to resolve work assignment related disputes. Thus, because Section 8 of the union's proposal would condition management's right to assign certain work to employees and would require the incumbent of a named position to perform certain work, i.e., to settle disputes relating to work assignments, it

7/ American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, Case No. 0-NG-40, 2 FLRA No. 77 (January 31, 1980), at 20 of the decision; and National Labor Relations Board Union, Local 19 and National Labor Relations Board, Region 19, Case No. 0-NG-131, 2 FLRA No. 98 (March 7, 1980), at 3 of the decision.

conflicts with section 7106(a)(2)(B) of the Statute. Accordingly, the agency's allegation that Section 8 of the union's proposal is not within the duty to bargain is sustained.

Issued, Washington, D.C., July 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

Appendix A

1. The following organizational changes shall take place in the American Law Division effective May 1, 1978.

Four sections for attorneys will be created in place of the present two.

a. A section responsible for administrative practice and procedure, Freedom of Information and privacy, health and welfare law, indian law, labor law, and procurement law.

b. A section responsible for civil rights and liberties, church-state relations, courts and the judiciary, criminal law, equal rights, and judicial procedure.

c. A section responsible for antitrust, environmental law, taxation, consumer protection, and commercial law.

d. A section responsible for Congress, conflicts of interest, election law, international law, and parliamentary law.

The views of individual attorneys shall be taken into account in making assignments to sections. Each section will have assigned to it a Section Coordinator.

2. It is agreed that Section Coordinators are not supervisors within the meaning of Title VII of the Civil Service Reform Act of 1978 since they lack authority and responsibility under existing job descriptions to hire, fire, direct, promote, reward, transfer, furlough, layoff, recall, suspend, discipline or remove employees.

3. Because Section Coordinators are not supervisors within the meaning of the Civil Service Reform Act of 1978, they shall not be subject to the merit pay provisions of that law.

4. Section Coordinator duties shall be as follows:

a. To assist the Division Chief in directing and coordinating the research work of lower-grade analysts assigned to work in the field, advising them as to the sources, scope and treatment of problems, and reviewing and evaluating their completed work.

b. To provide input for CRS management concerning the selection of all new employees of a lower grade; the promotion or reassignment of section analysts of a lower grade, and performance evaluations and within-grade determinations for analysts of a lower grade.

5. Review, coordination and administration of the work of analysts of the same grade or a higher grade than Section Coordinators shall be the ultimate responsibility of the Division Chief or Assistant Division Chief.

6. To provide procedures for the selection of Section Coordinators, management shall issue a memorandum containing the following procedures:

a. A statement that management intends to select Section Coordinators for designated sections.

b. A statement specifying the areas of coordination of the Section Coordinator; the minimum and desired qualifications, and the main factors governing selection.

c. A statement that selection shall be made on a non-discriminatory basis.

d. A statement that Section Coordinator is not a supervisory position within the meaning of Title VII of the Civil Service Reform Act of 1978, and that Section Coordinators will not be subject to the within-grade and cost-of-living increase limitations of the Merit Pay provisions of the Act.

e. A statement inviting interested individuals within the division to submit applications and to be interviewed.

f. A statement that individuals who do not apply for this selection shall not, under any circumstances, be designated as Section Coordinators. The individuals shall not be precluded from applying or being considered in the future.

g. A statement that those selected as Section Coordinators may be relieved of Section Coordinator's duties upon their request, or after consultation with management, with the understanding that relief from such duties shall not reflect adversely upon the individual in any way.

7. Management shall select Section Coordinators on the basis of qualifications, following competition among ll interested applicants, in accordance with the provisions set out in Section 5 of this Agreement. Thereafter, management shall issue a memorandum informing division staff of the persons selected as Section Coordinators.

8. It is contemplated that researchers will be free to accept assignments from all sections. Conflicts in assignments and workload will be resolved by the Assistant Division Chief.

9. Section Coordinator positions shall be rotated every 18 months to two years.

10. Whenever Section Coordinator vacancies occur, or rotations take place, selection of replacements shall be in accordance with the procedures set out in paragraph 5 of this agreement.

11. Persons selected as Section Coordinators may be relieved of Section Coordinator duties upon their request, or after consultation with management, with the understanding that relief from such duties shall not reflect adversely upon the individual in any way.

12. The exercise of Section Coordinator duties will neither help nor hinder the possibilities for GS-15 attorneys to be promoted to GS-16.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 6

(Labor Organization)

and

Case No. O-NG-11

INTERNAL REVENUE SERVICE,
NEW ORLEANS DISTRICT

(Activity)

DECISION ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 et seq.).

Union Proposal[1/]

Pre-paid parking spaces for bargaining unit employees' private vehicles, at the New Orleans, Baton Rouge, Shreveport, Lake Charles, and Houma posts of duty, will not be released to the General Services Administration.

Questions Here Before the Authority

The questions are, first of all, whether the union's proposal is inconsistent with applicable Government-wide regulations under section 7117(a)

1/ For a number of years, the Internal Revenue Service, New Orleans District Office (the activity) provided pre-paid, i.e., free, parking spaces for employees' private vehicles at various posts of duty in the District. Many of these private vehicles were not used for official business. In January 1979, the agency notified National Treasury Employees Union, Chapter 6 (the union) of its intention to release most of the pre-paid parking spaces. The union requested the opportunity to negotiate with the agency about "the substance, impact, and implementation of this decision." The agency informed the union that its decision to release the parking spaces was nonnegotiable. The union is appealing this agency allegation to the Authority, urging the Authority to "rule that the decision itself is negotiable." It appears from the record in the case that the agency held in abeyance implementation of its decision pending the decision of the Authority on the union's appeal.

of the Statute; or, secondly, whether the union's proposal concerns a matter which is negotiable at the election of the agency under section 7106(b)(1) of the Statute; or, finally, whether the union's proposal violates section 7106(a)(1) of the Statute.

Opinion

Conclusion: The union's proposal, insofar as it requires the agency to retain the disputed parking spaces, is consistent with applicable Government-wide regulations under section 7117(a) of the Statute, does not concern a matter which may be negotiated at the election of the agency within the meaning of section 7106(b)(1) of the Statute, and does not violate the agency's rights under section 7106(a)(1) of the Statute. However, to the extent that the proposal implicitly requires the agency to provide the parking spaces so retained free of charge to employees, it is inconsistent with applicable Government-wide regulations under section 7117(a) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations (45 Fed. Reg. 3513 (1980)), the agency's allegation that the disputed proposal is not within the duty to bargain is sustained in part and set aside in part.2/

Reasons: Under the Statute, the duty of an agency to negotiate with an exclusive representative extends to the conditions of employment affecting employees in an appropriate unit except as provided otherwise by Federal law and regulation, including Government-wide regulation.3/ That is, under the

---

2/ In so deciding that the proposal, insofar as it would require the agency to retain the parking spaces in dispute, is within the duty to bargain, the Authority makes no judgment as to the merits of that aspect of the proposal.

3/ Section 7117(a)(1) of the Statute provides as follows:

> § 7117. Duty to bargain in good faith; compelling need; duty to consult
>
> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

The term "matters" as used in section 7117(a)(1) is explained by reference to the definition of "collective bargaining" in section 7103(a)(12) and "conditions of employment" in section 7103(a)(14) of the Statute:

> § 7103. Definitions; application
>
> . . . . . .
>
> (12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet

(continued)

Statute, if a proposed matter relates to the conditions of employment of an appropriate unit of employees in an agency and is not inconsistent with law or regulation--i.e., is within the discretion of an agency--it is within the scope of bargaining which is required of that agency. In this case, the agency alleges, first of all, that the union's proposal is not within the duty to bargain because it is contrary to applicable Government-wide regulations. Specifically, the agency alleges that retention of the employee parking spaces which are the subject of the instant dispute conflicts with provisions of the Federal Property Management Regulations (FPMR).4/

(Continued)

at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees . . . .

. . . . . .

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . .

4/ The agency cites the FPMR, 41 C.F.R. § 101-20.111-2(a) and § 101-20.117. 41 C.F.R. § 101-20.111-2(a) provides as follows:

§ 101-20.111 Vehicle parking facilities.

. . . . . .

§ 101-20.111-2 Policy.

(a) GSA will establish, to the extent funds are available therefor, vehicle parking facilities in and around existing Government-owned properties under the custody and control of GSA. Such facilities will be consistent with the character of other properties in the neighborhood, will not adversely affect the use or appearance of the Government property, and will not constitute a traffic hazard. GSA will allocate parking space at the facility in the following order of priority:

(1) Postal maneuvering area and official postal vehicle parking (including contract mail hauling vehicles and private vehicles of rural carriers);

(2) Government-owned vehicles used for criminal apprehension law enforcement activities;

(3) Privately owned vehicles of Federal judges, Members of Congress, and heads of occupant agencies (priority is limited to the individuals and does not include members of their staffs);

(continued)

The initial question is whether the provisions of the FPMR (41 C.F.R. Subchapter D) at issue herein constitute a "Government-wide rule or regulation"

(Continued)

(4) Official parking other than that listed in paragraphs (a) (1) and (2) of this section:

(i) Net requirements for Government-owned vehicles other than those listed in paragraphs (a) (1) and (2) of this section including motor pool dispatch service vehicles and vehicles assigned directly to occupant agencies, shall be an amount less than the total number of vehicles assigned to the pool, depending on the nature of the pool operations;

(ii) Areas assigned for Government-owned vehicles, including postal and motor pool areas, shall also be used during other than early morning or late afternoon hours for visitors, service vehicles, privately owned vehicles regularly used for official business, physically handicapped employees of occupant agencies, and occupant agency employees not otherwise accommodated (with preference given to carpool drivers), in the order named. In connection with part-time use of these areas, street parking, municipal lots, and commercial parking facilities may be used during early and late hours when Government-owned vehicles are occupying assigned spaces;

(5) Vehicles of patrons and visitors and service vehicles not accommodated under paragraph (a) (4) (ii) of this section; and

(6) Privately owned vehicles of employees of occupant agencies not otherwise accommodated.

41 C.F.R. § 101-20.117 provides, in relevant part, as follows:

§ 101-20.117 Carpool parking.

. . . . . .

§ 101-20.117-2 Policies.

Agencies shall encourage the conservation of energy by taking positive action to increase carpooling. The following policies shall be reflected in agency plans:

(a) Parking. In assigning all parking spaces assigned to or controlled by each agency, the following policies shall be observed:

(1) Agencies shall give first priority to official and visitor parking requirements.

(2) Severely handicapped Government employees for whom assigned parking spaces are necessary shall be accommodated.

(3) A goal of not more than 10 percent of the total spaces available for employee parking on an agency-wide basis (excluding spaces assigned to severely handicapped) shall be assigned to executive personnel and persons who are assigned unusual hours.

(4) All other spaces available for employee parking shall be made available to carpools to the extent practical.

(5) Those parking spaces reserved for carpools shall be assigned primarily on the basis of the number of members in a carpool.

(continued)

within the meaning of the Statute. The phrase "Government-wide rule or regulation" is used in two different subsections of section 7117 of the Statute. First of all, as here in issue, it is used in section 7117(a) to state a limitation on the scope of bargaining; i.e., matters which are inconsistent with Government-wide rule or regulation are not within the duty to bargain.5/ Secondly, it is used in section 7117(d) to state the right of an exclusive representative, in certain circumstances, to consult with respect to the issuance of such rules and regulations effecting any substantive change in any condition of employment.6/ In neither of these contexts does the Statute precisely define what constitutes a "Government-wide rule or regulation" within the meaning of section 7117. The Committee Report accompanying the bill reported out of the House Committee (H.R. 11280) stated, as to the meaning of the term "Government-wide" as follows:7/

(Continued)

(6) For the purpose of allocation of parking spaces for carpools, full credit shall be given to any regular member regardless of where he is employed except that at least one member of the carpool must be a full-time employee of the agency.

5/ See note 3, supra.

6/ Section 7117(d) of the Statute provides as follows:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

. . . . . .

(d)(1) A labor organization which is the exlusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

7/ H. Rep. No. 95-1403, 95th Cong., 2nd Sess. 51-52 (1978).

> The term "Government-wide" shall be construed literally; only those regulations which affect the Federal civilian work force as a whole are "Government-wide" regulations. . . . Typically, it is anticipated, the issuing agency will be the Office of Personnel Management or the General Services Administration.

The bill as passed by the House ("the Udall substitute") differs from the bill reported by the House Committee as to the extent to which Government-wide rules and regulations constitute a limitation on the scope of the duty to bargain. Nevertheless, as relevant to the issue herein, the legislative history indicates that the definition of the term "Government-wide" in "the Udall substitute" was intended to be the same as that in the House Committee bill referred to above.8/

On the other hand, the bill as passed by the Senate (S.2640) provides that "regulations of appropriate authorities, including policies which are set forth in the Federal Personnel Manual," shall govern the administration of all matters covered by a collective bargaining agreement.9/ The House-Senate Conference Committee, however, adopted the provisions of the House bill, rather

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8/ See the statement of Congressman Ford of Michigan, a proponent of "the Udall substitute," during the debate on the House floor:

> Section 7117 sets forth the duty to bargain in good faith, especially with respect to regulations. Under the compromise version, Government-wide rules and regulations are no longer subject to bargaining as they were under the committee print of title VII (except for those supported by a compelling need). In this fashion, Government-wide rules and regulations are thus a major exception to the duty to bargain. In making this change, however, the committee at no time expanded the definition of "Government-wide" as contained in the committee's report.

124 Cong. Rec. H9650 (daily ed. Sept. 13, 1978).

9/ Section 7218 of the bill passed by the Senate (S.2640) provided, in relevant part, as follows:

> § 7218. Basic provisions of agreements
>
> (a) Each agreement between an agency and a labor organization shall provide the following:
>
> (1) In the administration of all matters covered by the agreement, officials and employees shall be governed by—
>
> (A) existing or future laws and the regulations of appropriate authorities, including policies which are set forth in the Federal Personnel Manual . . . .

than those of the Senate. In doing so, the conferees provided no further definition of the term "Government-wide," but stated as follows concerning the intended definition of the phrase "rules and regulations":10/

> The conferees specifically intend, however, that the term "rules or regulations" be interpreted as including official declarations of policy of an agency which are binding on officials and agencies to which they apply. The right of labor organizations to enjoy national consultation rights will also include such official declarations of policy which are binding on officials or agencies.

Thus, Congress intended the term "Government-wide regulation" to include those regulations and official declarations of policy which apply to the Federal civilian work force as a whole and are binding on the Federal agencies and officials to which they apply.

However, while the legislative history of the term "Government-wide" indicates Congress intended that regulations which only apply to a limited segment of the Federal civilian work force not serve to limit the duty to bargain,11/ it does not precisely define the outer limits of the reach required of a regulation in order for that regulation to be a "Government-wide" regulation within the meaning of section 7117. That is, it is unclear, for example, whether Congress intended that a regulation must apply to all employees in the Federal civilian work force in order to constitute a "Government-wide" regulation. In this regard, it is a basic rule of statutory construction that legislative enactments are to be construed so as to give them meaning.12/ A requirement that a regulation apply to all Federal civilian employees in order to constitute a "Government-wide" regulation under section 7117 would render that provision meaningless, since it does not appear that there is any regulation which literally affects every civilian employee of the Federal Government. Furthermore, such a literal definition of the term would also render meaningless the concomitant right of a labor organization under section 7117(d) of the Statute in appropriate circumstances to consult with the issuing agency on Government-wide rules or regulations effecting substantive changes in any conditions of employment. In this regard, the legislative history of the Statute indicates that Congress intended the consultation rights provided in section 7117(d) to be substantial union rights. One of the proponents of "the Udall substitute" stated on the House floor during debate on that bill as follows:13/

10/ H. Rep. No. 95-7117, 95th Cong., 2nd Sess. 158-159 (1978).

11/ Cf. statement of Congressman Ford of Michigan, 124 Cong. Rec. H9650 (daily ed. Sept. 13, 1978).

12/ Rosado v. Wyman, 379 U.S. 397, 415 (1970).

13/ 124 Cong. Rec. H9638 (daily ed. Sept. 13, 1978) (remarks of Rep. Clay).

> In section 7117, the Udall substitute removes many Government-wide regulations from collective bargaining. We have agreed to this change with the understanding that the consultation rights accorded exclusive representatives are to be rigidly enforced.

That Congress intended consultation rights to be "rigidly enforced" supports the view that Congress understood "Government-wide regulations" to constitute a significant limitation on the scope of bargaining, i.e., that Congress intended the term to include more than the inconsequential number of regulations that would fall within a literal definition.

The regulations at issue herein are codified at title 41 of the Code of Federal Regulations as property management regulations published by the General Services Administration (GSA). By their terms, these regulations are binding on most, but not all, segments of the executive, legislative, and judicial branches of the Federal Government.14/ As such, these regulations are generally applicable throughout the Federal Government, i.e., apply to the Federal civilian work force as a whole, though not, of course, to every Federal employee. It is reasonable to conclude, therefore, that these regulations are "Government-wide regulations" within the meaning of section 7117(a). Moreover, the reference to GSA in the portion of the House Committee Report cited above (see note 7, supra) supports the conclusion that the FPMR, promulgated pursuant to GSA's statutory property management authority, were considered by the House Committee to be of the type of regulation defined as "Government-wide." This does not mean, however, that a regulation must reach as far as the FPMR in order to satisfy the requirements of section 7117, but only that whatever else may be, the general applicability of the regulations at issue herein clearly is sufficient to support the determination that they are "Government-wide regulations" under the Statute. Thus, without deciding whether regulations less generally applicable throughout the Federal Government than those at issue herein would constitute "Government-wide rules and regulations," the Authority finds that the subject provisions of the FPMR are "Government-wide rules and regulations" which will bar negotiation on conflicting union proposals under section 7117(a) of the Statute.

The issue then becomes whether the union proposal in dispute herein is inconsistent with the provisions of the FPMR cited by the agency. In this regard, since GSA has primary responsibility for the issuance and interpretation of these regulations, the Authority requested an advisory opinion from GSA regarding whether any part of current FPMR would prevent an agency from

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14/ See generally 41 C.F.R. § 101-17.003 et seq.

providing free parking spaces for employee personally owned vehicles which are not used for official business. GSA responded to the Authority's request as follows:

> In connection with the pending case of National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, FLRA No. 0-NG-11, you solicited an advisory opinion from the General Services Administration (GSA) interpreting provisions of the Federal Property Management Regulations (the F.P.M.R.s). Your request stated, at its outset, that the question is whether the union's proposal in this case requiring the Internal Revenue Service (IRS) to provide free parking spaces for employee-owned vehicles not used for official business is in conflict with the F.P.M.R.s, particularly 41 C.F.R. 101-20.111-2(a) and 41 C.F.R. 101-20.117, which establish priorities for the allotment and assignment of parking spaces. Later in your letter you stated that you were requesting our opinion specifically on the issue of "whether any part of current regulations" would prevent an agency like the IRS from providing such parking spaces free to its employees. I find it necessary to distinguish between the two formulations in which this question was presented to me, since current regulations do exist which would prevent the IRS in this case from providing its employees with the spaces in question, but the regulations are not those at 41 C.F.R. 101-20.111-2(a), governing parking space assignment priorities, or 41 C.F.R. 101-20.117, governing carpooling.
>
> The FPMR provisions that are directly relevant to your question are found in 41 C.F.R. Subpart 101-17.2, Utilization of Space.
>
> Although the duties under these regulations belong to "agencies" (the terms "federal agency" and "executive agency" are defined in 41 C.F.R. 101-17.003-23 and 41 C.F.R. 101-17.003-24), an activity that is subordinate to such an agency, as is the IRS within the Treasury Department, is not able to evade these obligations.
>
> A statement of the responsibility of agencies in space utilization appears at 41 C.F.R. 101-17.202:
>
> > "It is the responsibility of the agencies to assist and cooperate with GSA in the assignment and utilization of space, including the furnishing of data relevant to the use of the space occupied.... It is the further responsibility of the agencies continuously to study and survey space occupied under assignment by GSA and other space which is controlled by the agencies, to insure efficient and economical space utilization."

Moreover, it is mandatory that agencies relinquish space deemed to be underutilized. 41 C.F.R. 101-17.203 provides that:

> "The space utilization program is designed to effect maximum efficient utilization of Government-controlled space. Space for which there is no current foreseeable need will be relinquished." (Emphasis Added)

When space is deemed to be underutilized, notice of relinquishment is given to GSA in accordance with 41 C.F.R. 101-17.204. The agency assigned the Government-controlled space is responsible for making the determination that the space is no longer needed. Evidence of this is found in 41 C.F.R. 101-17.204(b) which provides, in part, that:

> "When an agency is responsible for operation, maintenance, and protection of Government-owned space to which it has been assigned by GSA, and the agency determines that such space, or a portion thereof, is no longer needed, the agency shall so notify GSA...." (Emphasis Added)

Based on the above it was proper for the IRS to conclude that it was underutilizing the space on which it was providing free parking for employee-owned vehicles at its several Louisiana locations. Parking spaces--like any other government-controlled space--may be considered underutilized whenever an executive agency determines that their retention is no longer economical, that the agency no longer requires them, or that it can spare such space temporarily for utilization by other parties.

Accordingly, the decision concerning whether a portion of an agency's space is underutilized is for that agency to make, based on its own opinion of its needs, and not pursuant to collective bargaining negotiations. The executive agency is obligated to commence action to release any space that it determines to be unneeded or underutilized and the union which represents that agency's employees may not interfere with the performance of that duty, which the agency owes to GSA. Of course, if an agency has determined to relinquish space, and that decision will affect its employees' conditions of employment, the agency may, indeed, have an obligation then, under the labor relations statute, to negotiate with that union over the impact of that decision and the procedures for its implementation within the bargaining unit.

The question of whether an agency can be compelled to pay GSA for parking space which the agency has determined that it does not need has been addressed by the General Accounting Office in 55 Comp. Gen. 897 (1976). In that decision, the Comptroller General answered the question in the negative. Granted that that case involved the issue of whether GSA could force an agency to accept parking spaces against the agency's wishes, rather than whether a union could compel an agency to do so; yet if GSA, with its regulatory authority in property management cannot so obligate its client agencies, could Federal employee labor unions, who have no responsibility for property management, nevertheless negotiate to persuade

an agency to keep space that it wishes to relinquish? Evidently the client agency, of its own volition, is quite free to divest itself of unneeded parking spaces, for it was held in 55 Comp. Gen. 897 (1976) noted above:

> "Accordingly, it would appear that where a Government agency occupies parking space assigned by the GSA for which there is no current or foreseeable agency need, the agency may relinquish that space by giving the notice required."

Assuming, arguendo, that the IRS did not wish, or was not obligated, to relinquish the employee parking spaces that it deemed unessential, its employees would face a loss of their privilege of parking free of charge after November 1, 1979. A temporary regulation on federal employee parking takes effect on that date and expires on August 15, 1980. FPMR Temporary Regulation D-65 (Temp. Reg. D-65), 44 Fed. Reg. 53161 (1979), to be codified in 41 C.F.R. 101 Subchapter D, Appendix. Temp. Reg. D-65 implements the Office of Management and Budget (OMB) Circular A-118, August 13, 1979, entitled "Federal Employee Parking Facilities."

The policy of President Carter, as reflected in the OMB Circular and as incorporated in Temp. Reg. D-65, contains three parts: 1) federal agency parking facilities shall be limited to the minimum number of spaces necessary to avoid impairment of Government operations, 2) such parking facilities shall be administered in full compliance with carpooling regulations, and 3) subject to certain exemptions, federal employees who are provided parking in government-controlled space shall be assessed a charge equivalent to the fair monthly rental value for the use of equivalent commerical space. OMB Circular A-118, Paragraph 4; Temp. Reg. D-65, Paragraph 6, 44 Fed. Reg. 53162.

The chief exemptions from the fee requirement include handicapped employees, employees parking two-wheeled or government-owned vehicles, and employees whose duty hours constitute a shift that either starts or ends outside an agency's normal working hours. Moreover, under the new directive <u>all</u> employees of an agency would be exempt from parking fees on their private vehicles if the commercial rate per space in that agency's GSA-controlled parking facility is under $10 per month. OMB Circular A-118, Paragraphs 5a, b, g, i and 9a; Temp. Reg. D-65, Paragraphs 7a(4), 7b and 7b(1), and 11a, 44 Fed. Reg. 53162-3.

In localities where the commercial rate per space exceeds $10 per month, employees parking in GSA-controlled space are to be charged, starting on November 1, 1979, a monthly rate of 50 percent of the full commercial rate. The full rate will be charged beginning on October 1, 1981. OMB Circular A-118, Paragraph 9a; Temp. Reg. D-65, Paragraph 11c, 44 Fed. Reg. 53163.

Incidentally, the "old" regulations on parking space assignment priorities and on carpooling, at 41 C.F.R. 101-20.111-2(a) and 101-20.117—are expressly superseded by the temporary regulation as of November 1, 1979.

Temp. Reg. D-65, Paragraph 16, 44 Fed. Reg. 53163. As I noted earlier, however, it is my judgment that the resolution of the question that you presented turns not on an interpretation of regulations involving the methods of assigning parking spaces, but rather on an interpretation of those regulations concerning the relinquishment by such agencies of unneeded or underutilized space. The fundamental question is whether the IRS must negotiate with the N.T.E.U. before returning to GSA spaces that the IRS considers dispensable. The OMB Circular and the Temporary Regulation do not disturb the continued effectiveness of those property regulations which I cited earlier regarding the release by client agencies of unneeded or underutilized space. Thus my advisory opinion is not altered by the language of Paragraph 6 of the Circular, which defers the applicability of the terms of the Circular until the expiration of existing labor agreements that contain provisions on employee parking.

I reiterate, in closing, that under the Federal Property Management Regulations Federal agencies indeed have a duty under specified circumstances to return to GSA space that the agencies consider to be no longer needed. Such a duty, imposed pursuant to government-wide regulations, does, indeed, prevent an agency from providing free employee parking spaces on property that the agency has determined is unneeded, and precludes negotiations on any contrary bargaining proposal.

In summary, GSA interprets applicable provisions of the FPMR, specifically, 41 C.F.R. § 101-17.2, as imposing upon an agency the obligation to relinquish space to GSA, including space for parking, after the agency determines that such space is no longer needed or is underutilized. GSA also states that this duty of an agency to relinquish space is contingent upon a determination by the agency that the space is no longer needed or is underutilized. That is, according to GSA, under the FPMR, an agency has discretion to determine whether it needs, or is able to utilize, a given space. GSA then concluded, without citing any provision of the FPMR in support, that the agency could not make the requisite determination, i.e., exercise its discretion under the FPMR, through negotiations as provided by the union's proposal.

The Authority, for purposes of this decision, adopts GSA's conclusion that an agency is obligated to relinquish space to GSA, including space for parking, once the agency determines in its discretion, that such space is no longer needed or is underutilized. However, GSA's further conclusion that the agency could not exercise its discretion in this regard through negotiations with a union is without support. As stated at the outset of this decision, Congress, in enacting the Federal Service Labor-Management Relations Statute, established a requirement that an agency negotiate with the exclusive representative of an appropriate unit of its employees over the conditions of employment affecting those employees, except to the extent provided otherwise by law or regulation. That is, to the extent that an agency has discretion with respect to a matter affecting the conditions of employment of its employees, that matter is within

the duty to bargain of the agency.15/ GSA cited no provision of the FPMR which would preclude the agency from agreeing to retain the parking spaces at issue for the purposes stated in the proposal. Moreover, GSA cited no provision of the FPMR which would require an agency to relinquish space merely because it ceased to be utilized for a particular purpose, regardless of whether the agency had determined that the space could be put to some other use. In short, GSA cited no provision of the FPMR which by its terms would specifically preclude the result sought by the union's proposal.

Rather, as quoted above, GSA clearly interprets the FPMR as permitting an agency to make the determination as to whether it desires to retain a given space and put it to a particular use. In light of the statutory obligation to bargain outlined above, GSA's interpretation of the FPMR provides an insufficient basis for the conclusion that the union's proposal is inconsistent with applicable Government-wide regulations within the meaning of section 7117 of the Statute. That is, the fact that under the FPMR an agency has discretion to decide whether to relinquish a given space or to retain it for a particular use does not mean that the agency is thereby precluded from exercising its discretion to make that decision through the process of negotiation with an exclusive representative. GSA stated that an agency's discretion in this regard under the FPMR is subject to the obligation which Federal agencies owe to GSA concerning the management of property. Federal agencies also have an obligation, however, under the Statute to negotiate with exclusive representatives regarding conditions of employment. Therefore, unless the terms of an agency's obligation to GSA as stated in the FPMR specifically provide otherwise with respect to a particular matter affecting conditions of employment, an agency is obligated to negotiate with respect to that matter, so long as negotiation is not precluded on other grounds.

GSA did not advert to any provision of the FPMR which by its specific terms would preclude the agency from exercising its discretion regarding the particular matter at issue herein by negotiation. Instead, the conclusion that the union's proposal conflicts with the FPMR is based on the unsupported determination that the agency's decision with respect to the disposition of space must be made by the agency within its sole and exclusive discretion, and thus, that the decision is not subject to the obligation to bargain. Under section 7105 of the Statute, however, only the Federal Labor Relations Authority is empowered to resolve issues regarding whether the duty to bargain

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15/ GSA cites 55 Comp. Gen. 897 (1976) in support of its position. However, that decision, which held that GSA could not compel an agency to accept and pay for an allocation of parking spaces which the agency determined it did not need, merely reinforces the point that an agency, under the FPMR, has discretion as to whether it will retain or relinquish parking spaces allocated to it by GSA. Based on this decision, GSA makes the further argument that since, even with its regulatory authority over Federal property management, GSA cannot obligate an agency to retain space, an exclusive representative, which has no authority in the area of property management, could not negotiate to persuade an agency to retain space which the agency wished to relinquish. The argument is without merit since it fails to take into account the effect of an agency's statutory obligation to negotiate over those conditions of employment which are within its discretion.

extends to a particular matter.16/ Contrary to the conclusion reached by GSA, in the absence of specific provisions of the FPMR which provide otherwise, and

16/ Section 7105(a)(2)(E) of the Statute provides as follows:

§ 7105. Powers and duties of the Authority

. . . . . .

(a)(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

. . . . . .

(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title . . . .

Section 7117(c) of the Statute provides as follows:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

. . . . . .

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall--

(A) file with the Authority a statement--

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

insofar as not precluded on other grounds, the agency's duty to bargain under the Statute extends to that aspect of the union's proposal herein which relates to the agency's decision to relinquish the parking spaces in dispute.

GSA also states, however, that even if the agency's decision to relinquish space is subject to the duty to bargain under the Statute, the agency would be precluded from agreeing to provide those spaces free of charge by the provisions of FPMR Temporary Regulation D-65 (Temp. Reg. D-65), 44 Fed. Reg. 53161 (1979). Specifically, under section 11 of this regulation, Federal employees utilizing government-controlled parking spaces shall be assessed a charge at a rate which is the same as the commercial equivalent value of those parking spaces. (Between November 1, 1979, and September 30, 1981, however, the charge will be one-half of the full rate to be charged.)17/ This regulation is presently in effect and applies to the parking spaces here in

17/ Section 11 of FPMR Temporary Regulation D-65, 44 Fed. Reg. 53161, 53163 (1979), provides as follows:

> 11. Charges for employee parking. a. At all facilities where the monthly rate per space is $10 or more, employees shall be charged for the parking they are furnished unless specifically exempt (see subparagraph 7b). For parking spaces under the control of GSA, the charging system will overlay the existing Federal Buildings Fund procedure. That is, GSA will assign blocks of parking spaces, both official and employee, to the agencies and assess the appropriate Standard Level User Charge. The agencies shall make their own individual assignments to their employees consistent with the carpooling requirements. Agencies shall collect the fees at the time the permits are issued to employees. (See paragraph 12.)
>
> b. On July 1 of each year, GSA will furnish each agency a printout listing the monthly parking charge for the next fiscal year at each GSA-controlled facility where the rate per space exceeds $10. The rates to be charged will be the same as the commercial equivalent value of the spaces determined under the Standard Level User Charge System. Rates for non-GSA-controlled parking may be established by the responsible agency in accordance with 40 U.S.C. 490(k), using generally accepted appraisal techniques. GSA will assist agencies in developing the parking rates for their properties when requested. In this connection, GSA has developed GSA Form 3183, Appraisal of Fair Monthly Parking Rates Per Space, a simplified appraisal form for determining the monthly parking rate. Paragraph 18 provides information and instructions concerning the availability of GSA Form 3183. Rates must be developed by agencies and submitted to the appropriate GSA regional office (attention: Regional Commissioner, PBS) for approval.
>
> c. For the initial period November 1, 1979, through September 30, 1981, the charges to be collected shall be 50 percent of the full rate scheduled to be collected. The full charge shall be collected beginning October 1, 1981.
>
> d. In communities having several Federal facilities, buildings may be grouped or "zoned" for the purpose of establishing a uniform parking rate for the area rather than a building-by-building charge.

dispute.18/ Further, based upon the analysis stated above, this regulation, which is generally applicable throughout the executive branch,19/ is a Government-wide regulation within the meaning of section 7117 of the Statute and precludes negotiation on a conflicting union proposal. Thus, since the union proposal would require the agency to provide the disputed parking spaces free of charge to employees, it is inconsistent with FPMR Temporary Regulation D-65 and, to that extent, is outside the agency's duty to bargain under the Statute.

The agency next alleges that the union's proposal is outside its duty to bargain because the decision to relinquish the disputed parking spaces constitutes a determination as to the "means of performing work" within the meaning of section 7106(b)(1) of the Statute.20/ In particular, the agency states that its decision to relinquish the parking spaces in question is a result of its decision to change from pre-paid parking for employee's personal vehicles used in connection with official business to reimbursement of parking expenses by way of travel vouchers incident to official travel. The position of the agency, in essence, is that this change of policy with respect to the way in which it will provide the parking necessary for the performance of its operations is a determination of the "means" of performing its work.

However, even assuming that the agency position is correct in this regard, it would not be dispositive of the issue here. The decision to relinquish the parking spaces is a separate matter. That is, the union is not here seeking to reverse the agency's policy decision and require it to retain the spaces for employee's personal vehicles which are used in connection with official business. Rather, the union proposal assumes that the decision to provide parking by way of travel voucher has already been made. The union's proposal is an attempt to negotiate what will be done with the parking spaces in question now that they are no longer provided for employee vehicles used in connection with the agency's operations. In particular, the union proposes that the spaces be used to provide parking, free of charge, for employee vehicles which are not used in

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18/ The Authority takes note of the fact that GSA Temporary Regulation D-65 is presently subject to litigation involving constitutional questions. American Federation of Government Employees, et al. v. Freeman, Civil Action No. 79-2955 (D.C.D.C.).

19/ See FPMR Temporary Regulation D-65, 44 Fed. Reg. 53161, 53162 (1979).

20/ Section 7106(b)(1) of the Statute provides, in relevant part, as follows:

§ 7106. Management rights

. . . . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

(1) at the election of the agency, . . . on the technology, methods, and means of performing work . . . .

the performance of official business but, e.g., primarily for commuting.21/ The basic issue, therefore, is whether the union's proposed disposition of the parking spaces would impose upon the agency a particular "means" of performing its work.

The right of the agency under section 7106(b)(1) of the Statute to elect whether or not it will negotiate over "methods" and "means" extends only to matters which pertain to the performance of the work of the agency.22/ The purposes for which the parking spaces in this case are to be retained under the union's proposal are not related to the performance of the agency's work. That is, as already indicated, the union is not proposing that the spaces be retained in order that employees may have their own cars available for use in performing their official duties, but primarily so that employees will have a place to park vehicles they use to commute to work. Therefore, the union's proposal, for the reasons stated, does not concern such a matter. Thus, apart from consideration of the remaining ground of nonnegotiability alleged by the agency, the proposal, insofar as it requires the agency to retain the disputed parking spaces does not concern a matter about which the agency may elect to negotiate under section 7106(b)(1) and, in this regard, is within the agency's duty to bargain under the Statute.

The remaining agency allegation is that the union's proposal conflicts with its right to determine its budget under section 7106(a)(1) of the

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21/ The union cites the definitions of "employee parking" and "official parking" in the FPMR in order to distinguish the intent of its proposal from the interpretation placed upon it by the agency. "Employee parking" is defined in 41 C.F.R. § 101-20.117-1(c) as follows:

> "Employee parking" means the parking space assigned for the use of employee-owned vehicles other than those classified as "official parking."

"Official parking" is defined in 41 C.F.R. § 101-20.117-1(f) as follows:

> "Official parking" means parking spaces reserved for Government-owned, Government-leased, or privately owned vehicles regularly used for Government business. The phrase "privately owned vehicles regularly used for Government business" means vehicles used 12 or more workdays per month for Government business for which the employee receives reimbursement for mileage and parking fees under Government travel regulations. Monthly certification by agency heads may be required to establish this priority.

See also the provisions of the FPMR cited in note 4, supra.

22/ American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA No. 77 (1980), at p. 15.

Statute.23/ The agency states, in this regard, that the decision to relinquish the parking spaces at issue in this case was based on "budgetary considerations," i.e., reimbursement of employee parking expenses by travel voucher would cost the agency less than providing pre-paid parking for employee vehicles used in connection with agency business. Thus, the agency takes the position that the union's proposal conflicts with its right under section 7106(a)(1) to make this budgetary determination because the proposal would require it to absorb the additional costs of retaining the spaces it had planned to relinquish to GSA. Assuming the agency agreed to retain the spaces, such additional costs, given the effect of FPMR Temporary Regulation D-65 discussed above, could amount to one-half the commercial equivalent value of the parking spaces in dispute, at least until September 30, 1981.

The Authority, in Wright-Patterson Air Force Base,24/ considered the argument that a proposal which imposed additional costs upon an agency would violate the right of an agency to determine its budget under section 7106(a)(1). The Authority rejected the position that cost alone was a deciding factor in determining the negotiability of a proposal under section 7106(a)(1). The Authority stated as follows:25/

> . . . The underlying assumption of this position appears to be that a proposal is inconsistent with the authority of the agency to determine its budget within the meaning of section 7106(a)(1) if it imposes a cost upon the agency which requires the expenditure of appropriated agency funds. Such a construction of the Statute, however, could preclude negotiation on virtually all otherwise negotiable proposals, since, to one extent or another, most proposals would have the effect of imposing costs upon the agency which would require the expenditure of appropriated agency funds. Nothing in the relevant legislative history indicates that Congress intended the right of management to determine its budget to be so inclusive as to negate in this manner the obligation to bargain.
>
> There is no question but that Congress intended that any proposal which would directly infringe on the exercise of management rights under section 7106 of the Statute would be barred from negotiation. Whether a proposal directly affects the agency's determination of its budget depends upon the definition of "budget" as used in the Statute. The Statute and legislative history do not contain such a definition. In the absence of a clearly stated legislative intent, it is appropriate to give the term its common

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23/ Section 7106(a)(1) of the Statute provides, in relevant part, as follows:

> § 7106. Management rights
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
> (1) to determine the . . . budget . . . of the agency . . . .

24/ See note 19, supra.

25/ Id. at 4-5 of Authority decision.

> or dictionary definition. As defined by the dictionary, "budget" means a statement of the financial position of a body for a definite period of time based on detailed estimates of planned or expected expenditures during the period and proposals for financing them. In this sense, the agency's authority to determine its budget extends to the determination of the programs and operations which will be included in the estimate of proposed expenditures and the determination of the amounts required to fund them. Under the Statute, therefore, an agency cannot be required to negotiate those particular budgetary determinations. That is, a union proposal attempting to prescribe the particular programs or operations the agency would include in its budget or to prescribe the amount to be allocated in the budget for them would infringe upon the agency's right to determine its budget under section 7106(a)(1) of the Statute.
>
> Moreover, where a proposal which does not by its terms prescribe the particular programs or amounts to be included in an agency's budget, nevertheless is alleged to violate the agency's right to determine its budget because of increased cost, consideration must be given to all the factors involved. That is, rather than basing a determination as to the negotiability of the proposal on increased cost alone, that one factor must be weighed against such factors as the potential for improved employee performance, increased productivity, reduced turnover, fewer grievances, and the like. Only where an agency makes a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits can an otherwise negotiable proposal be found to violate the agency's right to determine its budget under section 7106(a) of the Statute. [Footnotes omitted.]

The proposal at issue herein, however, which would require the agency to retain certain parking spaces and could thereby, under FPMR Temporary Regulation D-65, require it to absorb up to one-half the cost of employee parking, does not require the agency to negotiate its budget. That is, the proposal does not on its face prescribe that the agency's budget will include a specific provision for those parking spaces or a specific monetary amount to fund them. Furthermore, the agency has not demonstrated that retention of the parking spaces at issue herein will result in a significant increase in costs. In particular, the agency made no attempt to refute the figures, or the calculations based on those figures, by which the union showed that the cost of retaining the parking spaces represented only 1/6 of 1% to 1/7 of 1% of the total budget for the New Orleans Regional Office for the last fiscal year. Moreover, under FPMR Temporary Regulation D-65, the possible budgetary impact of retaining those spaces would be even less. It is not necessary, therefore, to reach the issue of whether the alleged increase in costs is outweighed by compensating benefits. Consequently, the proposal at issue herein does not violate the right of the agency to determine its budget under section 7106(a) of the Statute.

In summary, consideration of each of the grounds for nonnegotiability alleged by the agency leads to the conclusion that, for the foregoing reasons, the union's proposal, insofar as it would require the agency to retain the disputed parking spaces for employee parking is within the agency's duty to bargain under the Statute; but to the extent that it would require the agency to provide those spaces free of charge to employees, it conflicts with the

currently applicable Government-wide regulation, namely, FPMR Temporary Regulation D-65 44 Fed. Reg. 53161 (1979), under section 7117(a) of the Statute, and thus, in that respect, is outside the agency's duty to bargain.

Issued, Washington, D.C., July 30, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES UNION

(Labor Organization)

and

Case No. O-NG-56

DEPARTMENT OF THE TREASURY,
BUREAU OF THE PUBLIC DEBT

(Activity)

DECISION ON NEGOTIABILITY ISSUES

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 et seq.).

Union Proposal

Accounts Maintenance Clerks, GS-502-3/5, must maintain the following minimum rates:

A. To retain his/her position incumbent must process 9.0 batches per hour.

B. To receive a within-grade step increase incumbent must process 9.0 batches per hour.

Question Here Before the Authority

The question is whether the Union proposal is outside the duty to bargain under section 7117(a)(1) of the Statute because it violates Federal law or any Government-wide rule or regulation, as alleged by the Agency.

Opinion

Conclusion: Subsection A of the Union's proposal establishing a specific number of batches per hour as the minimum standard for job retention is within the framework of the right of management to direct its employees and to assign

work under section 7106(a) of the Statute. However, consistent with the intent of Congress as expressed in section 7101 of the Statute that employees participate through labor organizations of their own choosing in decisions which affect them, and other sections discussed hereinafter, the agency's right to identify critical elements and establish performance standards under section 7106(a) is subject to certain rights of a labor organization under the Statute. Specifically, under section 7117, as to units of exclusive recognition, it is within the duty of the agency to bargain, consistent with law and regulation, on aspects of performance appraisal systems other than identification of critical elements and content of performance standards. The duty to bargain extends to, among other matters, the form of the employee participation in the establishment of performance standards required under section 4302 of the Civil Service Reform Act (CSRA). In this connection, section 4302 in its reference to participation of employees in establishing performance standards refers to all employees, whether represented or unrepresented.

Furthermore, section 7106(a) is subject to section 7106(b). Under section 7106(b)(2) an agency has the duty to bargain on procedures which management officials will observe in the development and implementation of performance standards and critical elements; and, under section 7106(b)(3), on appropriate arrangements for employees adversely affected by the application of performance standards to them. In addition, under section 7114 of the Statute, the agency must afford an exclusive representative the opportunity to be present at any formal discussion between an agency representative and a unit employee regarding the establishment or the implementation of performance standards and critical elements and, when requested, at any investigatory interview of a unit employee who reasonably believes that the examination may result in discipline for unacceptable performance under section 4303 of the CSRA. Finally, the right of an agency under section 7106(a) to identify critical elements and establish performance standards is subject to the right of an employee against whom disciplinary action has been taken. The employee has a right to challenge such action under the appellate procedures of section 7701 of the CSRA or under a negotiated grievance procedure pursuant to section 7121 of the Statute. In reference to subsection B of the proposal, it is determined the instant proposal is outside the Agency's duty to bargain because it conflicts with an applicable Government-wide regulation (5 CFR 531.407(c)(1)). Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations (5 CFR 2424.10), the Agency allegation that the proposal is not within the duty to bargain is sustained.

Reasons: The Union's proposal in this case would establish, in subsection A, the standards an employee must meet in order to continue in the employment of the agency and, in subsection B, to receive an increase in pay. The Union timely appealed to the Authority under section 7117(c) of the Statute from the Agency's allegation that the proposal was outside the Agency's duty to bargain under the Statute. Section 7114(a)(4), as relevant herein, provides as follows:

§ 7114. Representation rights and duties

. . . . . .

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. . . .

Section 7114(b)(2) states that the duty to negotiate in good faith shall include the obligation "to discuss and negotiate on any condition of employment." Conditions of employment are defined in section 7103(a)(14) as follows:

§ 7103. Definitions; application

(a) For the purpose of this chapter--

. . . . . .

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters--

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute . . . .

Section 7117(a)(1) further describes the duty to bargain in good faith as follows:

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

Thus, the scope of the duty to bargain under section 7117(a)(1) of the Statute extends to conditions of employment, i.e., personnel policies, practices and matters affecting working conditions, affecting employees in a unit of exclusive recognition unless the matters proposed for bargaining are inconsistent with Federal law or Government-wide rule or regulation.

The negotiability of subsection A of the Union's proposal stands or falls on the determination of whether it is inconsistent with Federal law or Government-wide rule or regulation under section 7117(a)(1). In this regard, the Agency alleges in part that, by requiring it to adopt a standard of nine batches an hour, the proposal conflicts with its right to direct employees under section 7106(a)(2)(A) of the Statute by preventing the Agency from requiring of an employee that he or she perform work beyond that which is

required under the standard; and with its right to assign work under section 7106(a)(2)(B) by, among other things, limiting the amount of work which can be assigned.1/

In order to determine whether the proposal identifying a critical element and establishing a performance standard concerns matters which constitute an exercise of the rights reserved to management under section 7106 of the Statute, it is necessary to examine the nature of performance appraisal systems as provided for in Title II of the CSRA.

Section 4302 of the CSRA2/ requires each agency to develop one or more performance appraisal systems and states the basic requirements of such systems. Before discussing the nature of performance appraisal systems, reference is made to the requirement that each performance appraisal system

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1/ 5 U.S.C. § 7106 provides, as relevant herein, as follows:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws—
(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

. . . . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

. . . . . .

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or
(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

2/ 5 U.S.C. § 4302 provides as follows:

§ 4302. Establishment of performance appraisal systems

(a) Each agency shall develop one or more performance appraisal systems which—

(Continued)

encourage employee participation in the establishment of performance standards. The Union takes the position that the answer to whether the disputed proposal herein is within the duty to bargain is not found in section 4302.3/ The Authority agrees.

Section 4302 makes no distinctions between an agency's responsibility to encourage participation by employees within units of exclusive recognition and unrepresented employees. Thus, this section covers both represented and unrepresented employees and does not specify the form which such employee participation must take. As more fully discussed on page 10, infra, the duty to bargain extends to, among other matters, the form of the employee participation in the establishment of performance standards required under section 4302 of the CSRA; and the intent of the Statute and the express provisions of section 7114 require that an exclusive representative be given the opportunity to be represented at certain meetings between management and employees relating to the development and implementation of performance systems. In summary, it is the Statute, and not section 4302, which controls whether the identification of critical elements and the content of performance standards are within the scope of the duty to bargain.

(Continued)

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees;

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for--

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

3/ Transcript of oral argument before the Authority on negotiability of proposals relating to performance appraisal systems, at 152.

Turning to the nature of performance appraisal systems, under section 4302 each system must provide for establishing "performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria . . . related to the job in question for each employee or position under the system." Section 4301 of the CSRA defines "unacceptable performance" as "performance of an employee which fails to meet established performance standards in one or more of the critical elements of such employee's position." Performance standards developed with employee participation are a measure of an employee's performance in crucial aspects of the employee's position, and "unacceptable performance" is the failure to accomplish the requirements of the job as stated in the standard for that aspect of the position. Section 4302(b)(4) provides for recognition and reward of employees whose performance so warrants. Section 4302(b)(5) and (6) provides for assistance to employees in improving unacceptable performance and action against employees who continue to perform unacceptably.

The Office of Personnel Management (OPM) is authorized under section 4302(b) to issue regulations implementing the statutory requirements regarding performance appraisal systems. As relevant to the dispute herein, OPM has, by regulation, defined the terms "performance standards" and "critical element:"4/

> "Performance standards" are the expressed measure of the level of achievement established by management for the duties and responsibilities of a position or group of positions. Performance standards may include, but are not limited to, elements such as quantity, quality, and timeliness.
>
> "Critical element" means a component of an employee's job that is of sufficient importance that performance below the minimum standard established by management requires remedial action and denial of a within-grade increase, and may be the basis for removing or reducing the grade level of that employee. Such action may be taken without regard to performance on other components of the job.

Thus, in terms of the law and implementing regulations, performance standards establish the minimum level of job performance required of an employee with regard to the duties and responsibilities of the employee's job. Critical elements are those components of the job which are of sufficient importance that failure to achieve the level of performance established in the performance standard requires remedial action.5/ As already noted, performance standards

4/ 5 CFR 430.202(d) and (e) (1980).

5/ These regulations literally provide for the establishment of performance standards by management. However, assuming that these regulations are Government-wide regulations within the meaning of section 7117 of the Statute and, as such, could constitute a bar to negotiation, the fact that the regulations are expressed in terms of management action to establish performance standards would not in and of itself render proposals to bargain those standards outside the duty to bargain. Cf. National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA No. 118, (1980) at 12-15 of decision.

must be developed with employee participation and union involvement, as more fully discussed on pages 10-11, infra.

The description of the statutory and regulatory requirements for performance appraisal systems, outlined above, establishes a direct relationship between the content of performance standards and the identification of critical elements and the right of an agency to direct employees under section 7106(a)(2)(A) of the Statute and to assign work under section 7106(a)(2)(B) of the Statute. Although significant aspects of performance appraisal systems may be negotiated, analysis of the rights of management to direct its employees and assign work under section 7106(a) of the Statute, as subject to section 7106(b), leads to the conclusion that identification of critical elements and establishment of performance standards constitute an exercise of the aforementioned management rights.

The right to direct employees in the agency is not defined in the Statute, is not specifically discussed in the legislative history and has not been applied in prior decisions of the Authority. Therefore, consistent with the main purpose and meaning of the Statute and in the absence of any indication that the phrase as used in the Statute has a meaning other than its ordinary meaning,[6/] the right "to direct . . . employees in the agency" means to supervise and guide them in the performance of their duties on the job.

The right to assign work to employees or positions under section 7106(a), subject to the provisions of section 7106(b), is composed of two discretionary elements: (1) the particular duties and work to be assigned, and (2) the particular employees to whom or positions to which it will be assigned.[7/] Furthermore, management discretion in this regard includes the right to assign general continuing duties,[8/] to make specific periodic work assignments to employees,[9/] to determine when such assignments will occur[10/] and to determine when the work which has been assigned will be performed.[11/]

In the circumstances of this case, the rights to direct employees and assign work are exercised through supervising and determining the quantity

6/ See Webster's Third New International Dictionary (Unabridged (1976)).

7/ American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA No. 77 (1980), at 18 and 28 of decision.

8/ American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey, 2 FLRA No. 16 (1979) at 7-9 of decision.

9/ National Labor Relations Board Union, Local 19 and National Labor Relations Board, Region 19, 2 FLRA No. 98 (1980).

10/ Id.

11/ International Association of Fire Fighters, Local F-61 and Philadelphia Naval Shipyard, 3 FLRA No. 66 (1980) at 1-4 of decision.

and timeliness of work production, and establishing priorities for its accomplishment. The establishing of "critical elements" and "performance standards" as provided for in law and defined by regulation are among the ways in which management supervises and determines the quality, quantity, and timeliness of work required of employees. More particularly, under section 4302 of the CSRA and OPM regulations, a performance standard with respect to a critical element of an employee's job determines the level of work performance, i.e., whether in terms of, among other things, quantity, quality, or timeliness, which is acceptable for, e.g., job retention, as expressed in the disputed proposal. In assessing the work which must be done to accomplish its mission, the agency makes determinations based upon its resources as to the aggregate level of output required to meet the need for its services. An integral part of accomplishing this mission is assigning work and establishing priorities. These decisions, when expressed in terms of an individual employee's job, translate into performance standards, that is, the quality and amount of work needed from each employee in order to achieve the agency's mission and functions. In this connection, the legislative history of the CSRA shows Congressional concern with promoting government effectiveness and efficiency, with the development of employee performance standards and critical elements to achieve this end, and encouraging employee participation in the establishment of such performance standards.12/

Performance standards are not merely measures of employee performance. They go to the levels of output and the quality of the work product. In this case, subsection A of the disputed proposal would establish a minimum requirement for job retention of 9 batches per hour. While that standard could be significant in terms of evaluating the performance of individual employees, it also would establish a level of output which is required in terms of the agency's directing employees and assigning work.

The Union argues its proposal would have been found to be within the duty to bargain pursuant to a cited decision of the Federal Labor Relations Council under E.O. 11491.13/ Apart from other considerations, the precedent relied upon is inapplicable in the circumstances of the present case. The performance standards and critical elements which are the subject of the instant dispute are defined by and must conform to the requirements of chapter 43 of the CSRA, which differ appreciably from the performance appraisal practices which were in effect at the time of the Council's decision. Further, in the cited case, the Council held, in effect, that the union's proposed procedure concerning the method for setting production goals and designating various levels of individual production as prima facie evidence in evaluating an employee's performance with respect to that factor, did not conflict with any reserved management rights.

12/ See, Message of President Carter to the Congress, 14 Weekly Comp. of Pres. Doc. 444 (March 2, 1978); S. Rep. No. 95-969, 95th Cong., 2nd Sess. 2-4, 39-40 (1978). See also H.R. Rep. No. 95-1403, 95th Cong., 2nd Sess. 3-4, 20-21 (1978).

13/ Patent Office Professional Association and U.S. Patent Office, Washington, D.C., 3 FLRC 635 (1975).

However, in the instant case, the Union's proposal is not procedural. It would require the Agency to bargain over its statutory authority to direct employees and assign work. It specifies a critical element of an employee's job and the performance standard with respect to the job element which must be met for job retention, thereby directly interfering with the statutory right of management to direct employees and assign work. As discussed hereinafter, these rights are subject to section 7106(b)(2) and (3) which requires management to negotiate on procedures and appropriate arrangements with respect to employees adversely affected by management's exercise of its rights.

The Union also asserts the legislative history of section 7106 indicates an intent that performance standards be subject to the duty to bargain. In support of this assertion, it cites the following statement of Congressman Udall:14/

> The intent of this provision [section 7106(a)(2)(C)] is to preserve as bargainable (to the extent permitted by applicable laws and regulations) the standards, criteria, and procedures for establishing promotion certificates, while ensuring management's right to make the actual selection from the certificate, or to make the appointment from any other appropriate source.

The Union claims that, in the above statement, Congressman Udall "clearly stated that performance standards were to remain negotiable as they were under the Executive Order."15/

Apart from any other considerations, this statement of Congressman Udall is not concerned with performance standards. Congressman Udall made this statement with respect to section 7106(a)(2)(C) which is concerned with management's right to fill positions and to make selections for appointments. On its face, the quoted language is specifically applicable to establishing promotion certificates. There appears to be no direct connection between standards for establishing promotion certificates and performance standards.

Further, the Union cited certain statements in the Congressional Record relating to an expanded scope of bargaining and the management rights provisions of the Statute.16/ These were general statements discussing the interpretation and application of the management rights provisions of the Statute. They essentially state that management rights provisions bar negotiation on those matters which directly and integrally affect such rights. Apart from other considerations, the decision here is not inconsistent with these principles.

14/ 124 Cong. Rec. H9634 (daily ed. Sept. 13, 1978).

15/ Union Response at 8.

16/ Union Response at 7-11, citing from 124 Cong. Rec. H9634, H9638, and H9648-9 (daily ed. Sept. 13, 1978).

Based on the foregoing, negotiation of performance standards and critical elements, as contained in the disputed proposal, would interfere with the authority of an agency to act as provided in section 7106(a). It already has been noted that this authority is subject to section 7106(b). Negotiation of critical elements and performance standards would require an agency to bargain the quantity, quality, and timeliness standards which it must establish in making work assignments and in directing employees. With particular regard to subsection A of the proposal at issue herein, the negotiation of the number of batches an employee is required to process under the proposal would restrict the Agency's decision in establishing priorities for the performance of work. In so doing, the proposal would prevent the Agency from exercising its authority to determine the minimum required level of output. Therefore, subsection A is outside the Agency's statutory duty to bargain.

This decision does not mean that all matters related to establishing performance appraisal systems are outside the duty to bargain. Consistent with the intent of Congress as expressed in section 7101 and other sections of the Statute, performance appraisal systems, apart from the identification of critical elements and the establishment of performance standards, are within the duty to bargain, to the extent they are consistent with law and regulation. To the extent that an agency has discretion with respect to a given matter related to such systems the agency must upon request negotiate with an exclusive representative over that matter.17/ In particular, as noted previously, section 4302(a)(2) of the CSRA requires that performance appraisal systems "encourage employee participation in establishing performance standards" but does not specify the form which such employee participation must take. Consequently, among other significant aspects of performance appraisal systems, the manner in which a particular agency provides for such employee participation is within the agency's discretion and, therefore, within the duty to bargain to the extent that it would not prevent the agency from establishing performance standards and critical elements pursuant to its statutory rights to direct employees and assign work.18/.

In addition to the right of an exclusive representative to negotiate provisions related to the form of the employee participation required under section 4302 of the CSRA, the intent of the Statute and the express provisions of section 7114 require that an exclusive representative be given the opportunity to be represented at certain meetings between management and employees relating to the development and the implementation of performance appraisal systems. Congress stated in section 7101 that statutory protection of the right of employees to participate through labor organizations of their

17/ The OPM, which is an amicus curiae herein, so conceded in the oral argument before the Authority. Transcript of oral argument before the Authority, at 22. See also Hearings Before the Committee on Post Office and Civil Service of the House of Representatives on H.R. 11280, 95th Cong., 2nd Sess. 727 (1978).

18/ Cf. American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 3 FLRA No. 120 (1980) at 4-6 of decision.

own choosing in decisions which affect them safeguards the public interest, contributes to the effective conduct of public business, and encourages the amicable settlement of disputes. Consistent with this legislative intent to protect the right of employees to participate through labor organizations, section 7114 of the Statute provides, in relevant part, as follows:

> § 7114. Representation rights and duties
>
> . . . . . .
>
> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
>
> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or
>
> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—
>
> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> (ii) the employee requests representation.

As it pertains to the matters here in dispute, section 7114 provides that an exclusive representative is entitled to be represented at any meeting between a representative of the agency and a unit employee which constitutes a formal discussion within the meaning of the Statute and which involves matters pertaining to performance appraisal systems, i.e., the identification of critical elements and the establishment of performance standards. Similarly, the exclusive representative is entitled to be represented at an examination of an employee in connection with an investigation whenever a unit employee reasonably believes that the examination may result in disciplinary action for unacceptable performance under section 4303 of the CSRA ("Actions based on unacceptable performance") and requests representation.19/

In addition, section 7106(b)(2) provides that management has a duty to bargain on the procedures which management officials will observe in exercising section 7106 rights. Similarly, section 7106(b)(3) provides that management has a duty to bargain on appropriate arrangements for employees adversely affected by management's exercise of its authority.20/ The legislative history relevant to these provisions makes clear that they are intended to authorize an exclusive representative to negotiate on such matters except to the extent that the establishment of procedures or appropriate arrangements through negotiations would prevent the agency from acting at all. Insofar as it is consistent with management's authority to act, Congress intended the parties to work out their differences in connection with these matters through

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19/ See the statement of OPM at the oral argument before the Authority. Transcript of oral argument before the Authority, at 250-53.

20/ See note 1, supra.

negotiations.21/ Thus, to the extent consistent with law and regulation, the procedural context of performance evaluation, including procedures related to the identification of critical elements and the establishment of performance standards, and appropriate arrangements for employees adversely affected by actions taken under those standards, are subject to bargaining. This is consistent with the mandate of Congress as expressed in section 4302 that performance appraisal systems must encourage employee participation in the establishment of performance standards.

With further reference to procedures, OPM suggested an exclusive representative could negotiate with regard to the process by which critical elements and performance standards are communicated to employees, periodic appraisals at least on an annual basis, the manner in which the performance of employees on detail will be appraised, the manner in which an employee's disagreement with his or her performance appraisal will be reviewed, and the process by which proposed performance standards will be reviewed within the agency.22/ Creative approaches to collective bargaining may expand the possibilities suggested. The stated examples reflect the wide range of employee participation possible through negotiation within units of exclusive recognition and the variety of protections for employees which may be negotiated as a part of such systems.

Finally, an employee against whom disciplinary action has been taken based on unacceptable performance under section 4303 of the CSRA, may appeal the action to the Merit Systems Protection Board pursuant to section 7701 of the CSRA or, alternatively, raise the matter in the negotiated grievance procedure pursuant to section 7121.23/ In the context of negotiated grievance procedures it would be possible for an employee against whom action has been taken for unacceptable performance to grieve such action, contending that the performance standard as applied to the grievant pursuant to which the discipline was imposed is improper, or impossible of performance, under requirements of law or the parties' agreement. With regard to the requirements of law, section 4302(b)(1) of the CSRA requires that performance standards be objective and job-related. As was acknowledged by OPM at the oral argument, in the case of an employee subject to discipline for unacceptable performance, an arbitrator would be able to find a standard as applied was not objective or job-related in ruling on a grievance.24/

21/ American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey, 2 FLRA No. 16 (1979) at 2-4 of decision; and National Treasury Employees Union and U.S. Customs Service, Region VIII, San Francisco, California, 2 FLRA No. 30 (1979) at 5-6 of decision.

22/ Transcript of oral argument before the Authority, at 244-45.

23/ 5 U.S.C. § 7701(c)(1)(A); 5 U.S.C. § 7121(e)(2). In either situation the decision rendered would be subject to judicial review. 5 U.S.C. § 7703(a)(1); 5 U.S.C. § 7121(f).

24/ Transcript of oral argument before the Authority, at 248-49.

With regard to the parties' agreement, nothing in this decision would preclude an exclusive representative from negotiating criteria for the application of performance standards which management has established. As the Authority determined with respect to a proposal requiring that performance standards be "fair and equitable" in American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 3 FLRA No. 120 (1980), decided this date, such a criterion would not interfere with the agency's discretion as to the identification of critical elements and the establishment of the content of a particular performance standard. This criterion would merely establish a general requirement by which the application of critical elements and performance standards established by management could subsequently be evaluated when they are challenged in a grievance filed pursuant to section 7121(e) of the Statute. This type of review would not preclude the agency from initially determining the content of the standard, nor would it result in substitution of an arbitrator's judgment for that of the agency and setting a new standard. It would simply determine if the standard established by management as applied to the grievant complied with the requirements of the parties' agreement.

In conclusion, based upon the foregoing, subsection A of the Union's proposal is not within the duty to bargain because it is within the framework of the right of management to direct employees and to assign work under section 7106(a), and is not a procedure or an appropriate arrangement within the meaning of section 7106(b)(2) and (3) of the Statute.

Turning to subsection B of the Union's proposal, it would establish a minimum performance level of 9.0 batches per hour for the employee to be eligible to receive within-grade increases. The Agency contends the Union's proposal would violate 5 CFR 531.407(c)(1), set forth below (see page 14, infra). It asserts the proposal is outside the duty to bargain under section 7117 which provides, as stated previously, that the scope of the duty to bargain does not extend to matters which are inconsistent with any Government-wide rule or regulation.

The initial question is whether the applicable regulation of the Office of Personnel Management constitutes a "Government-wide rule or regulation" within the meaning of the Statute. The Authority considered the meaning of the phrase "Government-wide rule or regulation" in National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA No. 118 (1980) and determined that the provisions of the Federal Property Management Regulations in that case were generally applicable throughout the Federal Government and, as such, constituted Government-wide regulations within the meaning of section 7117.

The regulation at issue herein is codified at title 5 of the Code of Federal Regulations as a personnel management regulation published by the Office of Personnel Management. This regulation is binding on most General Schedule employees of the executive branch and certain employees of the legislative branch. (5 CFR 531.402, 5 U.S.C. § 5102.) In this manner, the regulation is generally applicable to the Federal civilian work force as a whole, though not, of course, to every Federal employee. It is typical of the regulations issued by OPM and would appear to be the kind of regulation contemplated as a Government-wide regulation by the reference to OPM in the

House Committee Report, as cited in the New Orleans District decision, supra. Therefore, the regulation asserted by the Agency as a bar to negotiation of subsection B of the Union's proposal is a Government-wide regulation within the meaning of section 7117(a).

The question then becomes whether subsection B of the proposal is inconsistent with the cited regulation. That regulation provides as follows:

> § 531. 407 Work of an acceptable level of competence.
>
> . . . . . .
>
> (c) Determination. (1) In making his determinations, the head of an agency or his designee shall make effective use of this authority to stimulate optimum performance among his employees and:
>
> (i) Shall not award within-grade increases to employees who do not clearly meet the statutory standard for such award, recognizing that for these increases performance must be of sufficient level to merit a pay increase, not just adequate for retention on the job . . . .

The Union's proposal provides that the standard for eligibility to receive within-grade step increases for Accounts Maintenance Clerks shall be the same as the standard of performance for job retention. In contrast, the language of the above-quoted regulation requires that a performance level sufficient to receive a within-grade increase must exceed the level which is merely adequate for job retention. Without passing upon whether proposals related to acceptable levels of competence for the receipt of within-grade increases under 5 U.S.C. § 5335 are otherwise within the duty to bargain under section 7117, subsection B of the Union's proposal, insofar as it provides for a performance level for the granting of within-grade increases which does not exceed the standard adequate for job retention in the circumstances of this case, is inconsistent with Government-wide regulation.

In conclusion, for the reasons set forth above, the Union's proposal is found to be inconsistent with Federal law and Government-wide regulation and, thus, is outside the scope of bargaining established in section 7117(a)(1) of the Statute. Accordingly, the Agency's allegation is sustained.

Issued, Washington, D.C., July 31, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

Federal Labor Relations Authority

1900 E Street, NW.
Washington, D.C. 20424

Number 49 REPORT OF CASE DECISIONS September 15, 1980

3 FLRA No. 121 (July 31, 1980)

United States Army Support Command, Fort Shafter, Hawaii, Case No. 8-CA-160. Upon a complaint issued by the Regional Director, the ALJ found, among other things, that the preponderance of the evidence did not establish that the activity's action in prohibiting the two hotel service employees from wearing the union (SEIU Local 556) stewards' badges while dealing with the public violated section 7106(a) of the Statute, particularly in view of the size and conspicuous nature of the badges in issue. The Authority adopted the findings, conclusions and recommendation of the ALJ and dismissed the complaint. (Decision and Order attached.)

3 FLRA No. 122 (July 31, 1980)

United States Air Force, Dyess Air Force Base, Texas, Abilene, Texas, Case No. 6-CA-117. Upon a complaint issued by the Regional Director, the ALJ found that the activity had violated section 19(a)(1) and (2) of E.O. 11491 when it failed to rehire the named individual because of her prior activity as a union steward for AFGE Local 2356. As a remedy the ALJ recommended, among other things, that the activity offer the individual employment in a particular position, or if that job no longer existed, in a substantially similar position, and make her whole by the payment of a sum of money to be calculated as described by the ALJ. The Authority adopted the findings, conclusions and recommendations of the ALJ except with respect to the affirmative action portion of the recommended remedial order. As to that portion, the Authority, based on a previous decision of the Comptroller General and an interpretation of the Office of Personnel Management modified the recommendation to order the activity to give the individual first consideration in filling any position for which she may be qualified, including but not limited to the one identified by the ALJ. (Decision and Order attached.)

3 FLRA No. 123 (July 31, 1980)

U.S. Patent and Trademark Office, Assistant Secretary Case No. 22-09584(CA). Upon an amended complaint filed by the union (Patent Office Professional Association) under E.O. 11491, the ALJ found that the agency had engaged in certain unilateral conduct, pertaining to a reduction in turnaround time for the processing of amended cases by patent examiners and to a change in the existing policy of notification

to supervisors regarding unit employee absences from their workplace, which was violative of section 19(a)(1) and (6) of the Order. The ALJ further found other conduct, pertaining to a statement that employees were expected to achieve 100% of their assigned production goal and the achievement of anything less would be considered deficient, was not violative of section 19(a)(1) and (6) of the Order and recommended dismissa' of that portion of the complaint. Both parties filed exceptions to the ALJ's recommended decision and order. The Authority adopted the ALJ's findings, conclusions and recommendations, with certain specific interpretations. Thus, in adopting the ALJ's finding that turnaround time or "time targets" in this case is a negotiable matter within the meaning of section 11(a) of the Order, the Authority did not construe the finding to mean that any proposal concerned with the subject of turnaround time or time targets would be within the duty to bargain, i.e., consistent with applicable law and regulations. Rather, noting that the ALJ was not presented with nor was his determination based upon a specific proposal, the Authority found that the ALJ merely ruled that specific proposals pertaining to the matter of turnaround time or time targets could be drafted within the scope of the duty to bargain under the Order. Accordingly, the Authority concluded, in agreement with the ALJ, that the agency violated section 19(a)(1) and (6) of the Order by unilaterally reducing the turnaround time for the processing of amended cases by patent examiners. However, in so concluding, the Authority made no judgment as to whether proposals relating to the matter of time targets for the performance of various duties would be within the duty to bargain under the Statute. Such a determination would require the presentation of proposals sufficiently specific and delimited in form and content by which the Authority could ascertain whether negotiations over such proposals would be consistent with law, regulations and the Statute. (Decision and Order attached.)

NEGOTIABILITY CASE

3 FLRA No. 120 (July 31, 1980)

American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., Case No. 0-NG-177-2, 3, 4 and 5. The dispute involved four union proposals which (1) defined "a performance standard"; (2) defined "critical element"; (3) provided for employee participation in establishing performance standards through collective bargaining to the extent the matter was within the scope of bargaining; and (4) provided that all performance standards will be fair and equitable and consistent with classification standards for the job involved, and that an employee who believed that a standard did not meet the criterion could grieve the matter under the negotiated grievance procedure of the parties' agreement. As to (1) and (2), the Authority held that the proposed definitions were not inconsistent with Government-wide rules or regulations and, therefore, were not excluded

from the obligation to bargain by reason of section 7117(a)(1) of the Statute. With regard to (3), however, the Authority held that the union's proposal violated section 7106(a)(2)(A) and (B) of the Statute insofar as it required negotiation on the establishment and content of performance standards. Finally, as to (4), the Authority held that the proposal as a whole did not violate either section 7106(a)(2)(A) or 7106(b)(1) of the Statute; and, further, that the "classification standards" portion of the proposal did not violate either section 4302(b)(1) of the Civil Service Reform Act of 1978 or section 7106(a)(2)(B) of the Statute. Accordingly, the Authority set aside the agency's allegations that the proposals numbered (1), (2) and (4) above were outside the duty to bargain; and sustained the allegation as to (3). (Decision attached.)

Attachments (4)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES ARMY SUPPORT COMMAND
FORT SHAFTER, HAWAII

Respondent

and

Case No. 8-CA-160

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 556, AFL-CIO

Labor Organization

DECISION AND ORDER

The Administrative Law Judge in the above-entitled proceeding issued his Recommended Decision and Order finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Administrative Law Judge's Recommended Decision and Order and a supporting brief, and the Respondent filed an opposition to the General Counsel's exceptions.

Therefore, pursuant to section 2423.29 of the Authority's rules and regulations (5 CFR 2423.29) and section 7118 of the Federal Service Labor-Management Relations Statute (5 U.S.C. §§ 7101-7135), the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in this case, including the General Counsel's exceptions and supporting brief and the Respondent's opposition thereto, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation. In adopting the Administrative Law Judge's recommendation, the Authority agrees with his conclusion that, in the absence of special circumstances, employees have a right under the Statute to wear union insignia at the work place. In the instant case, the Authority concurs with the Administrative Law Judge's finding that under all the circumstances herein, including the size and conspicuous nature of the union insignia involved, the Respondent's action in prohibiting the two hotel service employees from wearing the union stewards' badges in issue while dealing with the public did not violate section 7116(a) of the Statute.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 8-CA-160 be, and it hereby is, dismissed.

Issued, Washington, D.C., July 31, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of

UNITED STATES ARMY SUPPORT COMMAND
FORT SHAFTER, HAWAII

Respondent

and

Case No. 8-CA-160

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 556, AFL-CIO

Charging Party

Gerald M. Cole, Esquire
Regional Attorney
Federal Labor Relations Authority
Region 8, 350 South Figueroa Street
10th Floor
Los Angeles, California 90071

For the General Counsel

Terry E. Thomason, Esquire
Captain, Judge Advocate General Corps
United States Army Support Command
Office of the Staff Judge Advocate
Fort Shafter, Hawaii 96858

For the Respondent

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This case arose pursuant to the Federal Service Labor-Management Relations Statute, 5 U.S.C. Section 7101 et seq., as a result of an unfair labor practice

complaint, dated November 16, 1979, filed by the Regional Director, Region 8, Federal Labor Relations Authority, Los Angeles, California against the United States Army Support Command, Fort Shafter, Hawaii (Respondent).

The complaint alleged, in substance, that Respondent violated 5 U.S.C. §7116(a)(1) in that on or about June 9, 1979, and continuing to date, Respondent has promulgated, maintained, and enforced a rule prohibiting its non-appropriated fund employees at the Hale Koa Hotel from wearing union insignia at times when Respondent requires that employees wear a specifically distinctive mode of dress incident to the employees' duties.

Respondent's amended answer denied the allegations. Respondent asserted that employees do not hold an unrestricted right to wear union insignia, and any right to wear union insignia which may be held by employees required to wear a specifically distinctive mode of dress incident to the employees' duties was waived in the collective bargaining agreement between the Respondent and the Service Employees' International Union, Local 556, AFL-CIO (Charging Party or Union).

A hearing was held in this matter before the undersigned in Fort Shafter, Hawaii. 1/ The General Counsel, FLRA and the Respondent were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs.

Based on the entire record herein, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, and the briefs, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

1. At all times material to the complaint, until on or about October 1, 1979, Respondent employed various employees paid from nonappropriated funds, including employees who were employed at the Hale Koa Hotel, Hawaii.

2. At all times material to the complaint, the Union was the exclusive representative of a unit of such employees, including approximately 500 employees at the Hale Koa Hotel.

3. Respondent and the Union entered into a collective bargaining agreement, approved April 11, 1979, which was in effect at all times material and until October 1979. (General Counsel's Ex. 2). Article 16 of the agreement provided, in part, as follows:

1/ The transcript at page 14, line 16 is hereby corrected to delete the words, "within 24 hours."

Article 16

Uniform

Section 1. Where the Employer requires that employee(s) wear a specifically distinctive or unusual mode of dress incident to the employee's assigned duties, such prescribed uniforms shall be provided by the Employer in such quantity as to allow the employee(s) to maintain a neat and clean appearance without requiring the cleaning of the uniform on a daily basis. Employees will wear such uniforms as prescribed by the Employer ... and will not alter, change or otherwise tailor the prescribed and issued uniforms without the express consent of the Employer....

. . .

Section 5. As used in this Article, the term 'uniform' shall mean a specific and distinctive article of apparel specifically prescribed for wear by employees by the Employer....

4. Article 16, Section 1 was taken from a previous agreement between the parties and placed in the April 1979 agreement without change. Article 16, Section 5, dealing with what constitutes a uniform, was changed from the prior agreement to include prescribed color schemes.

5. Negotiation concerning Article 16, Section 1, of the previous agreement, took place in 1974 and early 1975. There was no discussion concerning the wearing of union insignia. However, it was discussed and agreed that if an employee should come to work with a lei, sweater, scarf, or gaudy jewelry, the Respondent, under Article 16, Section 1, could ask the employee not to wear such an item. (Tr. 26-27).

6. The parties stipulated as follows concerning the incidents in issue, and I so find:

> (1.) At all times material herein, employee Michael Dallas was a cart waiter for Respondent. As a cart waiter, he was required by Respondent to wear a uniform. In May 1979, he became a shop steward for the Union. In June 1979, Mr. Dallas began wearing a steward's badge on his uniform, including times when he dealt with customers of the Hale Koa Hotel. Respondent required waiters to wear a uniform consisting of brown slacks, a white shirt, vest or jacket, a bow tie and a Hale Koa Hotel name tag. On June 9, 1979, Dallas was told not to wear the steward's badge by Ernest Bodner, maitre d' and a supervisor of Respondent within the meaning of Section 7103(a)(10) of the Statute. Mr. Bodner then gave Mr. Dallas a written letter of counseling concerning the wearing of the

steward's badge as a violation of Respondent's uniform requirement. Thereafter, Mr. Dallas ceased wearing the steward's badge.

(2.) Henry Holthaus is a fry cook employed by Respondent at the Hale Koa Hotel who was also appointed a steward for the Union in May 1979. Fry cooks were required by Respondent to wear a white uniform. Holthaus wore a steward's badge for approximately 2 weeks without incident. On June 22, 1979, he was told by Executive Chef Rolf Walters, a supervisor within the meaning of Section 7103(a)(10) of the Statute, that he could not wear the steward's badge when he was serving the public. As directed, Mr. Holthaus stopped wearing his steward's badge when dealing with the public. On the average, Mr. Holthaus' weekly duties including serving the public on the buffet line three times a week and at luaus twice a week, where he was also required to wear whites.

(3.) At all times relevant to the matters in issue the Respondent has enforced its policy that wherever there is a uniform requirement no alteration of that uniform is permitted without prior approval by the Respondent. Since June 1979, as noted above, stewards of the union with a uniform requirement have not worn any steward's badges when dealing with the public.

(4.) An example of the steward's badge worn by both Dallas and Holthaus may be admitted into evidence as General Counsel's Exhibit No. 4. 2/

(5.) In January or February 1979, there was ongoing construction being performed at the Hale Koa Hotel. One week with their paychecks, Respondent distributed a patch which it requested that employees place on their uniforms (for the purpose of aiding customer relations during the construction project). Some employees did place this patch on their shirt

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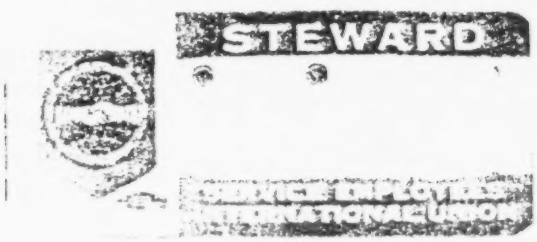
2/ The steward's badge worn by both Dallas and Holthaus measures approximately 3 inches long and 1 1/2 inches wide and, except for color, is the approximate design and dimensions as follows:



sleeves when dealing with the public for the period of about a week. A copy of this patch may be admitted into evidence as General Counsel's Exhibit NO. 5. 3/

(6.) The letter of counselling received by Michael Dallas may be admitted into evidence as General Counsel's Exhibit No. 6.

(7.) This stipulation may be entered into evidence as General Counsel's Exhibit No. 3. (Footnotes added).

7. Mr. Dallas sometimes wore his steward's badge in addition to the Hale Koa Hotel name tag and sometimes in place of the Hale Koa Hotel name tag. He wore the steward's badge over the pocket area of his uniform. The hotel name tag is approximately the same size and worn in the same location.

8. It is a tradition for hotels to have their own identification badges so that customers can readily identify employees.

3/ The patch worn by some employees at Respondent's request in January or February 1979 was the approximate design and dimensions as follows:

9. Respondent received some complaints from customers concerning the wearing of the steward's badges as described above. These customers objected to the badges, other than the hotel identification name tag, being worn, and questioned whether the employees were working for the hotel or the Union. One customer was particularly disturbed and remarked that he could not understand why employees were wearing the union name tag in a military dining room.

10. Respondent took the action described above because it concluded that the wearing of union badges by employees while serving the public was not part of the prescribed uniform, would cause further customer complaints, antagonize customers, and impact adversely on business. The Hale Koa Hotel only serves military personnel, their dependents and their guests. It has a narrow profit margin and must be self-supporting to stay in business.

11. The employees were not restricted from wearing the badges at times when they were not serving the public or were out of the view of the guests.

12. As a waiter, a substantial portion of shop steward Michael Dallas' work day was spent serving the public. He came in contact with other employees as well in the dining room.

13. Pursuant to the negotiated agreement, the Respondent provided space on official employee bulletin boards for the posting of Union notices and similar informational material and, upon request, made meeting space available for Union meetings with employees of the unit.

14. In October 1979 the Hale Koa Hotel was transferred from the command of the Respondent and transferred to the United States Army Adjutant General Center. (Tr. 5). However, for purposes of this case, the parties agree, in compliance with bargaining agreements, that any ruling involving the Respondent will also be applicable to the Hale Koa Hotel. (Tr. 51).

Discussion, Conclusions, and Recommendations

The issue presented for determination is whether Respondent's action in prohibiting the two hotel service employees from wearing their union steward's badges when dealing with the public violated Section 7116(a)(1) of the Statute. 4/

4/ Section 7116(a)(1) of the Statute provides as follows:

"§7116. Unfair labor practices

"(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
(cont'd)

The right of employees to wear small, neat, inconspicuous, non-provocative union insignia at work has been recognized in both the private 5/ and public 6/ sectors. In determining whether there has been a violation of such a right under the Statute, or whether there may be present the kind of "special circumstances" where the agency may restrict such a right, it is appropriate to examine the facts and balance the competing rights and obligations of all concerned. 7/

4/ (cont'd)

> "(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

Section 7102 provides, in relevant part, as follows:

> "§7102. Employees' rights
>
> "Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--
>
> "(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and
>
> "(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5/ Republic Aviation Corporation v. NLRB, 324 U.S. 793 (1963); Floridan Hotel of Tampa, Inc., 137 NLRB No. 161, 50 LRRM 1433, enforced as modified on other grounds, 318 F.2d 545 (5th Cir. 1963); Consolidated Casinos Corp., 164 NLRB No. 132, 65 LRRM 1301 (1967).

6/ Department of Transportation, Federal Aviation Administration, Aeronautical Center, A/SLMR No. 117, 1 A/SLMR 556, reversal in part on other grounds, 1 FLRC 246 (1973).

7/ Department of Transportation; Floridan Hotel of Tampa, Inc.; Consolidated Casinos Corp.; all supra, notes 5 and 6; NLRB v. Harrah's Club, 337 F.2d 177 (9th Cir. 1964); Davison-Paxon Co. v. NLRB, 462 F.2d 364 (5th Cir. 1972).

Article 16, Section 1 of the parties' negotiated agreement provides that, "Employees will wear such uniforms as prescribed by the Employer (or a personally owned substitute not prescribed, but authorized by the Employer) and will not alter, change or otherwise tailor the prescribed and issued uniforms without the express consent of the Employer."

As noted above, the prescribed uniform for waiters consists of brown slacks, a white shirt, vest or jacket, a bow tie, and a Hale Koa Hotel name tag. Thus, a particular name tag, the Hale Koa Hotel name tag, is a prescribed part of the uniform in the case of waiters. The prescribed uniform for fry cooks is a white uniform. A hotel name tag is not prescribed for fry cooks.

The contractual provision and its bargaining history do not demonstrate a clear and unmistakable waiver of the right to wear small, neat, inconspicuous non-provocative union insignia. However, while the badges in issue are neat and non-provocative, 8/ they are not small or inconspicuous. 9/ They are approximately 3 inches long and 1 1/2 inches wide, the customary size of a name tag and the approximate same size as the Hale Koa Hotel name tag.

The bargaining history indicates agreement by the parties on the view that the wearing of a lei, sweater, scarf, or gaudy jewelry would constitute an alteration or change of the prescribed uniform, and that such an item could not be worn without the employer's approval. In my view, since the stewards' badge is approximately the same size as the hotel name tag, the Respondent could reasonably regard its size and conspicuous nature as constituting an alteration or change of the prescribed uniform and, thus, being waived under the agreement from being worn by employees without the prior consent of the Respondent.

The record reflects that the image of the hotel is essential for business and public relations. It is traditional for hotels to have their own identification badges so that customers can readily identify employees. (Tr. 32-33). 10/ In this case, some customers were confused as to whether the waiter was employed by the hotel or the Union. Some employees were also confused about the wearing of the two name tags. (Tr. 40-41). The prohibition against the wearing of the stewards' name tag was, thus, a valid exercise of the Respondent's right, on the basis of business judgment, to avoid confusing

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8/ See Consolidated Casinos Corp., supra.

9/ Compare Consolidated Casinos Corp., supra, and Eckerd's Market, Inc., 74 LRRM 1319 (1970), where the Union buttons were the size of a nickel, Floridan Hotel of Tampa, Inc., supra, where the Union button was smaller than a dime, and Department of Transportation, supra, where the membership pin was "unobtrusive."

10/ Cf. National Treasury Employees Union and U.S. Customs Service, Region VIII, San Francisco, California, 2 FLRA 30 (1980), where the Authority agreed with the agency's contention that the requirement for uniformed employees to wear nameplates constitutes management's choice of "means of performing work" under Section 7106(b)(1) of the Statute.

customers and protecting its image by not authorizing the wearing of a foreign name tag as part of the prescribed uniform. Cf. NLRB v. Harrahs Club, 337 F.2d 177 (9th Cir. 1964); Davison-Paxon Co. v. NLRB, 462 F.2d 364, 371 (5th Cir. 1972); AFGE, National Immigration and Naturalization Service Council and Department of Justice, INS, FLRC No. 76A-26, 5 FLRC 104 (1977).

It should be emphasized, however, that the record reflects that Respondent also took into consideration some complaints apparently having nothing to do with the size, conspicuous nature, or confusion caused by the stewards' badges. These were simply customer objections to union badges being worn in a military dining room. In my view, these complaints are entitled to no weight, even though Respondent might fear a diminution of business if customers are antagonized by union buttons. Such customers may not be aware of employee rights under the Statute. The mere fact that employees come into contact with customers who might be offended by union buttons does not constitute such special circumstances as to deprive employees of the right of wearing otherwise proper union insignia. 11/

The General Counsel contends that in addition to being a protected employee right under the Statute, the badges in issue are needed by the Union to provide notice to employees of the identities of the two stewards. One of the stewards spends most of his time serving the public as a waiter. Thus, the General Counsel asserts that in preventing him from wearing the steward badge while serving the public, the Respondent effectively prevents him from displaying his badge to other employees and alerting them to the fact that he is their union representative.

Although the record shows that there are approximately 500 employees in the unit at the Hale Koa Hotel, there was no showing of how many stewards there are among the waiters and cooks, or that the Union's other means of communication with unit employees are inadequate to inform employees of the identities of their union stewards, such as notices on bulletin boards, the wearing of less conspicuous stewards' badges, the wearing of the badges in issue outside the public view, or a combination of these alternatives.

After considering all the circumstances, and particularly the size and nature of the stewards' badges, it is concluded that a preponderance of the evidence does not establish that Respondent's action in prohibiting the two hotel service employees from wearing the union stewards' badges in issue while dealing with the public violated Section 7116(a) of the Statute, as alleged.

It is noted particularly that the restriction is pursuant to and consistent with Respondent's long-standing policy of enforcing its prescribed uniform requirement, there is no evidence of a discriminatory purpose, and uniformed

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11/ Cf. Consolidated Casinos Corp. and Floridan Hotel of Tampa, Inc., supra. Compare Davison-Paxon Co. v. NLRB, supra, 462 F.2d at 370 where the court held, in part, that an employer could reasonably believe that the wearing of a conspicuous union button would cause existing employee unrest to extend to the selling floor and antagonize customers.

employees are allowed to wear the union stewards' badges in issue when they are not serving the public.

Recommendation

Upon the basis of the foregoing findings and conclusions, it is recommended that the Authority issue the following Order pursuant to 5 C.F.R. §2423.29(c):

Order

It is hereby Ordered that the complaint in Case No. 6-CA-62 be, and it hereby is, dismissed.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: March 10, 1980
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES AIR FORCE
DYESS AIR FORCE BASE, TEXAS
ABILENE, TEXAS

Respondent

and

Case No. 6-CA-117

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2356

Complainant

DECISION AND ORDER

The Administrative Law Judge issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practice alleged in the complaint and recommending it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Respondent filed exceptions to the Administrative Law Judge's Recommended Decision and Order and the General Counsel filed a response to the Respondent's exceptions.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (5 CFR 2400.2). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions, and the General Counsel's response thereto, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation except as modified herein.

The Administrative Law Judge found that the Respondent violated section 19(a)(2) and (1) of Executive Order 11491, as amended, by refusing to rehire Mrs. Patricia C. Carroll because of her activity as a union steward for the Complainant, Local 2356, AFGE. As a remedy the Administrative Law Judge recommended, among other things, that the Respondent offer Patricia C. Carroll

employment as a sales store checker, GS-3 intermittent, or if that job no longer exists, in a substantially similar position, and make her whole by the payment of that sum of money which she would have earned between the date of discriminatory failure to hire and the date of offer of employment, less any amounts earned elsewhere during that period of time.

The Comptroller General has previously decided, in matters arising under Executive Order 11491, as amended, that in cases of agency discrimination in hiring, the Back Pay Act of 1966, 5 U.S.C. 5596 (1970) "is apposite only to Federal employees and does not provide a remedy for unsuccessful applicants for Federal employment." See Decision No. B-180010, 54 Comp. Gen. 760, 763 (March 19, 1975). The Comptroller General further indicated that, in his opinion, the Assistant Secretary of Labor for Labor-Management Relations "may not direct an applicant's appointment [to a civil service position] even though he is authorized to take affirmative action in cases involving discrimination in hiring as a result of an unfair labor practice." In so concluding, he noted that "the authority to appoint is in the administrative agencies under regulations issued by the Civil Service Commission [now the Office of Personnel Management]." Id. at 763-764. See also Federal Employees Metal Trades Council and Mare Island Naval Shipyard, 3 FLRA No. 90, wherein the Authority, based upon an interpretation by OPM, set aside as violative of applicable law, civil service regulations and instructions, an arbitrator's award requiring a grievant to be retroactively appointed to a career position with back pay. In view of the foregoing, the Authority is constrained to conclude that the remedial order recommended by the Administrative Law Judge must be modified as set forth below.*/

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of the Air Force, Dyess Air Force Base, Abilene, Texas, shall:

1. Cease and desist from:

(a) Refusing to employ Patricia Carroll, or any other applicant, because of membership in, or activity in behalf of, Local 2356, American Federation of Government Employees, AFL-CIO.

(b) Discouraging membership in Local 2356, American Federation of Government Employees, AFL-CIO, or any other labor organization, by discrimination in respect to any term or condition of employment, based upon considerations of union membership.

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*/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purpose and policies of Executive Order 11491, as amended:

(a) Give first consideration to Patricia Carroll, in filling any position for which she may be qualified, including but not limited to the position of sales store checker, GS-3 intermittent, without regard to her union activity on behalf of Local 2356, American Federation of Government Employees, AFL-CIO, or any other labor organization.

(b) Post at its Abilene, Texas, facility, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Base Commander and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Base Commander shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., July 31, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to employ Patricia Carroll, or any other applicant, because of membership in, or activity on behalf of, Local 2356, American Federation of Government Employees, AFL-CIO.

WE WILL NOT discourage membership in Local 2356, American Federation of Government Employees, AFL-CIO, or any other labor organization, by discrimination in respect to any term or condition of employment, based upon considerations of union membership.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of rights assured by Executive Order 11491, as amended.

WE WILL give first consideration to Patricia Carroll, in filling any position for which she may be qualified, including but not limited to the position of sales store checker, GS-3 intermittent, without regard to her union activity on behalf of Local 2356, American Federation of Government Employees, AFL-CIO, or any other labor organization.

_____

United States Air Force, Dyess
Air Force Base, Texas, Abilene, Texas

Dated: _____ By: _____

(Base Commander)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address is: Bryan & Ervay Street, Old Post Office Building, Room 450, Dallas, Texas 75221.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of

UNITED STATES AIR FORCE
DYESS AIR FORCE BASE, TEXAS
ABILENE, TEXAS

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2356

Charging Party

Case No. 6-CA-117

Steven M. Angel, Esquire
Federal Labor Relations Authority
Region VI
Bryan & Ervay Street
Old Post Office Building
Room 450
Dallas, TX 75221
For the General Counsel

Jerry M. Brasel
Central Labor Law Office
Randolph Air Force Base, TX 78148
For the Respondent

Milton Colia
96th CSG/JA
Dyess Air Force Base, TX 79607
For the Respondent

Pete Evans
National Representative, 10th District
American Federation of Government
Employees, AFL-CIO
203 Timothy Trail
Duncanville, TX 75116
For the Charging Party

Before: JOHN H. FENTON
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This is a proceeding pursuant to the Federal Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. Section 7101 et seq., which arose upon a complaint filed on August 20, 1979 by the Regional Director, Region 6, Federal Labor Relations Authority, against the Department of the Air Force, Dyess Air Force Base, Abilene, Texas. The complaint alleged that Respondent violated Section 19(a)(2) and (1) of Executive Order 11491 on December 13, 1978, by refusing to rehire Mrs. Patricia C. Carroll because of her activity as a steward for Local 2356, AFGE. Respondent's defense, in substance, is that Carroll was not hired because she had indicated an intention to bid out of the Commissary on the basis of her status as a reinstatement eligible, and thus would not serve long in the Commissary; because she had applied undue pressure in her effort to be hired; and because it hired pursuant to a special (local) recruitment program designed to meet the requirements of its equal employment opportunity program.

At the hearing all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. Counsel for the General Counsel and for Respondent filed briefs. Upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact and conclusions.

Facts

1. Mrs. Patricia C. Carroll first worked as a GS-3 checker at the Dyess Air Force Base Commissary from July of 1974 to May, 1976. She was a very active and successful Union steward from March of 1975 until she left. She described nine grievances she won, including one addressed to pre-selection of the Head Cashier which redounded to the benefit of the present incumbent, Mrs. Anna Hammersmith. She also complained to the Office of Special Investigations about thefts which she said had been ignored by management. She testified that when she resigned, agents of that Office told her to immediately contact them in the event she ever was refused reemployment. When she left Dyess to accompany her husband to Orlando, Florida, she requested and received outstanding letters of recommendation from Hammersmith, Major Root and the Dyess Commissary Officer. She was described by Hammersmith as "very efficient....dependable and conscientious," an "outstanding" employee and a "great asset to any organization." The other two were equally effusive in their praise (G.C. Exhibits 4, 15(a) and 15(b)).

2. Carroll was a cashier in the Orlando Navy Exchange from September of 1976 to May of 1977 and then moved to Arizona, where she worked as a GS-2 intermittent checker in the commissary at Luke Air Force Base for approximately 90 days ending in August, 1978. During that time she used sophisticated cash registers similar to those in use at Dyess. In mid-August she telephoned Mrs. Hammersmith to inform her that she was returning to Abilene, and to inquire

about the availability of cashier jobs and housing. Hammersmith told her that they always need cashiers and agreed to call Personnel to determine whether Carroll should attempt to transfer or should resign and reapply. Then or in their next conversation, Carroll was told that the available jobs were GS-3 intermittent part-time, which limited employees to 20 hours per week whenever needed.

3. In early September Carroll moved to Abilene and visited Hammersmith at work. She was told that the vacancies existed but were not yet being filled, and that she should apply at the Personnel section, making sure that she indicated her willingness to accept intermittent employment. At that time she was introduced as a former cashier to Mr. Ray Whitley, Commissary Manager. He also stated that cashiers were always needed. In mid-September Carroll filed an application with Personnel. Again she was told that there were openings but it was not known when they would be filled. She provided Dyess officials with a letter of reference from her supervisor at Luke, which noted that she was highly trained in the NCR 255/726 cash register and that she was number two in an Air Force Competition. (G.C. Exhibit 15(c)).

4. On October 24, 1978, Department of Defense was placed under a Presidential freeze which permitted it to replace only 50% of attrition. This lasted until February of 1979, and intensified "raiding" among components of Department of Defense to acquire needed personnel. Because of the relatively low grades and income of Commissary intermittent cashiers, Base management had reason not to increase its vulnerability to such turnover by hiring reinstatement eligibles who could almost immediately bid out to better jobs. Employees without status would receive temporary appointments and be required to work several months before acquiring status and then an additional 90 days before being eligible to bid out. A perhaps more stable, if less experienced staff could in this manner be assembled. 1/

5. From mid-September until her interview on December 13, Carroll regularly visited Hammersmith at the Cashier's Cage in the Commissary and inquired about job developments. Although never accusing Carroll of being discourteous or unfriendly, this persistence, according to Hammersmith and Assistant Head Cashier Goldie Wiley, was received as pressure by Hammersmith, and constituted "hassling" which Hammersmith came to resent. 2/ Hammersmith testified that Carroll constantly asked when she would be hired, and said she would make

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1/ This effort to analyze an important element of the defense is complicated by the fact that six of the eight cashier's hired for whom personnel records were available were wives of servicemen, and therefore subject to relocation with their husbands. Hammersmith testified that there is much turnover among military dependents.

2/ Thus, Wiley told Hammersmith she felt that Carroll was putting pressure on her, and Hammersmith responded that she did feel she was being pressured. Nevertheless Wiley described the visits as friendly. They were annoying she said, because the questions repeatedly put could only be answered by Personnel.

trouble if she was not. Carroll acknowledges having told her about the invitation to report any refusal to rehire to the Office of Special Investigations, and further, that if she was not "sent for consideration" for employment (made eligible by Personnel) she would question it. On several occasions she asked Hammersmith to call Personnel "right then," while she waited, and she once inquired about the hours worked by part-timers, saying that she was "checking up" on her. At about the time of her interview she informed the Legal Office that she could be reached at the Commissary, so confident was she of such employment. In one such conversation, Carroll asserts, Hammersmith said when asked whether Carroll would get the job, that she did not know, that she had to discuss it with Whitley and still had more people to interview. Hammersmith and Whitley testified that she had a free hand in hiring.

6. In late November or early December, Commissary Manager Whitley visited Civilian Personnel Officer Ibbotson to inquire about progress on the list of eligibles for cashiers. In the course of their conversation Ibbotson told Whitley that Carroll had been a Union steward. When Whitley reported back to Hammersmith as to when the list would be sent down, according to his and Hammersmith's testimony he remarked that he did not know that Carroll had been a Union steward. Hammersmith testified that she replied that Carroll was, but that she did not think that that was an issue, and that Whitley agreed it was not.

7. Helen Blair, a clerical assigned to Whitley's office, and a Union member, testified that she overheard a conversation between Whitley and Hammersmith in December when the former inquired of the latter about the progress of interviews. Hammersmith allegedly responded that she didn't know why she had to interview Carroll, who knew the NCR register, had worked there and used to be the steward, to which Whitley allegedly responded "we don't want anymore of that Union in the Commissary." 3/ This conversation allegedly occurred at the Head Cashier's cage, out of Mrs. Blairs sight, and was ended by a phone call. Rozel Collins, also a clerical assigned to Whitley, and a Union steward, 4/ testified that in December she overheard a conversation involving Whitley, Hammersmith and Assistant Head Cashier Wiley. Allegedly, Whitley asked Hammersmith what kind of person Carroll was, to which Hammersmith replied "Well, she's a Union steward and she just keeps a lot of hell going." Whitley allegedly responded "Well, we don't want anymore of that Union shit here ... and furthermore I'm not going to have anymore of that Union shit in here." 5/ Wiley, Whitley and Hammersmith denied that any such conversation took place,

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3/ I consider it insignificant that the word "union" was omitted from Blair's statement given the Inspector General, as it is clear from the context that the reference was to the Union.

4/ She received a promotion while serving in that capacity.

5/ Ms. Collins gave a statement to the Inspector General in which she did not mention the Union in the words attributed to Whitley, and substituted "mess" for the expletive.

although the latter two did admit to a discussion of Carroll's former role as steward, as related above.

8. On December 6, Personnel forwarded to the Commissary a list of 12 applicants eligible for consideration, to be interviewed by Hammersmith for the nine vacancies. Carroll was interviewed on December 13. On that or some earlier occasion, Carroll had indicated that once hired, she would be eligible to bid out without delay. The applications had been screened by Goldie Wiley, who told Hammersmith that Carroll had extensive cashiering experience and probably would make a good cashier. Nine employees were selected, all from the so-called local labor market (sometimes called the Texas Employment Commission (TEC) source), which is to say they enjoyed no Civil Service status. Neither Carroll nor Wiley and Brier, the other two reinstatement eligibles on the list for consideration was hired. As noted, Respondent in part defends on the ground that such reinstatement eligibles were unlikely to last as long as temporary employees, and that Wiley and Brier were not Union activists. However, Hammersmith stated on the personnel form that Wiley did not have enough experience on the cash register, and said simply, with respect to Carroll and Brier, that she had selected other candidates.

Carroll testified that she asked Hammersmith why she had not been hired and was told that she had "hassled" Hammersmith, who took this and other things into consideration, and that Hammersmith did not have to give her a reason. Hammersmith testified that she told Carroll she decided not to hire her because Carroll was harrassing her. On examination by Counsel for the General Counsel she gave as her reasons the fact that Carroll had told her she had been told she did not have to wait 90 days before applying for another job (taken by Hammersmith as a statement that she would not stay), and that she felt that Carroll was putting pressure on her and threatening to make trouble if she was not hired. Hammersmith admitted that Carroll had the most experience among the applicants in operating a cash register, that she knew reinstatement eligible applicant Brier already had another job and was looking for full-time employment and that reinstatement eligible applicant Wiley lacked experience. Their status as reinstatement eligibles was, according to Hammersmith, important only if there was reason to believe that they would seek to bid out at an early date. She admitted also that selected applicant Frazier was as likely as a reinstatement eligible to bid out. She also conceded that the EEO program had no "real" impact on the decision whether to hire Carroll. 6/

9. Although evidence was adduced that Carroll was not thereafter considered for any similar vacancy because such jobs were filled at the GS-2 level, below her minimum acceptable level, a Certificate of Eligibles was in fact issued for GS-3 checkers on January 26, 1979 and one person was selected from it (G.C. Exhibit 17). Consistent with his position that none of the three

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6/ Failure to rely on this defense is unsurprising, as all applicants were female and the hiring of four minority members, while diminishing opportunities for whites, hardly eliminated Carroll's prospects for selection to one of the five remaining vacancies.

reinstatement eligibles had any right to be considered for the vacancies filled in December, Civilian Personnel Director Ibbotson did not refer them for consideration by the hiring officials in the Commissary.

10. Carroll filed a complaint of "unfair employment practices" with the Inspector General on an unknown date sufficiently early to provoke an investigation during the period from January 15 to 18, 1979. That investigation was reopened, in part, upon Carroll's request that Inspector General should interview other witnesses and consider the impact of her activity as a Union steward upon her nonselection, and further investigation took place from March 1 through 8. Thereafter a Report of Investigation issued, a part of which was furnished to Carroll pursuant to an FOIA request, which is in evidence as G.C. Exhibit 16. It records that Base management defended its nonselection of Carroll exclusively on the ground that selection of the successful applicants was based upon the requirements of the Base EEO plan and its special recruitment program. No mention was made in that Report, or the first Report, of the retainability defense upon which Respondent relied so heavily in this proceeding. The relevant "special recruitment" FPM provision requires that agencies, in deciding which source or sources of candidates to use, must determine "which is most likely to best meet the agency mission objectives, contribute fresh ideas and new viewpoints and meet the agency's affirmative action goals."

11. Civilian Personnel Director David Ibbotson testified that his statement to the Inspector General was a fair statement of the reasons for nonselection of Carroll. That statement simply parroted the quoted FPM provision. However, he otherwise placed great, or at least particular emphasis, on the fact that the three reinstatement eligibles were not hired in order to keep cashiers available, as they were assumed to wish entry into the Commissary as a springboard to better positions elsewhere. Nevertheless, there is no indication that such considerations were communicated to the selecting official, nor that they entered significantly into the selection process. Thus Brier and Wiley were rejected for other reasons, and Carroll was allegedly rejected because she had "hassled" or "harassed" Hammersmith and also because she had indicated a disposition to bid out early.

Analysis and Conclusions

The General Counsel asserts that the nonselection of Carroll was based upon animus flowing from her earlier activity as a Union steward, and that the circumstantial evidence supporting this view is overwhelming. He lays particular stress upon the shifting and "pretextual" nature of the various bases offered by management in explanation of its action. Management asserts it had a legitimate reason for avoiding the reinstatement eligibles - two of whom were not union members - in their likely proclivity to use cashier jobs as stepping stones. Direct hires, on the other hand, would be likely to stay, even if involuntarily. To this it adds the fact that Carroll tried to pressure Hammersmith to hire her, that she used her stewardship "as a hammer to get the job." Finally (though not necessarily as a matter of priority), it asserts that the local recruitment program, with its EEO component, explains the failure to rehire Carroll. It is, of course, reliance on these multiple grounds which the General Counsel seeks to exploit.

There is a strange irrelevancy to the defense based on the local recruitment program. All those eligible for consideration were in fact local, all were female, minority hires left ample vacancies, and the asserted TEC source evaporated. Most importantly, Hammersmith, the selecting official according to management, testified that the EEO program did not bear upon Carroll's nonselection. Likewise, she testified that Carroll's status as a reinstatement eligible was relevant "only in a way," an apparent reference to the fact that it was not such status, but rather indication of an intention to use such status to bid out, that mattered. While the local recruitment program would have justified a refusal to consider reinstatement eligibles as a source (as happened later) they were in fact referred for consideration. Thus Personnel did not preclude their rehire, and such status did not alone impact upon the decision not to reemploy Carroll.

Carroll was the most experienced applicant, and her work at Dyess and elsewhere as a cashier was highly regarded. It is evident that Hammersmith welcomed her reappearance and sought to facilitate her reemployment. Either Carroll wore out her welcome with her persistent, somewhat presumptuous pursuit of the job, or by disclosing an intention to bid out quickly, or she was not hired on the instructions of Whitley because of her activities as a steward. Perhaps all such reasons entered into the decision. Interestingly, the belief that she would bid out as promptly as possible was not given to her as a reason, nor did it provoke any discussion of her plans. According to both Hammersmith and Carroll, "hassling" or "harassment" was the only specific reason assigned.

The demeanor of the principal witnesses has not aided me. Hammersmith, Wiley, Carroll, Blair and Collins gave the impression of being straightforward. My conclusions thus are principally based on the logic of the situation, and in part upon both the shifting and contradictory defenses advanced by the several layers of management and the reliance I place upon the testimony of Helen Blair and Rozelle Collins, who took the risk of testifying against their immediate superior in circumstances where there was no apparent reason for them to misstate the facts. Aside from the statement they attribute to Whitley, there is, in fact, no evidence of animus toward the Union. Collins received a raise while steward, Carroll received excellent references after her period of activity as steward, and Hammersmith in the beginning was certainly helpful to Carroll in her effort to secure employment. I do not doubt that Carroll came to annoy Hammersmith, and to convey the impression that she must be hired, and that Hammersmith felt and resented the pressure. Carroll did not deny having said that she would be entitled to bid out immediately upon being hired. It is suspicious however, that neither of these reasons was used on the form recording the reason for nonselection, that the latter was never communicated to Carroll, and that the major thrust of the defense presented in the Inspector General investigation was the local recruitment program and its EEO component.

Respondent concedes that Whitley and Hammersmith had a conversation about Carroll's status as a former steward, after Whitley was informed by Ibbotson that she had been the steward. While he claims that such knowledge caused him no "particular" concern, I reject his claim that he left the hiring decision totally to Hammersmith. Rather I credit the testimony of Blair and Collins

that he told Hammersmith that the Commissary did not need any more Union activism, and I conclude that Hammersmith decided not to hire Carroll for that reason. No other persuasive reason is advanced for the nonselection of a highly qualified applicant, one of the few with relevant experience, and one whose previous work had been regarded as outstanding. Accordingly, I find that a violation of Sections 19(a)(2) and (1) of the Order has been established.

Recommendation

On the basis of the foregoing findings and conclusions, it is recommended that the Authority issue the following Order pursuant to 5 C.F.R. §2423.29(c):

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations thereunder, and Section 2400.2 of the Final Rules and Regulations, it is hereby ORDERED that the Department of the Air Force, Dyess Air Force Base, Abilene, Texas shall:

1. Cease and desist from:

(a) Refusing to employ Patricia Carroll, or any other applicant, because of membership in, or activity in behalf of, Local 2356, American Federation of Government Employees, AFL-CIO.

(b) Discouraging membership in Local 2356, American Federation of Government Employees, or any other labor organization, by discrimination in respect to any term or condition of employment, based upon considerations of union membership.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of rights assured by Executive Order 11491.

2. Take the following affirmative action in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Offer employment as a sales store checker, GS-3 intermittent, to Patricia Carroll, or if that job no longer exists, in a substantially similar position, without prejudice to the seniority or other privileges she would have enjoyed but for the discrimination, and make her whole by the payment of that sum of money which she would have earned between the date of discriminatory failure to hire and the date of offer of employment, less any amounts earned elsewhere during that period of time.

(b) Post at its Abilene, Texas, facility, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon reciept of such forms they shall be signed by the Base Commander and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Base Commander shall take reasonable

steps to insure that such notices are not altered, defaced or covered by any other material.

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

John H. Fenton

JOHN H. FENTON
Administrative Law Judge

Dated: March 21, 1980
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

We hereby notify our employees that:

WE WILL NOT refuse to employ Patricia Carroll, or any other applicant, because of membership in, or activity in behalf of, Local 2356, American Federation of Government Employees, AFL-CIO.

WE WILL NOT discourage membership in Local 2356, American Federation of Government Employees, or any other labor organization, by discrimination in respect to any term or condition of employment, based upon considerations of union membership.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of rights assured by Executive Order 11491.

WE WILL offer employment as a sales store checker, GS-3 intermittent, to Patricia Carroll, or if that job no longer exists, in a substantially similar position, without prejudice to the seniority or other privileges she would have enjoyed but for the discrimination, and make her whole by the payment of that sum of money which she would have earned between the date of discriminatory failure to hire and the date of offer of employment, less any amounts earned elsewhere during that period of time.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address is: Bryan & Ervay Street, Old Post Office Building, Room 450, Dallas, TX 75221.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. PATENT AND TRADEMARK OFFICE

Respondent

and

Assistant Secretary
Case No. 22-09584(CA)

PATENT OFFICE PROFESSIONAL ASSOCIATION

Complainant

DECISION AND ORDER

The Administrative Law Judge issued his Recommended Decision and Order in the above-entitled proceeding finding that the Respondent had engaged in certain unilateral conduct, pertaining to a reduction in turnaround time for the processing of amended cases by patent examiners and to a change in the existing policy of notification to supervisors regarding unit employee absences from their workplace, which was violative of section 19(a)(1) and (6) of Executive Order 11491, as amended, and recommending it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge further found other conduct, pertaining to the Respondent's statement that employees were expected to achieve 100% of their assigned production goal and the achievement of anything less would be considered deficient, was not violative of section 19(a)(1) and (6) of the Order and recommended dismissal of that portion of the complaint. Both parties filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (5 CFR 2400.2). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions filed by the parties, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendations. In adopting the Administrative Law Judge's

finding that turnaround time or "time targets" in this case is a negotiable matter within the meaning of section 11(a) of the Executive Order, the Authority does not construe the Administrative Law Judge's finding to mean that any proposal concerned with the subject of turnaround time or time targets would be within the duty to bargain, i.e., consistent with applicable law and regulations. Rather, noting that the Administrative Law Judge was not presented with nor was his determination based upon a specific proposal with regard thereto, in our view, the Administrative Law Judge merely ruled that specific proposals pertaining to the matter of turnaround time or time targets could be drafted within the scope of the duty to bargain under the Executive Order. Accordingly, in the circumstances of the instant case, the Authority finds, in agreement with the Administrative Law Judge, that the Respondent violated section 19(a)(1) and (6) of the Executive Order by unilaterally reducing the turnaround time for the processing of amended cases by patent examiners. However, in so finding, the Authority makes no judgment as to whether proposals relating to the matter of time targets for the performance of various duties would be within the duty to bargain under the Statute. Such a determination would require the presentation of proposals sufficiently specific and delimited in form and content by which the Authority could ascertain whether negotiations over such proposals would be consistent with law, regulations and the Statute.*/

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the U.S. Patent and Trademark Office shall:

1. Cease and desist from:

(a) Instituting changes in the length of turnaround time for the processing of amended cases by unit employees in Group 310 without first notifying the Patent Office Professional Association, the exclusive representative of the unit employees, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, with regard to any proposed changes in turnaround time.

(b) Instituting changes in the existing policy of notification to supervisors regarding unit employee absences from their workplace without first notifying the Patent Office Professional Association, the exclusive representative of the unit employees, and affording such representative the opportunity to meet and confer to the extent consonant with law and regulations, on such changes.

*/ In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions:

(a) Rescind the change in turnaround time for the processing of amended cases in Group 310 as announced by Group Director Newman on October 5, 1978.

(b) Rescind the change in policy of notifying supervisors regarding unit employee absences from their workplace as announced by Group Director Newman on October 5, 1978.

(c) Notify the Patent Office Professional Association of any intended change in the turnaround time for the processing of amended cases and of any intended change in the policy of notifying supervisors regarding unit employee absences from their workplace and, upon request, meet and confer in good faith, to the extent consonant with law, regulations and the Statute, on such intended changes.

(d) Post at its facilities in Crystal City, Arlington, Virginia, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Deputy Assistant Commissioner for Patents, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees customarily are posted. The Deputy Assistant Commissioner shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(e) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS HEREBY FURTHER ORDERED that the portion of the complaint found not to be violative of the Executive Order be, and it hereby is, dismissed.

Issued, Washington, D.C., July 31, 1980

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute changes in the length of turnaround time for the processing of amended cases by unit employees in Group 310 without first notifying the Patent Office Professional Association, the exclusive representative of the unit employees, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, with regard to any proposed changes in turnaround time.

WE WILL NOT institute changes in the existing policy of notification to supervisors regarding unit employee absences from their workplace without first notifying the Patent Office Professional Association, the exclusive representative of the unit employees, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind the change in turnaround time for the processing of amended cases in Group 310 as announced by Group Director Newman on October 5, 1978.

WE WILL rescind the change in policy of notifying supervisors regarding unit employee absences from their workplace as announced by Group Director Newman on October 5, 1978.

WE WILL notify the Patent Office Professional Association of any intended change in the turnaround time for the processing of amended cases and of any intended change in the policy of notifying supervisors regarding unit employee absences from their workplace and, upon request, meet and confer in good faith, to the extent consonant with law, regulations and the Statute, on such intended changes.

_____
(Agency or Activity)

Dated:_____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, whose address is: Room 300, 1133 15th Street, N.W., Washington, D.C. 20005, and whose telephone number is (202) 653-8452.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

In the Matter of	
U.S. PATENT AND TRADEMARK OFFICE Respondent	
and	Case No. 22-09584(CA)
PATENT OFFICE PROFESSIONAL ASSOCIATION Complainant	

Ronald J. Stern, Esquire
Patent Office Professional Association
P. O. Box 2745
Arlington, Virginia 22202
For the Complainant

Robert S. Sherman, Esquire
Chief, Employee Relations Division
Patent and Trademark Office
United States Department of Commerce
Washington, D.C. 20231
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is a proceeding under Executive Order 11491, as amended (hereinafter also referred to as the "Order"). Pursuant to transition rules and regulations, Federal Register, Vol. 44, No. 1, January 2, 1979, pp. 7-8 and Federal Register, Vol. 44, No. 147, July 30, 1979, pp. 44741-44742, all proceedings after January 1, 1979, have been conducted before the Federal Labor Relations and this decision is issued by the Authority in accordance with

Section 2400.2 of the transition rules and regulations (5 C.F.R. Section 2400.2).

This matter was initiated by a charge filed on, or about, October 13, 1978; a complaint filed on December 29, 1978, which alleged violations of Sections 19(a)(1), (5) and (6) of the Order (ALJ Exh. 1); and an amended complaint filed on June 11, 1979, which alleged violation of Sections 19(a)(1) and (6) of the Order (ALJ Exh. 2). Notice of Hearing issued on June 26, 1979, for a hearing on July 25, 1979 (ALJ Exh. 3); and on July 23, 1979, at the request of Respondent, with consent of Complainant, and for good cause shown, Notice Rescheduling the hearing for August 27, 1979, was issued by the undersigned (ALJ Exh. 5), pursuant to which a hearing was duly held in Washington, D.C. on August 27 and 28, 1979. All parties were represented by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. At the close of the hearing, October 15, 1979, was fixed as the date for the filing of briefs and each party has timely filed an excellent brief which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendations:

Findings and Conclusions

A. Background. The Patent and Trademark Office (PTO), a primary operating unit of the Department of Commerce, is headed by the Commissioner of Patents and Trademarks. There are three major subdivisions within the PTO, only one of which is involved herein, namely, the subdivision under the jurisdiction of the Assistant Commissioner for Patents, which includes the Patent Examining Corps of about 1,000 patent examiners who are individuals technically trained to examine patent applications relating to inventions in various fields. The PTO receives in excess of 100,000 patent applications each year. Each application is examined by a patent examiner for compliance with the statute, with case law and with applicable regulations.

The Patent Examining Corps is divided into 15 functional groups. Each group is headed by a Group Director. Each group is further divided into technological speciality units, known as Art Units. Art Units are supervised by Supervisory Primary Examiners. Within each Art Unit are patent examiners ranging in grade from GS-5 to GS-15.

The initial examination of a patent application may, and frequently does, reveal deficiencies in which case the application is returned to the inventor, or representative,

for clarification or correction. When resubmitted, the application is considered an amended case and the time it takes an examiner to act further on an amended case is known as turnaround time.

Mr. Mark Newman has been a Group Director since September, 1971, first of Group 340, then, from May, 1974, of Group 350, and from October 1, 1978, of Group 310. The incidents involved in this proceeding relate to Group 310 following Mr. Newman's assumption of duties as Director of Group 310.

B. Facts giving rise to this proceeding. There is no dispute as to the facts which gave rise to this proceeding. On October 5, 1978, Mr. Newman met with all professional employees of Group 310. Mr. Newman had assumed his new position as Director of Group 310 a few days earlier and the meeting was held for the purpose of introducing him to the professional employees of Group 310 and to instruct them as to how he intended to operate Group 310. Mr. Newman stated that: a) there would be a change from 60 to 30 days turn-around time for amended cases. Respondent concedes, in its Brief at page 3, that this was a change in operating procedures; b) that employees should keep their supervisors apprised of their whereabouts for absences in excess of 10 minutes; and c) that, as professional employees, examiners would be expected to achieve 100 per cent of their individually assigned production goals; that "anything less than 100% of expectancy was considered deficient" (Jt. Exh. 7, p. 3; Tr. 101). Complainant contends that each of the above announcements by Mr. Newman constituted a change of an established condition of employment as to which Complainant was entitled to notice and opportunity to bargain prior to such change being implemented; that Respondent was given no advance notice of the October 5, 1978, announcement, and, of course, no opportunity to bargain prior to announcement of the changes in personnel policies and working conditions. Respondent, in its Brief at pages 13-14, "admits a violation of Sections 19(a)(1) and (6) of the Order in its failure to provide to POPA [Respondent] advance notice of the October 5, 1978, meeting"; but denies that it has otherwise violated the Order and/or asserts that Complainant "has failed to sustain its burden of proof by either a preponderance of the evidence or even by a lesser standard of substantial evidence." (Respondent's Brief, p. 14).

C. The alleged violations.

1. Turnaround time. Respondent contends that its conceded unilateral change in operating procedure, whereby turnaround time was changed from 60 days to 30 days, was, nevertheless, a reserved right of management protected by

Section 12(b)(5) of the Order 1/, or, at most, was a permissible area of bargaining pursuant to Section 11(b) of the Order, but not, in any event, a required matter for bargaining; and, moreover, that, while Respondent did not give advance notice of the impending change in turnaround time, the change was not to be effective until three months after Mr. Newman's announcement on October 5, 1978, and Complainant, with ample opportunity to request negotiations on impact and implementation, failed to do so.

Section 12(b)(5) provides as follows:

> Section 12(b) management officials of the agency retain the right, in accordance with applicable laws and regulations --
>
> . . .
>
> "(5) to determine the methods, means, and personnel by which such operations are to be conducted; . . . ."

Section 11(b) of the Order provides as follows:

> "(b) In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligations imposed by paragraph (a) of this section. However, the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions of employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change." (Emphasis supplied).

1/ At the hearing, Respondent stated that this action was also a reserved right of management under 12(b)(1) and (2) of the Order. As Respondent does not make such assertion in its Brief, no further consideration will be given to applicability of Sections 12(b)(1) or (2) to the change in turnaround time.

There is no doubt that the turnaround time for amended cases in Group 310 had been 60 days prior to Mr. Newman's announcement on October 5, 1978, that, affective January, 1979, it would be 30 days; nor, that, beginning immediately, examiners were expected to dispose of pending amended cases so that beginning in January, 1979, the 30 day turnaround time limit would be adhered to. Indeed, except for Groups 340 and 350, when supervised by Mr. Newman, the standard for all Groups, as set forth in the memorandum of Deputy Assistant Commissioner for Patents, Mr. William Feldman,to Directors, Patent Examining Groups, dated March 5, 1973 (Jt. Exh. 10) was, and is, ". . . two months of receipt of the amendments", which Mr. Feldman further emphasized in his memorandum, to Directors, Patent Examining Groups, dated June 22, 1973 (Jt. Exh. 11). It is further noted, that Mr. Feldman in his memorandum of June 22, 1973, stated, in part, as follows:

> ". . . one of the primary elements constituting the goals of the Patent Examining Groups is to act on all amended patent applications within two months of receipt of the amendments. (Emphasis in original).
>
> "To obviate any further misunderstanding of this matter, until further notice from this Office no patent examiner shall act on any new case not enjoying special status as long as he has an amended case over two months old . . . ." (Jt. Exh. 11).

While it is obvious that the Patent Office has long been concerned with the orderly disposition of amended cases, both the written policy as to the two month (60 day) turnaround time for amended cases, as set forth by the Deputy Assistant Commissioner for Patents, Mr. Feldman, and the practice within Group 310 establish firmly that, prior to October 5, 1978, the turnaround time in Group 310 had been 60 days and that Mr. Newman unilaterally, on October 5, 1978, announced that turnaround time for Group 310 would be 30 days. While it is true that the 30 day turnaround time was not effective until January, 1979, the record shows that Mr. Newman's announcement had an immediate effect inasmuch as each examiner was expected to dispose of any backlog of amended cases so that beginning January, 1979, the new turnaround time standard would be fully effective, and each supervisor was expected to insure achievement of this objective by reassigning, if necessary, amended cases. The 60 day turnaround time for amended cases was an established condition of employment which Respondent was not free to change without prior notice to Complainant and an opportunity to negotiate prior to implementation unless it was a reserved right of management.

Is turnaround time a "method" within the meaning of Section 12(b)(5) of the Order? I have given careful consideration to: Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56, 1 FLRC 431 (1973), cited and relied upon by Respondent, as well as to: 78th Division (Training), Kilmer USAR Center, Edison New Jersey and American Federation of Government Employees, Local 2807, AFL-CIO, 1 FLRA No. 97 (August 15, 1979) (FLRA Report No. 14, September 21, 1979), and conclude that such established "time target" or "goal" is not a "method" within the meaning of Section 12(b)(5) of the Order. The Authority, in its 78th Division, decision, stated, in relevant part, as follows:

> "An examination of the record reveals that the 'performance standards' as they are referred to by the parties and the Administrative Law Judge, are, in actuality, guidelines for use by unit employees in performing their assigned duties. More specifically, the 'performance standards' outlined the methods by which the particular job was to be performed. [footnote 2 omitted]
>
> "In the Authority's view these 'standards' in issue herein, constitute a 'method' within the meaning of section 12(b)(5) [footnote 3 omitted] of the Order rather than a measure of individual productivity encompassed by section 11(a) of the Order. 4/

4/ The term 'methods' as it appears in section 12(b)(5) of the Order has been defined by the Council to mean 'the procedures, processes, ways, techniques, modes, manners and systems by which operations are to be conducted - - in short, how operations are to be conducted.' See Tidewater Virginia Federal Employee Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431, at page 436, FLRC No. 71-A-56 (June 29, 1973). Cf. Patent Office Professional Association and U.S. Patent Office, Washington, D.C., 3 FLRC 635, FLRC No. 75A-13 (October 3, 1975), in which the Federal Labor Relations Council found negotiable under section 11(a) of the Order a proposal relating to 'production goals,' which were used to measure individual productivity for the purpose of assessing employee performance."

Tidewater Virginia Federal Employees Metal Trades Council, supra, had involved a union proposal concerning "work assignment" and "contracting out of bargaining unit work"; and, while neither that case nor the 78th Division decision of the Authority, supra, involved a "time target" or "goal", the Authority's specific reservation that "a measure of individual productivity" is "encompassed by section 11(a) of the Order", and, therefore not governed by Section 12(b)(5) of the Order, and the Authority's reference to the Council's Patent Office Professional Association, decision, supra, in which "production goals" was held negotiable under Section 11(a) of the Order, together with the decision of the Assistant Secretary, in National Labor Relations Board, A/SLMR No. 246, 3 A/SLMR 88 (1973), persuasively demonstrate that turnaround time for patent examiners was a negotiable matter within the meaning of Section 11(a) of the Order. In National Labor Relations Board, supra, the Assistant Secretary stated, in part, as follows:

> ". . . I find that . . . Respondent's institution of changes in time schedules for the processing of cases . . . is a matter affecting working conditions within the meaning of Section 11(a) of the Order and a proper subject for collective bargaining. . . .In my view, the right to engage in a dialogue with respect to a change in employee working conditions becomes meaningful only when agency management has afforded the exclusive representative reasonable notification and ample opportunity to explore fully the matter prior to the implementation of such change. If, as here, a party to an exclusive bargaining relationship were free to make unilateral changes in established working conditions of unit employees, the obligation established under Section 11(a) to meet and confer on such working conditions with an exclusive representative would become meaningless. In addition, such unilateral contact by an agency has the effect of undercutting the exclusive bargaining representative, thereby destroying its effectiveness in the eyes of those whom it represents." (3 A/SLMR at 90)

Turnaround time, or a "time target" for disposition of amended cases, is a very direct measure of individual productivity. In addition, the record shows that change in turnaround time may impact on production goals in various ways.

For example, an examiner in the initial examination of the patent application gains a degree of familiarization with the application. Presumably, this would vary depending on the nature of the deficiencies encountered; but would involve performance of some portion of the work required for a final decision on the application. Reassignment of an amended case results in the loss of this expertise, which, I assume, would range from modest to very substantial, and impose a greater burden on the examiner to whom the amended case is assigned since, to him, the matter is, essentially, a "new" case but with the time limitation of an amended case. Overall productivity of the Office is affected when amended cases are reassinged, inter alia, to the extent of duplication of work. Accordingly, I conclude that turnaround time for the disposition of amended cases in the patent office is a time schedule to the same extent as the time schedules involved in National Labor Relations Board, supra; that, for the reasons stated by the Assistant Secretary in National Labor Relations Board, supra, Respondent's turnaround time for amended cases is a matter affecting working conditions within the meaning of Section 11(a) of the Order; that Respondent's unilateral change, implemented on October 5, 1978, of the established turnaround time, of 60 days to 30 days, violated Sections 19(a)(1) and (6) of the Order; and that, in addition, Respondent's unilateral conduct had the effect of undercutting the exclusive bargaining representative, thereby imparing its effectiveness in the eyes of those whom it represents, National Labor Relations Board, supra.

In reaching the conclusion that turnaround time is a matter affecting working conditions within the meaning of Section 11(a) of the Order, I have carefully considered Respondent's further contention that, if not governed by the provisions of Section 12(b)(5) of the Order, turnaround time is merely a permissible subject for bargaining, within the meaning of Section 11(b) of the Order, as to which Respondent had determined not to bargain by Mr. Newman's announcement of October 5, 1978, including Immigration and Naturalization Service and American Federation of Government Employees, FLRC No. 71A-13, 3 FLRC 380 (1975); and American Federation of Government Employees, Local 3488 and Federal Deposit Insurance Corporation, New York Region, FLRC No. 77A-76 (Report No. 147, March 13, 1978), cited and relied upon by Respondent, and find Respondent's contentions without merit. First, the Assistant Secretary rejected essentially similar contentions in National Labor Relations Board, supra, and concluded that time schedules for the processing of cases is governed by Section 11(a) of the Order and were not rendered privileged by Section 11(b) of the Order. Second, the

considerations set forth above, including the Authority's decision in 78th Division, supra, are persuasive that time schedules are negotiable under Section 11(a) of the Order and, necessarily, not rendered privileged by Section 11(b) of the Order. Third analysis of the items found negotiable under Section 11(a) in both Immigration and Naturalization Service, and supra, and Federal Deposit Insurance Corporation, supra, in comparison with the items found subject to Section 11(b) does not suggest that a time standard for the processing of cases is subject to Section 11(b); nor does such time standard involve "the mission of an agency"; "its budget"; "its organization"; "the number of employees"; or "the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty"; "the technology of performing its work"; or "its internal security practices" which is, of course, the coverage of Section 11(b) of the Order. Fourth, even if Respondent were right and turnaround time were only a permissible subject of bargaining, the 60 day turnaround time for amended cases in Group 310 was an established condition of employment which Respondent could not unilaterally change. U.S. Department of the Treasury, Internal Revenue Service, New Orleans District, New Orleans, Louisiana, A/SLMR No. 1034, 8 A/SLMR 497 (1978); Internal Revenue Service, Southwest Region, Appellate Branch Office, New Orleans, Louisiana, A/SLMR No. 1153, 8 A/SLMR 1254 (1978).

Having found that turnaround time was a matter affecting working conditions within the meaning of Section 11(a) of the Order and/or was an established condition of employment, Respondent violated Sections 19(a)(1) and (6) of the Order by its announcement on October 5, 1978, without any prior notice to Complainant and without affording Complainant any opportunity to negotiate prior to implementation of such change. In addition, Respondent's unilateral action had the effect of undercutting Complainant, the exclusive representative, and impairing its effectiveness in the eyes of those whom it represents in further violation of Sections 19(a)(1) and (6) of the Order. Respondent's announcement, by Group Director Newman, of the change in turnaround time was notification of a fait accompli and provided Complainant with no notice and no opportunity to negotiate prior to implementation of the change. As the violations of Section 19(a)(1) and (6) occurred on the date, October 5, 1978, of Respondent's unilateral change of turnaround time, I do not find: U.S. Department of Air Force, Norton Air Force Base, A/SLMR No. 261, 3 A/SLMR 176(1973). United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289, 3 A/SLMR 375 (1973); or Southeast Exchange Region of the Army and Air Force Exchange Service,

Rosewood Warehouse, Columbia, South Carolina, A/SLMR No. 656, 6 A/SLMR 237 (1976), cited and relied upon by Respondent, authority for the proposition that Respondent's unfair labor practice may not be remedied because Complainant, following Mr. Newman's announcement of the change in turnaround time on October 5, 1978, did not thereafter request bargaining and, in Respondent's view, the change was not effective until January, 1979. First, the proposition relied upon by Respondent is applicable only where an agency takes unilateral action pursuant to a served right of management pursuant to Section 11(b) or 12(b) by the Order; the bargaining obligation relates only to impact and implementation; and the bargaining representative has reasonable opportunity after notice to request bargaining on impact and inplementation and fails to do so. Here, of course, the matter was a subject for negotiation pursuant to Section 11(a) of the Order, and/or established condition of employment, as to which Respondent was required to give prior notice to Complainant and ample opportunity to bargain prior to implementation of the change. Second, Respondent's unilateral action in announcing the change in turnaround time, necessarily had the effect of undercutting the exclusive bargaining representative, thereby destroying its effectiveness in the eyes of those whom it represents. Third, the record plainly shows, and I have so found, that the announced change in turnaround time had immediate effect inasmuch as the examiners were informed that they must, during the period from October 5, 1978, to January, 1979, dispose of their backlog of amended cases and that, beginning January, 1979, the 30 day turnaround time would be fully effective. Fourth, if a request to negotiate were deemed necessary, I agree with Complainant that inclusion of precisely such a request in the pre-complaint charge, filed on October 13, 1978, constituted a fully sufficient request for bargaining. In addition, Mr. Alan P. Douglas, President of Complainant, testified that he met with Mr. Newman on November 16, 1978, 2/ and that Mr. Newman refused to negotiate, i.e., Mr. Newman told Mr. Douglas, ". . . his policies were not subject to negotiations" or, "Oh, by the way, my policies

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2/ Tr. 81; however the "Summary of Investigative Interview and Attempted Resolution", attachment to complaint, ALJ Exh. 1, shows the date as October 16, 1978; see, also, Mr. Newman's testimony, Tr. 121, which places the meeting in October, 1978. For present purposes, whether the meeting took place on October 16 or November 16, 1978, is not significant.

are not negotiable in these matters . . . ." 3/ Nor did the Commissioner of Patents and Trademarks, Mr. Donald W. Banner, to whom the charge (Jt. Exh. 1) was addressed, directly, or through any representative, agree to negotiate in response to the request made in the pre-complaint charge (Tr. 85, 86). 4/

2. Apprising Office of Whereabouts. The complaint alleges that "Mr. Newman required unit members to give a written indication of their location when they were absent from their desks more than ten minutes; there was no such policy or practice previously." (Basis of the Complaint, ALJ Exh. 1).

The record shows that, on October 5, 1978, Mr. Newman told employees that there were occasions when they had to be located promptly and that in order to do so it was necessary to know where they are when they are away from their desks.

3/ I am aware that Mr. Newman testified:

> "I have never received a request; I have never had any enquiry in that regard; never even had it discussed whether it was negotiable until 10 or 15 minutes ago." (Tr. 128)

However, Mr. Newman admitted that he met with Mr. Douglas in October, 1978; testified that he did not consider turnaround time or the leaving of notes negotiable, and that he thought he communicated his feeling on these matters to Mr. Douglas when they met in October, 1978 (Tr. 121). Accordingly, I do not credit Mr. Newman's testimony and find, as Mr. Douglas credibly testified, that Mr. Newman stated on October 16, 1978, or on November 16, 1978, that his policies were not negotiable.

4/ Respondent, in effect, concedes that Complainant requested negotiations and that Respondent refused to negotiate, albeit for the reason that Respondent asserted the matters were not negotiable (Respondent's Brief, p. 9). Of course, Respondent's reason for refusing to bargain is immaterial under the circumstances. Pursuant to Section 6(a)(4) of the Order, where, as here, conditions of employment have been changed unilaterally and an initial negotiability determination is required to decide the unfair labor practice, said determination shall be made in the unfair labor practice proceeding.

Accordingly, he said that they should, or that he wanted them to leave a note on their desk, or to tell their supervisor, any time they were going to be away for more than 10 minutes. There can be no doubt that the policy in Group 310, long prior to October, 1978, had been that supervisors were to know where the employees were. Mr. Stocking, the prior Director of Group 310, so testified and stated:

> "A. There was a policy that the supervisors were to know where the employees were. How that policy was implemented was left in the supervisor's hands, and it is my understanding that it was done by way of notes, cards, or oral communication.
>
> . . .
>
> "A. To the best of my knowledge, it was complied with." (Tr. 281)

Supervisors Spar and Blix likewise testified to the existence of this policy and that examiners were encouraged to comply, long before Mr. Newman became Director of Group 310. Indeed, the record shows that, in Group 310, compliance with this policy was specifically given consideration in award recommendations (See, Resp. Exhs. 8, 9, 10 and 11).

The statements on Respondent Exhibits 9, 10 and 11, are that the examiner "always leaves an indication on his desk as to his whereabouts when duty requires him to be elsewhere" (Resp. Exhs. 9, 10 and 11)(Emphasis supplied). Respondent's Exhibit 8 states that the examiner "indicates by note where he will be if he has to be away from his desk for an extended period of time." (Emphasis supplied). These statements, each by Supervisory Patent Examiner Trygve M. Blix, shed light on the policy as it existed prior to October, 1978, when considered in conjunction with the testimony of Mr. Stocking and Mr. Robert J. Spar, also a Supervisory Patent Examiner under both Group Director Stocking and Group Director Newman in Group 310. Mr. Spar testified that, although he advised the examiners in his unit in writing, they must leave a note for absences of ten minutes or more, such notification did not apply at all to absences to search the prior art or any other activity for which examining time was chargable. (See, Tr. 244). From Mr. Stocking's testimony there is a strong inference that Mr. Stocking's policy was, in fact, also directed to "other-time" activities, described by Mr. Spar, and not to examining duties. Thus, Mr. Stocking testified,

> "A. Well, if they are off the floor for a significant length of time - - ten minutes, to me, is enough time to go get a cup of coffee and come back. I don't want to hear about those visits, but if they are going to be gone to a meeting for a half hour or an hour, I want to know, and that's normally the time that they let me know." (Tr. 278).

Mr. Raymon B. Johnson, a patent examiner in Group 310 (Art Unit 314), testified that prior to October 5, 1978, he was never required to leave a note when absent from the room on examining duties but that they were required to do so for union activities and EEO activities (Tr. 136-137).

From all the evidence and testimony, I conclude that, prior to October 5, 1978, there had been a policy in Group 310 that examiners should advise their supervisors when absent for activities, other than reasonable coffee breaks, etc., for which examining time was not chargable, such as any union activity, any EEO activities, any Patent Office Society activities; and that this policy may even have been intended by Mr. Stocking to extend to other absences "off the floor for a significant length of time", which, substantially in agreement with Complainant, I find meant leaving the unit (See, also, the comments noted above is Respondent's Exhibit 9, 10 and 11 and Mr. Blix' testimony at page 284 that "they are encouraged to leave notes as to their whereabouts when they are elsewhere.") for a significant length of time which, from Mr. Stocking's testimony, I infer, in turn, meant approximately 30 minutes; and that Mr. Spar had further required notification for absences for non-examining activities of 10 minutes or more; but that Mr. Spar required no notification, even for absences from the Art Unit, for which examining time was changable.

Mr. Newman's announcement on October 5, 1978, that examiners should leave a note or advise their supervisors did, indeed, change prior policy in at least two regards. First, such notification was thereafter to be given for any absence of more than 10 minutes; and Second, such notification was to be given for absence from their desks, rather than "off the floor". Moreover, this was an announcement by the Director of Group 310 of his policy, whereas, prior implementation of policy had been left by Mr. Stocking to each supervisor. That Mr. Newman intended to impress the examiners that his "wishes" were to be complied with may reasonably be inferred from the tone of the meeting and his express reference to his size 12 shoe. Not only was there testimony by various examiners that Mr. Newman "required" such notification but Mr. Spar testified,

> "A. Mr. Newman announced that he would require - - that he wanted all examiners - - he would require all examiners to leave notes . . . He implied that it was mandatory for all examiners. . . ." (Tr. 232)

While I am aware that Mr. Newman stated, "It's an encouraged policy. There is no absolute requirement for anything" (Tr. 129), I conclude, as Mr. Spar testifed, "He implied that it was a mandatory policy for all examiners". Finally, any possible doubt that Mr. Newman intended to institute a new policy with regard to reporting absences is firmly laid to rest by Mr. Newman's own report to the Deputy Assistant Commissioner for Patents, Mr. Feldman, in which he stated,

> ". . . We instituted a program of informing Supervisors (in person or by a note left on the desk) when absence of more than 10 minutes occur. . . ." (Comp. Exh. 6, p. 8; Tr. 100).

Mr. Newman's unilateral institution of his program of informing supervisors when absences of more than 10 minutes occur on October 5, 1978, changed an existing condition of employment; involved personnel policies and practices and matters affecting working conditions, within the meaning of Section 11(a) of the Order; was effective immediately; and Complainant was afforded no prior notice or opportunity to bargain prior to implementation of the "program". Respondent thereby violated Sections 19(a)(1) and (6) of the Order in the manner and for the reasons more fully set forth hereinabove in sub-section 1 of this paragraph with regard to its unilateral change, on the same date, of turnaround time.

3. Productivity Standard. As noted hereinabove, there is no dispute that on October 5, 1978, Mr. Newman advised all examiners of Group 310 that, as professional employees, examiners would be expected to achieve 100 per cent of their individually assigned production goals; that "anything less than 100% of expectancy was considered deficient" (Jt. Exh. 7, p. 3; Tr. 101, 107-108). 5/ In its complaint, Complainant

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5/ Complainant would characterize Mr. Newman's statement as having been, "100 per cent achievement of a goal is the bare minimum" (Tr. 107). Mr. Newman stated,

> "A. I don't recall ever saying the words 'bare minimum.' I believe when I talked to the emplyees what I said was that anybody who is below 100 percent is deficient. I could have said 'bare minimum', I don't know." (Tr. 107-108).

asserts that this ". . . represents a twenty-five percent increase over the previous quantitive performance standard." More specifically, Complainant asserts that as the Amendment to the Agreement of December 13, 1972 (Jt. Exh. 2a), as extended by the extension agreement of October 24, 1975 (Jt. Exh. 2b) provides, in part, that:

> ". . .
>
> "4. An achievement of at least 75% of an assigned goal shall be deemed prima facie evidence of an acceptable level of competence on the factor of production for purposes of granting a within-grade increase unless adequate written justification is given to the employee that the achievement level on the factor of production is insufficient. An achievement below 75% of an assigned goal shall be deemed prima facie evidence that the level of competence on the factor of production is not acceptable for purposes of granting a within-grade increase unless there are extenuating circumstances which justify the achieved production level. . . ." (Jt. Exh. 2c, dated July 7, 1976),

Mr. Newman's statement that "anything less than 100% of expectancy was considered deficient" effectively modified the negotiated provision, set forth above. In effect, Complainant asserts that an examiner who achieves 75% of an assigned goal is not deficient by virtue of the negotiated provision; and, in particular that, in view of the negotiated provision, demonination of achievement of any level below 100% as a "bare minimum", modifies the negotiated agreement. Respondent, of course, denies that Mr. Newman's statement was improper. Indeed, Respondent asserts, inter alia, that the statement was not directed to ingrade increases, but, in any event, constituted no change in paragraph 4, set forth above, since the agreement specifically provided that achievement of 75% of an assigned goal was only prima facie evidence of an acceptable level of competence on the factor of production for granting a within-grade increase and that the agreement recognized that 75%, while constituting prima facie evidence of an acceptable level of production for an ingrade increase, was, nevertheless, a deficiency in attaining the assigned goal and that even the presumption for granting of a within-grade increase was rebuttable by "adequate written justification". Moreover, Respondent further asserts that failure to achieve an assigned goal, wholly apart from within-grade increases, is a deficiency necessarily considered in other determinations, including, for example,

evaluations of performance and that this is demonstrated by its consistent practice, and in particular its practice since the date of the above amendment, July 7, 1976.

A threshold question is whether determination of this issue is, in essence, a disagreement over the interpretation of an existing collective bargaining agreement, which provides a procedure for resolution of such disagreement, which should be left for resolution under remedies provided under the parties' collective bargaining agreement. See, for example, Report on a Ruling of the Assistant Secretary pursuant to Section 6 of Executive Order 11491, Report No. 49, 2 A/SLMR 639 (1972); Department of Army, Watervliet Arsenal, Watervliet, N.Y., A/SLMR No. 624, 6 A/SLMR 127 (1976); Aerospace Guidance and Metrology Center, Newark Air Force Station, Newark, Ohio, A/SLMR No. 677, 6 A/SLMR 361 (1976). The touchstone, as stated by the Assistant Secretary is whether there are:

> ". . . alleged violations of a negotiated agreement which concern differing and arguable interpretation of such agreement, as distinguished from alleged actions which would constitute clear, unilateral breaches of the agreement. . . " (6 A/SLMR at 129; 6/ALMR at 362-363).

If the alleged violation of a negotiated agreement concern differing and arguable interpretations of the agreement, such alleged violation is not deemed to be violative of the Order. Department of Army, Watervliet Arsenal, supra; Aerospace Guidance and Metrology Center, supra; Warner Robbins Air Logistics Center, Robbins Air Force Base, Georgia, A/SLMR No. 912, 7 A/SLMR 859 (1977); General Services Administration, National Archives and Records Service, A/SLMR No. 1055, 8 A/SLMR 629 (1978); General Services Administration, Region 5, Public Buildings Service, Chicago Field Office, A/SLMR No. 528; 5 A/SLMR 424 (1975); Federal Aviation Administration, Muskegon Air Traffic Control Tower, A/SLMR No. 543, 5 A/SLMR 457 (1975). For reasons set forth hereinafter, I conclude that the alleged violation herein concerns differing and arguable interpretations of the parties collective bargaining agreement and that Mr. Newman's statement on October 5, 1978, did not constitute a clear, unilateral breach of that Agreement.

In theory, certainly, once a production goal is established for an individual, any failure to achieve that goal is a deficiency vis-a-vis that goal. Here, the agreement of the parties makes specific provision for various circumstances. Thus, paragraph 1, provides, subject to certain limitations, that achievement of 110% of a goal, over a stated period, is prima facie evidence of sufficiently outstanding performance

on the factor of production to warrant grant of a quality step increase; paragraph 2, relates to grant of a special achievement award for achievement of 110% of a goal over a period of six consecutive months, subject to stated conditions; paragraph 3, relates to qualification for a promotion in accordance with Article IX, Section 8 of the Agreement; and, of course, paragraph 4 relates to the granting of a within-grade increase.

The introductory sentence, which applies equally to paragraphs 1-4, states:

> "Insofar as purely quantitive criteria are concerned, an individual's goal shall have the following meaning and effect:
>
> . . .
>
> "4. An achievement of at least 75% of an assigned goal shall be deemed prima facie evidence of an acceptable level of competence on the factor of production for purposes of granting a within grade increase unless adequate written justification is given to the employee that the achievement level on the factor of production is insufficient. . . ." (Jt. Exh. 2c) (Emphasis supplied).

The above provision does relate to the acceptable level of competence but does not establish this level as achievement as, simply, 75% of an assigned goal. To the contrary, the agreement provides that, ". . . as purely quantitive criteria are concerned . . . achievement of at least 75% of an assigned goal shall be deemed prima facie evidence of an acceptable level of competence for purposes of granting a within-grade increase unless adequate written justification is given . . . that the achievement level on the factor of production is insufficient . . . ." Complainant's interpretation of its agreement is an arguable construction; but Respondent's interpretation, while differing, is no less an arguable interpretation. In view of the specific provision of Respondent's own Administrative Order, AO 202-531 (Jt. Exh 8) which provides, in part, that:

> ". . . An employee's performance shall not be deemed to meet this standard [an acceptable level of competence] unless. . . (2) it . . . meets . . . all . . . standards. . . for a satisfactory performance rating." (Section 7.02 b.1.(b) (Emphasis supplied),

Complainant's assertion in its Brief that,

> "Respondent has taken the outrageous position that while 75% may be sufficient for a within-grade, 100% is the bare minimum level for satisfactory performance . . . ." (p. 7),

is, in any event, laid to rest by the above provision of Administrative Order AO 202-531. That is, with full recognition that a performance rating and an ingrade increase are entirely separate (See, Tr. 224, 225) and may cover very different periods (Tr. 254), it not only would seem inconsistent, as Mr. Spar testified (Tr. 254) to grant an ingrade increase for exceeding 75% and simultaneously issue a 90-day letter for unsatisfactory performance; but it would be improper under AO 202-531 to grant an ingrade increase unless the employees' performance has met all standards for a satisfactory performance rating. Accordingly, Mr. Newman's testimony that:

> "Q. The question was, are you going to grant a within-grade to someone whose performance you consider to be unsatisfactory.
>
> "A. Deficient, not fully satisfactory, I would have to. You can deny a within-grade if a person's performance is below marginal." (Tr. 107),

if intended to mean that acceptable level of performance has a different meaning for the purpose of an examiner's rating than for grant of an ingrade increase would not comport with Administrative Order AO 202-531. Nevertheless, Respondent's Exhibits 2-7 show a consistent policy of exhorting achievement of each examiner's goal. For example, "Production achievement is way too low and at an unsatisfactory level. Bring it up to your expectancy of 100%" (Resp. Exh. 2); "More work effort is needed to bring production up to meet 100% of your goals" (Resp. Exh. 4); "Try to achieve your production expectancy each pay period . . . ." (Resp. Exh. 5); "New case efforts should be substantially increased to bring performance up to at least 100%" (Resp. Exh. 6). Mr. Stocking testified,

> "A. I expected them to produce at 100 percent of their expectancy. (Tr. 273)
>
> . . .
>
> "Q. When examiners performed between 75 to 100 percent of their expectancy, were they considered deficient in any way?

"A. They would be considered deficient from the standpoint of achieving their expectancy, but we would look behind to see which reasons there might be.

. . .

"A. In my understanding, it's an Office policy that everybody is to do 100 percent of their expectancy.

. . .

"A. Evaluation of performance has always been, at least under my direction, a continuing thing. The employees are informed of their failure to achieve what is expected of them on a regular basis. It might be a bi-weekly basis; it might be a monthly basis, or it might be a quarterly basis. . . " (Tr. 273).

Supervisors Spar and Blix further testified that examiners were regularly counseled concerning any failure to meet their goals.

Accordingly, I can not conclude that Mr. Newman's statement that "anything less than 100% of expectancy was considered deficient" constituted a clear, unilateral breach of the parties' agreement. The agreement of the paties, while making achievement of at least 75% of an assigned goal prima facie evidence of acceptable level of performance, specifically provides that "adequate written justification . . . that the achievement level on the factor of production is insufficient" may be given. What constitutes an acceptable level of performance in any given instance, what constitutes adequate written justification in any instance, or whether any particular rating is proper in any given instance are not issues before me. I do not hold that Respondent may apply a different standard, under paragraph 4 of its agreement and Administrative Order 202-531, for an in-grade increase than it applies in an examiner's rating, based solely on the factor of production. I have decided only that Mr. Newman's statement of October 5, 1978, did not constitute a clear, unilateral breach of the negotiated agreement. Indeed, the record affirmatively shows that Mr. Newman's statement reflected a reaffirmation of Respondent's consistent prior policy. All other alleged violations of the negotiated agreement concern differing and arguable interpretations of the agreement and said alleged violations are not deemed violative of the Order. Therefore, this portion of the complaint is hereby dismissed. Department of Army, Watervliet Arsenal, supra; Aerospace Guidance and Metrology Center, supra.

RECOMMENDED ORDER

Having found that Respondent violated Sections 19(a)(1) and (6) of the Order by virtue of certain unilateral changes with respect to turnaround time and with respect to reporting absences, an appropriate order, designed to remedy the unfair labor practices found, is set forth hereinafter. Having found that Respondent did not otherwise violate Sections 19(a)(1) and (6) of the Order, and specifically that Mr. Newman's statement that "anything less that 100% of expectancy was considered deficient" did not constitute a clear, unilateral breach of the parties' negotiated agreement, the remaining allegations of the complaint are hereby dismissed.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations thereunder, 29 C.F.R. Section 203.26 (b); and Section 2400.2 of the transition rules and regulations, 5 C.F.R. Chapter XIV, Subchapter A, Fed. Reg. Vol. 44, No. 147, July 30, 1979, p. 44741, the Authority hereby orders that the U.S. Patent and Trademark Office, Washington, D.C. shall:

1. Cease and desist from:

a) Instituting changes in the 60 day turnaround time for the processing of amended cases by unit employees in Group 310, as it existed prior to October 5, 1978, without reasonable prior notice to Patent Office Professional Association, the exclusive representative of the unit employees;

b) Instituting changes in the reporting of absences off the floor for a significant length of time, as such policy existed prior to October 5, 1978, in Group 310, without reasonable prior notice to Patent Office Professional Employees, the exclusive representative of its unit employees.

c) In any like or related manner interferring with, restraining, or coercing its employes in the exercises of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and policies of Executive Order 11491, as amended:

a) Rescind the change in turnaround time for the processing of amended cases in Group 310, announced by Group Director Newman on October 5, 1978, and forthwith reinstate

a 60 day turnaround time for the processing of amended cases in Group 310, which was the policy in Group 310 prior to October 5, 1978.

b) Rescind the change in reporting absences in Group 310, as announced by Group Director Newman on October 5, 1978, and forthwith reinstate in Group 310 the policy of reporting absences off the floor for a significant length of time in the manner and to the extent that such absences were reported prior to October 5, 1978.

c) Upon request, negotiate with the Patent Office Professional Association with respect to changes in turnaround time for the processing of amended cases by unit employees and/or changes in reporting absences by unit employees off the floor.

d) Post at its facilites in Crystal City, Arlington, Virginia, copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Deputy Assistant Commissioner for Patents, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted, including, but not limited to, such bulletin boards and other places in Group 310. The Deputy Assistant Commissioner for Patents shall take reasonable steps to insure that said notices are not altered, defaced, or covered by any other material.

e) Pursuant to Section 203.27 of the Regulations, notify the Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 18, 1979
Washington, D.C.

APPENDIX

N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We hereby notify our employees that:

WE WILL NOT change the 60 day turnaround time for the processing of amended cases by unit employees in Group 310, as it existed prior to October 5, 1978, without first giving reasonable prior notice to the Patent Office Professional Association, the exclusive representative of our employees, and, upon request, bargaining in good faith with the Patent Office Professional Association, or any other exclusive representative.

WE WILL NOT change the reporting of absences off the floor for a significant length of time in Group 310, as it existed prior to October 5, 1978, without first giving reasonable prior notice to the Patent Office Professional Association, the exclusive representative of our employees, and, upon request, bargain in good faith with the Patent Office Professional Association, or other exclusive representative.

WE WILL forthwith rescind in Group 310 the change in turnaround time for amended cases, announced by Group Director Newman on October 5, 1978, and, forthwith reinstate in Group 310 the 60 day turnaround time for the processing of amended cases.

WE WILL, forthwith, rescind the change in reporting absences, as announced by Group Director Newman on October 5, 1978, and; forthwith reinstate in Group 310 the policy of reporting absences off the floor for a significant length of time in the manner, and to the extent, that such absences were reported prior to October 5, 1978.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

_____

(Agency or Activity)

Dated: _____ By: _____

Deputy Assistant Commissioner
for Patents

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region 3, whose address is: 1730 K Street, N.W., Washington, D.C. 20006

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 32

(Labor Organization)

and

Case No. O-NG-177-2
177-3
177-4
177-5

OFFICE OF PERSONNEL MANAGEMENT,
WASHINGTON, D.C.

(Activity)

DECISION ON NEGOTIABILITY ISSUES

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 et seq.).[1/]

Union Proposals 2 and 3

Section ___. A performance standard is a statement of the expressed level of achievement in terms of the quality, quantity, timeliness, etc., required for the performance of an element of an employee's job. [All of this proposal is alleged to be outside the duty to bargain.]

Section 5. All performance elements identified for an employee's position, specifying those which are critical, will be communicated to the employee in writing at the beginning of each appraisal period. A critical element is one which is so important that inadequate performance of it outweighs acceptable or better performance in other aspects of the job. [In section 5, only the underscored sentence has been alleged to be outside the duty to bargain.]

1/ Pursuant to the requirement to expedite proceedings to the extent practicable contained in section 7117(c)(6) of the Statute and section 2424.10 of the Authority's rules and regulations, 5 CFR 2424.10, Union Proposal 1 (O-NG-177-1) in the above-captioned matter has been severed from the proposals considered herein and will be considered separately.

Question Here Before the Authority

The question presented is whether the Union's proposals are, as alleged by the Agency, inconsistent with Government-wide rules or regulations and therefore excluded from the obligation to bargain under section 7117(a)(1) of the Statute.

Opinion

Conclusion: The proposals are not inconsistent with Government-wide rules or regulations and, therefore, are not excluded from the obligation to bargain by reason of section 7117(a)(1) of the Statute. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 5 CFR 2424.10, the Agency's allegation that the disputed proposals are not within the duty to bargain is set aside.2/

Reasons: The Agency alleges the proposals are excluded from the duty to bargain by section 7117(a)(1) of the Statute, which provides as follows:

> § 7117. Duty to bargain in good faith; compelling need; duty to consult
>
> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

The Agency contends regulations concerning performance appraisal are Government-wide regulations, and "as such, management is prohibited from negotiating a definition which would differ from that promulgated in the government-wide regulation." Specifically, the Agency contends since the regulations at 5 CFR 430.202(d) and (e) define, respectively, the terms "performance standard" and "critical element," any proposed definitions which differ from the regulatory language would contravene the regulation and, therefore, would not be within the duty to bargain. The Union, however, contends, in order for a proposal to be outside the duty to bargain, the proposal must be inconsistent with the regulations "in the sense of being mutually repugnant or contradictory." Thus, the Union argues, use of the proposed definitions would not result in noncompliance with the regulations. Finally, the Union notes that other language tentatively agreed upon between the parties would provide:

> In the administration of all matters covered by the agreement, officials and employees are governed by the provisions of existing and future laws and regulations . . . .

The Union here concludes the proposal cannot be read without reference to the applicable Office of Personnel Management (OPM) regulations and must be interpreted and applied consistently with those regulations.

2/ In deciding that the proposals are within the duty to bargain, the Authority makes no judgment as to their merits.

Section 4302 of the Civil Service Reform Act (CSRA)[3/] requires each agency to develop one or more performance appraisal systems and states the basic requirements of such systems. The OPM regulations issued pursuant to this section, which are relied upon by the Agency, provide in pertinent part as follows:

> (d) "Performance standards" are the expressed measure of the level of achievement established by management for the duties and responsibilities of a position or group of positions. Performance standards may include, but are not limited to, elements such as quantity, quality, and timeliness.
>
> (e) "Critical element" means a component of an employee's job that is of sufficient importance that performance below the minimum standard established by management requires remedial action and denial of a within-grade increase, and may be the basis for removing or reducing the grade level of that employee. Such action may be taken without regard to performance on other components of the job.

3/ Section 4302 of the CSRA (5 U.S.C. § 4302) provides as follows:

§ 4302. Establishment of performance appraisal systems

(a) Each agency shall develop one or more performance appraisal systems which--

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees;

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for--

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

Assuming, without deciding, that the regulations at 5 CFR 430.202 are Government-wide regulations, the proposals here are not inconsistent with the cited regulations in that they are not incompatible or irreconcilable with those regulations. The only difference between the Union's proposed definition of the term "performance standard" and the definition set forth at 5 CFR 430.202(d) is that the regulatory definition indicates that such standards are to be "established by management," while the proposal here is silent in that respect. In that regard, however, the Authority held in National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA No. 119 (1980), decided this date, that management retains the right under section 7106(a)(2)(A) and (B) of the Statute to establish performance standards. Similarly, the regulation at 5 CFR 430.202(e) regarding critical elements refers to certain required "remedial action" for substandard performance, while the Union's proposed section 5 is silent in that respect. In all cases regarding remedial action, the regulation would govern; therefore, management's right to take such action is protected.

Insofar as the proposals here are silent with respect to the matters set forth above, and the record does not indicate that the Union intends that the proposals be applied in any manner inconsistent with law and regulation, the proposals are not inconsistent with the regulations cited by the Agency here. In any event, the Statute, as applied by the Authority, and the applicable regulation would govern the matters not addressed by the proposals. Accordingly, since the proposals here are thus not inconsistent with the regulations cited by the Agency, the Agency's allegation that the disputed proposals are not within the duty to bargain must be set aside.

Union Proposal 4

Section 6. Employees shall participate in establishing performance standards through collective bargaining, to the extent this matter is within the scope of bargaining.

Question Here Before the Authority

The question presented is whether the Union's proposal is a matter within the duty to bargain under the Statute or, as alleged by the Agency, violates section 7106[4/] of the Statute.

4/ 5 U.S.C. § 7106 pertinently provides:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

. . . . . .

(2) in accordance with applicable laws—

(Continued)

Opinion

Conclusion: The proposal violates section 7106(a)(2)(A) and (B) of the Statute insofar as it requires negotiation on the establishment and content of performance standards. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 5 CFR 2424.10, the Agency's allegation that the proposal is not within the duty to bargain is sustained.

Reasons: Both the Union and the Agency have interpreted this proposal as requiring collective bargaining concerning the establishment and substance of performance standards and the proposal is so interpreted for the purpose of this decision. Thus, the substantive issue presented here is identical to that addressed by the Authority in Bureau of the Public Debt, 3 FLRA No. 119 (1980), supra. In that decision, the Authority held that a proposal to establish a particular critical element and performance standard would directly interfere with the exercise of management's rights to direct employees and to assign work under section 7106(a)(2)(A) and (B) of the Statute and, therefore, was not within the duty to bargain. Since the proposal here would likewise require negotiations concerning the establishment and content of performance standards, it bears no dispositive difference from the proposal held not to be within the duty to bargain in the Bureau of the Public Debt case. Therefore, for the reasons fully set forth in Bureau of the Public Debt, the proposal here in dispute must also be held not to be within the duty to bargain. It is emphasized, however, as stated in Bureau of the Public Debt (at page 2 of the decision) that:

> . . . consistent with the intent of Congress as expressed in section 7101 of the Statute that employees participate through labor organizations of their own choosing in decisions which affect them, and other sections discussed hereinafter, the agency's right to identify critical elements and establish performance standards under section 7106(a) is subject to certain rights of a labor organization under the Statute. Specifically, under section 7117, as to the units of exclusive recognition, it is within the duty of the agency to bargain, consistent with law and regulation, on aspects of performance appraisal systems other than identification of critical elements and content of performance standards. The duty to bargain extends to, among other matters, the form of the employee participation in the establishment of performance standards required under section 4302 of the Civil Service Reform Act (CSRA). In this connection, section 4302 in its reference to participation of employees in establishing performance standards refers to all employees, whether represented or unrepresented.

(Continued)

> (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted[.]

Furthermore, section 7106(a) is subject to section 7106(b). Under section 7106(b)(2), an agency has the duty to bargain on procedures which management officials will observe in the development and implementation of performance standards and critical elements; and, under section 7106(b)(3), on appropriate arrangements for employees adversely affected by the application of performance standards to them. In addition, under section 7114 of the Statute, the agency must afford an exclusive representative the opportunity to be present at any formal discussion between an agency representative and a unit employee regarding the establishment or the implementation of performance standards and critical elements and, when requested, at any investigatory interview of a unit employee who reasonably believes that the examination may result in discipline for unacceptable performance under section 4303 of the CSRA. Finally, the right of an agency under section 7106(a) to identify critical elements and establish performance standards is subject to the right of an employee against whom disciplinary action has been taken. The employee has a right to challenge such action under the appellate procedures of section 7701 of the CSRA or under a negotiated grievance procedure pursuant to section 7121 of the Statute.

Thus, in the instant case, the Agency's right to identify critical elements and establish performance standards is subject to the right of a labor organization to negotiate on significant aspects of performance appraisal systems, including the form of the employee participation in the establishment of performance standards. Furthermore, management has an obligation to negotiate procedures and appropriate arrangements for employees adversely affected by management's establishing performance standards. In addition, an exclusive representative must be given the opportunity to be represented at certain meetings between management and employees relating to the development and implementation of performance appraisal systems and, when requested, at any investigatory interview when a unit employee believes that the examination may result in discipline for unacceptable performance. Finally, an employee against whom disciplinary action has been taken for unacceptable performance has a right to challenge under appellate procedures or a negotiated grievance procedure the action taken. However, insofar as the proposal here as interpreted by the parties requires bargaining over the content of performance standards, it is outside the duty to bargain, and the Agency's allegation must be sustained.

Union Proposal 5

Section ____. All performance standards will be fair and equitable and consistent with the classification standards for the job. An employee who believes a standard does not meet the above criteria may grieve under the procedures in Section ____.

Questions Here Before the Authority

The question presented is whether the Union's proposal as a whole is a matter within the duty to bargain under the Statute or, as alleged by the Agency, the proposal as a whole violates sections 7106(a)(2)(A) or 7106(b)(1).

An additional question presented is whether, as further alleged by the Agency, the "classification standards" portion of the proposal violates 5 U.S.C. § 4302(b)(1) or whether that portion of the proposal violates section 7106(a)(2)(B) of the Statute.

Opinion

Conclusion: The proposal as a whole does not violate sections 7106(a)(2)(A) or 7106(b)(1) of the Statute. Further, the "classification standards" portion of the proposal does not violate section 4302(b)(1) of the CSRA or section 7106(a)(2)(B) of the Statute. Therefore, the proposal is within the duty to bargain under section 7117(a)(1). Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations, 5 CFR 2424.10, the Agency's allegations that the disputed proposal is not within the duty to bargain are set aside.5/

Reasons: The Agency contends this proposal in its entirety would interfere with the exercise of certain management rights under section 7106(a) and (b)(1) of the Statute. More particularly, the Agency argues the proposal would interfere with its right to direct employees under section 7106(a)(2)(A) of the Statute. Essentially, the Agency contends the "fair and equitable" portion of the proposal here would prevent the Agency from exercising its discretion in establishing performance standards and might ultimately permit a third party to establish such standards in derogation of its right to direct employees. The Agency also contends generally that the proposal here would interfere with its right to discipline employees under section 7106(a)(2)(A) because the proposal would severely circumscribe management's right to take action against an employee for poor performance. The Agency also argues generally that the proposal as a whole would interfere with its right under section 7106(b)(1) to determine the numbers, types, and grades of employees.

The Agency makes several additional arguments that the portion of the proposal which would require that "performance standards will be . . . consistent with the classification standards for the job" is excluded from the duty to bargain because it is inconsistent with section 4302(b)(1) of the CSRA regarding establishment of performance appraisal systems, and violates the right to assign work under section 7106(a)(2)(B) of the Statute. The Agency argues in essence that, since section 4302(b)(1) requires performance standards to be related to the job in question, the Union's proposal would violate that statutory requirement insofar as the proposal would relate performance standards to classification standards, rather than to the job. In addition, the Agency contends that this portion of the proposal would limit management's right to assign work under section 7106(a)(2)(B) of the Statute. Specifically, the Agency asserts that the proposal would interfere with management's right to assign work by restricting identification of critical elements and establishment of performance standards to only those limited duties explicitly set forth in the classification standards for the employee's position. Similarly, the Agency claims that management would be unable to assign and

5/ In deciding that the proposal is within the duty to bargain, the Authority makes no judgment as to the merits of the proposal.

evaluate employee performance with respect to duties unrelated to an employee's classification, and questions whether any performance standard could be established for positions for which no classification standard exists.

Section 7106(a) and (b)(1) of the Statute recognizes certain management rights. However, section 7106(b)(2) and (3) of the Statute provides that management has a duty to bargain on procedures which management officials will observe in exercising those rights and on appropriate arrangements for employees adversely affected by the exercise of management's authority.6/ Insofar as it is consistent with the right of management ultimately to act with respect to its authority, Congress intended the parties to work out their differences on procedures and appropriate arrangements through negotiations.7/

In Bureau of the Public Debt, 3 FLRA No. 119 (1980), supra, the Authority applied section 7106(a)(2)(A) and (B) of the Statute concerning the rights of management to direct employees and to assign work. Analyzing the purpose and function of critical elements and performance standards, the Authority found that the rights to direct employees and to assign work under the Statute include the authority to establish critical elements and performance standards. Accordingly, the Authority held that the proposal in that case which identified a critical element and established a quantitative performance standard for that job element was not within the duty to bargain. However, as was emphasized in that decision, an agency has a duty to bargain under section 7106(b)(3) of the Statute, on appropriate arrangements for employees adversely affected by management's exercise of its authority under section 7106(a), i.e., actions taken under such standards. More particularly, the Authority stated that

6/ 5 U.S.C. § 7106(b)(2) and (3) provide:

§ 7106. Management rights

. . . . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

. . . . . .

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such mangement officials.

7/ American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey, 2 FLRA No. 16 (1979) at 2-4 of decision; and National Treasury Employees Union and U.S. Customs Service, Region VIII, San Francisco, California, 2 FLRA No. 30 (1979) at 5-6 of decision.

nothing in its decision would preclude an exclusive representative from negotiating criteria for the application of performance standards which management has established. Accordingly, insofar as the proposal here merely would establish a general, nonquantitative requirement by which the application of critical elements and performance standards established by management may subsequently be evaluated in a grievance by an employee who believes that he has been adversely affected by the application of management's performance standard to him, and the Authority so interprets the proposal for purposes of this decision, it is within the duty to bargain. Thus, an employee against whom management takes disciplinary action for unacceptable performance may, in a grievance of such action pursuant to section 7121(e) of the Statute raise the issue of whether the performance standards as applied to him meet the contractual requirements.8/ Such review by an arbitrator would not, contrary to the Agency's allegations, preclude the Agency from initially determining the content of the standard, nor would it result in the substitution of the arbitrator's judgment for that of the Agency and the setting of a new standard; it would simply determine if the standard established by management as applied to the grievant complied with the "fair and equitable . . ." requirements of the parties' agreement.

Thus, the proposal here does not impose on the Agency a particular decision as to the quantity, quality, and timeliness of production or the establishing of priorities, or otherwise establish the content of performance standards in derogation of management's right to direct employees under section 7106(a)(2)(A) of the Statute. Similarly, since the proposal does not prevent management from establishing performance standards and taking action under section 4303 of the CSRA against employees based upon such standards, it does not prevent management from taking disciplinary action against an employee pursuant to section 7106(a)(2)(A). Further, the record does not disclose and it is not otherwise apparent in what manner the proposal is related to numbers, types, and grades of employees assigned to a tour of duty or organizational subdivision. Accordingly, the Agency's allegations that the proposal as a whole is not within the duty to bargain by reason of section 7106(a)(2)(A) or that the proposal is negotiable only at the election of the Agency under section 7106(b)(1) cannot be sustained.

With respect to the Agency's additional allegation that the portion of the proposal which states that "performance standards will be . . . consistent with the classification standards for the job" is inconsistent with section 4302 of the CSRA, the Union expressly concedes that "performance standards must be ultimately based on the actual duties properly assigned the employees." Moreover, with respect to the express terms of the proposal, i.e., that performance standards must be "consistent with the classification standards for the job," the Union states as follows:

> All that the proposal means, is that, for example, when quality of work is grade-defining, the standard for quality at a given level must be at that level, and not at a higher or lower level . . . . Under the

8/ Cf. National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District Office, 1 FLRA No. 102 (1979) (requirement that certain agency determinations "be made in a fair, objective and equitable manner" is within the duty to bargain under section 7106(b)(2)).

proposal, classification standards only come into play to the extent they are "for the job."

Thus, under the Union's interpretation of its proposed language, the Union does not in any manner seek to bargain over policies, practices and matters relating to the classification of any position. The sole and limited effect of the Union's proposal as interpreted by the Union, which interpretation is consistent with the language of the proposal and is adopted for purposes of this decision, is as follows: In the rare instance where an applicable classification standard uses a quantitative or qualitative performance criterion to distinguish among grade levels, the performance standard established should reflect this distinction. That is, under this proposal, where such a classification standard is applicable, an employee could grieve the application of a performance standard with respect to any task assigned to him if that performance standard reflected a level of achievement different from the level specified for the grade to which the employee's position is classified. In essence, the "classification standards" portion of the proposal merely constitutes a specific aspect of the "fair and equitable" requirement of the proposal under which the application of performance standards may be reviewed by an arbitrator. It has a limited effect as just stated in only applying in those rare instances where quantitative or qualitative performance criteria are used in a classification standard to distinguish among grade levels. Thus, as the Union expressly states, the proposal does not prevent the Agency from establishing, pursuant to section 4302(b)(1), performance standards related to the job performed by the employee. Accordingly, the proposal here does not in any manner seek to negotiate over classification matters or the substance of performance standards, nor is it inconsistent with section 4302 as alleged by the Agency.

Further, as noted above, the Agency has alleged that the proposal would interfere with its right to assign work under section 7106(a)(2)(B) of the Statute. Specifically, the Agency contends that this right would be infringed upon in three respects. That is, the Agency contends it would be unable to assign duties not prescribed in the classification standards, it would be unable to assign duties unrelated to those standards, and it would be unable to establish performance standards where no classification standards are applicable to the position or to any particular duties thereof. None of these arguments can be sustained for the same reason, which is that the proposal on its face and as interpreted by the Union does not in any manner limit the assignment of work or the scope of duties upon which an employee can be evaluated. Thus, without regard to whether the duties assigned to an employee are stated in or are unrelated to the classification standards applicable to the employee's job, or whether there is any classification standard applicable to the employee's job, the proposal does not conflict with management's right to assign to an employee any duties and to establish performance standards and critical elements with respect to any one of them. Accordingly, the Agency's allegation that the proposal would interfere with its right to assign work under section 7106(a)(2)(B) of the Statute must be set aside.

Based upon the foregoing, the proposal is within the duty to bargain under section 7106(b)(3) of the Statute as an appropriate arrangement for employees

adversely affected by management's authority under the Statute to direct employees and assign work through the establishment of performance standards and to discipline employees for unacceptable performance.

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Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY